

**DISCIPLINE OF STUDENTS WITH DISABILITIES UNDER
IDEA:
WHERE SCHOOL SAFETY, POSITIVE BEHAVIORAL
INTERVENTIONS AND DUE PROCESS MEET?**

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I. Background

A. Historical Context

1. In 1975, Congress enacted the Education for All Handicapped Children Act (EHA), 20 U.S.C. ' 1400 *et seq.* (West 1990) [now Individuals with Disabilities Education Act (IDEA), 20 U.S.C. ' 1400 *et seq.* (West Supp. 1999)], in part to eliminate the exclusion of students with disabilities from education. 20 U.S.C. ' 1400(b)(4) (West 1990). Approximately two million of the eight million children with disabilities in the United States were excluded from public schools; 82 percent of the children classified as emotionally disturbed were unserved. H.R. Rep. No. 332, 94th Cong., 1st Sess. 2-7 (1975); S. Rep. No. 168, 94th Cong., 1st Sess. 5-8 (1975), reprinted in 1976 U.S. Code Cong. & Ad. News, 1425, 1429-32.
2. Schools often used disciplinary measures to exclude students with disabilities from education because they were different or more difficult to educate than nondisabled students. *Honig v. Doe*, 484 U.S. 305, 324 (1988); *Mills v. Board of Educ.*, 348 F. Supp. 866, 875 (D.D.C. 1972); 34 C.F.R. Part 300, Appendix A Question 1(1999).
3. In enacting EHA, Congress was aware of *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972), in which the court recognized that many children were being entirely excluded from education merely because they were being identified as having a behavior disorder, and required that appropriate educational services must be provided to these children.

B. B. Protections Afforded to Students with Disabilities under IDEA in Disciplinary Proceedings Prior to the IDEA Amendments of 1977

1. Discipline should not be imposed on a student if the misconduct is related to the student=s disability, *S-1 v. Turlington*, 635 F.2d 342, 350 (5th Cir.), cert. denied, 454 U.S. 1030 (1981); *Doe v. Maher*, 793 F.2d 1470, 1480-82 & n.8 (9th Cir. 1996), aff=d as modified sub nom *Honig v.*

Doe, 484 U.S. 305 (1988); and

2. The student=s parents may assert procedural rights to challenge the school=s disciplinary action if the disciplinary action results in a change in placement, e.g. a suspension, expulsion, or placement in alternative educational program (AEP) for more than ten days. *Sherry v. New York State Educ. Dep=t*, 479 F. Supp. 1328, 1338 (W.D. N.Y. 1979); *School Bd. v. Malone*, 762 F.2d 1210, 1215 (4th Cir. 1985). Such procedural protections include:
 - a. convening an ARD meeting to determine whether the conduct was a manifestation of the child=s disability (*manifestation determination*). *S-1*, 635 F.2d at 347; *Kaelin v. Grubbs*, 682 F.2d 595, 598 (6th Cir. 1982);
 - b. providing parents with prior written notice, *Sherry v. New York State Educ. Dep=t*, 479 F. Supp. 1328, 1338 & n.8 (W.D. N.Y. 1979);
 - c. requesting a due process hearing to appeal the school=s disciplinary action, *S-1*, 635 F.2d at 349; and
 - d. invoking the Astay-put@ provision, i.e., the right of the student to remain in the last agreed upon educational placement pending the administrative and judicial proceedings, *Honig v. Doe*, 484 U.S. 305, 323-26 (1988) (Note: school could override Astay-put@ by seeking a court-ordered injunction to require the student to be placed in another setting, if the student=s behavior constituted an ongoing threat to the student or others, *Honig*, 484 U.S. at 325-26, and the school district had taken reasonable steps to minimize the risk. *Light v. Parkway C-2 School District*, 41 F.3d 1223, 1228 (8th Cir. 1994).

C. Inappropriate School Actions Often Contribute to the Behavior Problem for Which Schools Then Discipline the Student

1. *Morgan v. Chris L.*, 25 IDELR 227, 230 (6th Cir. 1997) (A[w]hen school systems fail to accommodate a disabled student=s behavioral problems, these problems may be attributed to the school system=s failure to comply with the requirements of the IDEA@); *Stuart v. Nappi*, 443 F. Supp. 1235, 1241 (D. Conn. 1978) (school=s Ahandling of the plaintiff may have contributed to her disruptive behavior@); *Howard S. v. Friendswood School District*, 454 F. Supp. 634, 640 (S.D. Tex. 1987) (student, who school officials sought to expel following a suicide attempt and hospi-

talization, Awas not afforded a free, appropriate public education [which] was a contributing and proximate cause to his emotional difficulties and emotional disturbance@); *Frederick L. v. Thomas*, 408 F. Supp. 832, 835 (E.D. Penn. 1976) (an inappropriate educational placement can cause antisocial behavior). See Lohrmann-O=Rourke & Zirkel, *The Case Law on Aversive Interventions for Students with Disabilities*, 65 EXCEPTIONAL CHILDREN 101 (1998).

D. Behavioral Support Services Prior to the IDEA Amendments of 1997

1. A key impetus behind the enactment of EHA was to secure appropriate education and services for students with behavior disorders. *Honig*, 484 U.S. at 324-25; *Board of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 192 (1982). For children whose behaviors interfered with their ability to learn, IDEA recognized that the provision of a free appropriate public education (FAPE) requires A special education@ and A related services@ aimed at addressing the behaviors. 20 U.S.C. ‘ 1401(18) (West 1990).
2. The concept of education under IDEA is broad encompassing a child=s unique social and emotional needs as well as the academic ones. *Seattle School District No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) (A[e]veryone agrees that A.S. is exceptionally bright and thus able to test appropriately on standardized tests. This is not the sine qua non of >educational benefit,= however. The term >unique educational needs= [shall] be broadly construed to include...academic, social, health, emotional, communicative, physical and vocational needs@); *Babb v. Knox County School System*, 965 F.2d 104, 109 (6th Cir. 1992), cert. denied, 506 U.S. 941 (education under IDEA encompasses A both academic instruction and a broad range of associated services traditionally grouped under the general rubric of >treatment=@); *Timothy W. v. Rochester School District*, 875 F.2d 954, 962 (1st Cir. 1989), cert. denied, 493 U.S. 983 (1989) (A the Act=s concept of special education is broad, encompassing not only traditional cognitive skills, but basic functional skills as well@); *Stacy G. v. Pasadena Independent School District*, 547 F. Supp. 61, 77 (S.D. Tex. 1982) (A...an essential element of an appropriate education for a child as handicapped as Stacey is an opportunity to develop skills that would allow Stacey to be self-sufficient as possible and to function outside of an institution@).
3. The duty to address behavior as a component of FAPE extends to behavior exhibited outside as well as inside of school. *David D. v. Dartmouth School Committee*, 775 F.2d 411, 423 (1st Cir. 1985), cert.

denied, 475 U.S. 1140 (1986) (district failed to provide FAPE because although David had performed relatively well in the rather cloistered and familiar environment of the school . . . in less familiar settings, or where relatively unsupervised, he frequently showed little or no self-control in his conduct towards other persons@); *Chris D. v. Montgomery County Bd. of Educ.*, 753 F. Supp. 922 (M.D. Ala. 1990) (district failed to provide FAPE because the student=s appropriate behavior in class was due to the fact that a teacher or other adult is literally standing over him@ and clearly such a dependency building approach does nothing and in fact may make it more difficult to enable Cory to behave in a regular classroom or in the real world@).

4. FAPE includes the right to a written behavior management plan (BMP). 19 TEX. ADMIN. CODE § 89.1050(b); *Chris D.*, 753 F. Supp at 932-34; *Devine Indep. Sch. Dist.*, 25 IDELR 1238 (SEA TX 1997) (as part of the student=s IEP, the district was ordered to develop a BMP different from regular Student Code of Conduct in order to confer educational benefit). BMP must be developed and approved by ARD committee, *Abinabi B. v. George West ISD*, Dkt. No. 238-SE-396 (SEA TX 1996), and must be individualized and based on current assessment data. *Clay ADusty@ A. v. Pflugerville ISD*, Dkt. No. 197-SE-295 (SEA TX 1995). See *Carlos T. v. Northside Indep. Sch. Dist.*, Dkt. No. 090-SE-1096 (SEA TX 1997) (BMP was inappropriate because it did not address student=s main areas of weakness@ and provided consequences which were all punitive in nature - detention, suspension, ISS, and ultimately AEP removal@.) Minor departures from BMP may not be denial of FAPE. *Robert H. v. Nixa R-2 Sch. Dist.*, 26 IDELR 564 (W.D. Mo. 1997) (placement in time-out not denial of FAPE).
5. Certain disciplinary procedures have been found inappropriate. *Oakland Unified School District*, 20 IDELR 1338 (OCR 1993) (taping student=s mouth shut for disability-related behavior and for showing a photograph of the student=s mouth taped to other students); *Sylvester v. Cancienne*, 23 IDELR 609 (La. App. 1995) (principal=s tying a five-year-old special education student to a desk with a rope and tape and leaving him in public view for two hours); *Abinabi B. v. George West ISD*, Docket No. 238-SE-396 (SEA TX 1996) (teacher=s strapping a child with disability in early childhood program into his seat, shoving him into a time out enclosure, shouting at him at close range and pressing her fingers into his shoulders); *Clay ADusty@ A. v. Pflugerville ISD*, Docket No. 197-SE-295 (SEA TX 1995) (ACT program which used techniques such as delaying lunch and having teachers eat pizza and fan the fumes toward the Ahungry kids,@ referring to students as Acrazy,@

keeping students late without food for non-compliant behavior until 12 a.m., and having the teacher stand barefoot on the student=s desk). See *Fee v. Herndon*, 900 F.2d 804 (5th Cir.1990) (‘ 1983 suit challenging the paddling of sixth grade student with emotional disturbance was dismissed, but state tort action remanded to state court for excessive use of corporal punishment).

6. In 1997, school districts in Texas were found to utilize a punitive, consequence driven approach to disciplining students with behavior disorders instead of using positive behavioral supports. A Critical Issues Regarding Behavior Management Interventions in Texas Public Schools, @ ESC Regions I, II & III (1997).

II. Positive Behavioral Interventions under the IDEA Amendments of 1997

A. Positive Behavioral Interventions Requirement

The IDEA Amendments of 1997 (hereafter AIDEA@) underscore the duty of schools to address behavior. When developing a student=s individualized education program (IEP), the ARD committee must consider as a special factor, @ in the case of a child whose behavior impedes his or her learning or that of others, Awhen appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior. @ 20 U.S.C. ‘ 1414(d)(3)(B)(I); 34 C.F.R. ‘ 300.346(a)(2)(I).

B. New Federal Regulations Interpreting Positive Behavioral Interventions Requirement

1. The new federal regulations track the statutory language in 20 U.S.C. ‘ 1414(d)(3)(B)(I). 34 C.F.R. ‘ 300.346(a)(2)(I).
 - a. As to which positive behavioral interventions may be used, and whether aversive behavioral management strategies are prohibited, the comments to the regulations state that Athe needs of the individual child are of paramount importance in determining the behavioral management strategies that are appropriate for inclusion in the child=s IEP. In making these determinations, the primary focus must be on ensuring that the behavior management strategies in the child=s IEP reflect the Act=s requirement for the use of positive behavioral interventions and strategies to address the behavior that impedes the learning of the child or that of other children. @ Comments to 34 C.F.R. ‘ 300.346(a)(2)(I).

- b. The regulations do not require a specific plan between teacher and parent that specifies consequences for a student=s failure to comply with a behavioral intervention plan (BIP). Inclusion of such consequences in a BIP depends on the child and the behavior involved. AOf course, in appropriate circumstances, the [ARD committee] which includes the child=s parents, might agree upon a behavioral intervention plan that included specific regular or alternative disciplinary measures that would result from particular infractions of school rules.@ *Id.*
 - c. Parents who disagree with the behavioral interventions and strategies included in IEP can file for due process hearing or request mediation under 20 U.S.C. ‘ 1415 or its regulations, 34 C.F.R. ‘ 300.507, 300.506. *Id.*
- 2. If the ARD committee determines that a student requires positive behavioral interventions in order to receive FAPE, the ARD committee must include a statement to that effect in the IEP. 34 C.F.R. ‘ 300.3468).
- 3. A regular education teacher as a member of the ARD committee must, to the extent appropriate, participate in the development, review, and revision of the student=s IEP, including the determination of appropriate positive behavioral interventions and strategies for the student. 34 C.F.R. ‘ 300.346(d)(I).
- 4. The new regulations Areflect very serious consideration of the concerns of school administrators and teachers regarding preserving school safety and order without unduly burdensome requirements, while helping school respond appropriately to a child=s behavior, promoting the use of appropriate behavioral interventions, and increasing the likelihood of success in school and school completion for some of our most at-risk students.@ 34 C.F.R. Appendix A, Discipline Q & A. See *Letter to Trahan*, 30 IDELR 403.
 - a. The positive behavioral intervention requirement is intended to promote up-front measures that will help prevent discipline problems. This includes training of school personnel to ensure that they have the knowledge and skill to address behavior problems appropriately when they occur. If the ARD committee recommends positive behavioral interventions, they must be added to IEP and provided. 34 C.F.R. Appendix A, Question 2.
 - b. In most cases when a student=s behavior impedes his or her learn-

ing or that of others, this behavior is repetitive, so that positive behavioral interventions should be included in the IEP. This could include behavior that could violate the student code of conduct. The failure to consider and address the behavior in developing and implementing the IEP would constitute a denial of FAPE. 34 C.F.R. Appendix A, Question 38.

- c. The positive behavioral intervention requirement is A designed to foster increased participation of children with disabilities in regular education environments or other less restrictive environments, not to serve as a basis for placing children with disabilities in more restrictive settings. Determination of whether a student whose behaviors are interfering with the education of others requires a careful consideration of whether the student can be placed in a regular classroom with appropriate behavioral supports. If the student can function in a regular setting with positive behavioral supports, placement in a more restrictive setting would be inconsistent with the least restrictive environment provisions of IDEA, 20 U.S.C. ‘ 1412(a)(5)(A), 34 C.F.R. ‘ 300.550 - 300.553. If the student=s behavior, even with the provision of positive behavioral interventions, significantly impairs the learning of others, that placement would not be appropriate. 34 C.F.R. Appendix A, Question 39.
- d. Positive behavioral interventions include functional behavioral assessments (see section VIII for discussion of functional behavioral assessment). Te obligation to perform a functional behavioral assessment is not limited to a change in placement under 20 U.S.C. ‘ 1415(k)(1)(B)(I). AAs a policy matter, it makes sense to attend to the behavior of children with disabilities that is interfering with their education and that of others, so that the behavior can be addressed, even when that behavior will not result in a change in placement.@ Comment to 34 C.F.R. ‘ 300.520.

C. Caselaw Interpreting Positive Behavioral Interventions

- 1. There is very little caselaw interpreting the positive behavioral intervention requirement. Even though the following hearing officer decisions were issued after the enactment of the IDEA Amendments of 1997, none of them directly address the issue.
 - a. Texas Hearing Officer Decisions¹: *Michael J. v. Houston ISD*, 28 IDELR 1220 (SEA TX 1998)(Dkt. No. 364-SE-798) (school dis-

district was not required to develop BIP if the student responded to typical classroom intervention and his behavior has not interfered with or disrupted the classroom to such an extent to have impeded the learning of the other students); *Ted H. v. Carrollton-Farmers Branch ISD*, Dkt. No. 257-SE-498 (SEA TX 1998) (hearing officer approved placement in a self-contained class on a segregated campus with 1:1 instruction, psychological services, in-home training, social skills training, a BIP and a daily inclusion, socialization period which served as transition to regular education campus, instead of a regular education placement with behavior supports); *Daire R. v. Harlingen Consolidated ISD*, Dkt. No. 078-SE-1198 (SEA TX 1999) (in addition to finding pre-IDEA Amendments BIP defective because it failed to address student=s disabilities and continued to use ineffective and punitive disciplinary consequences, hearing officer denied request for residential placement and psychological evaluation, but ordered a functional behavioral assessment by behavior specialist to collect and review behavioral data, develop behavioral strategies, monitor student=s behavior program, and train staff); *Matthew C. v. El Paso ISD*, Dkt. No. 174-SE-0299 (SEA TX 1999) (even though a hearing officer found that (a) BIPs were flawed because too much was left to staff discretion in the implementing and evaluating the plan, (b) the student=s program was inaccurately monitored by counting discipline referrals; and 8) the teachers were not trained or provided with classroom resources to deal with student=s severe behaviors. The hearing officer still approved a placement in a self-contained behavior intervention class, because a highly structured behavior program could not be implemented in a regular education setting); *Corpus Christi Indep. Sch. Dist.*, 30 IDELR 88 (SEA TX 1999) (Dkt. No. 046-SE-1098) (district was ordered to provide ten hours of compensatory education because of its failure to implement BIP by having the teachers keep a point system); *Zachary B. v. Garland ISD*, Dkt. No. 266-SE-599 (SEA TX 1999) (after finding that behavioral control was the primary educational need of a student who could not learn until his behavior was controlled, hearing officer ordered reimbursement for and continued placement in a residential treatment program because the student did not make meaningful educational progress in the district=s behavior adjustment class); *Allie I. v. Corpus Christi ISD*, Dkt. No. 145-SE-199 (SEA TX 1999) (hearing officer held that use of physical restraint was necessary to ensure student=s safety, but the increased use of physical restraint was reason that her educational program needed adjustment).

- b. Hearing Officer Decisions from Other States - *Birmingham Pub. Schs.*, 29 IDELR 765 (SEA MICH 1998) (district ordered to pay reimbursement for private residential placement because even though school recognized student needed positive behavior interventions, it delayed conducting functional behavioral assessment and developing an individualized BIP to address his refusal to go to school and violent behavior); *Modesto City Sch. Dist.*, 30 IDELR 170 (SEA CA 1998) (district ordered to return student with autism to his neighborhood school because it failed to provide appropriate BIP that complied with state law); *Independent Sch. Dist. No. 2310*, 28 IDELR 933 (SEA Minn 1998) (district failed to provide student with sensory integration and behavior problems with a well-defined behavior modification program, and the district exacerbated his behavioral problems by using physical restraint).

III. Short- Term Removals under IDEA

A. General Rule

1. To the extent removal would be applied to students without disabilities, a school may remove a student with a disability from his or her current placement for not more than ten consecutive school days. 20 U.S.C. § 1415(k)(1)(A)(I); 34 C.F.R. § 300.520(a)(1)(I).
2. Even though IDEA permits the suspension of a student up to ten consecutive days, Texas law prohibits a student from being suspended for more than three school days, TEX. EDUC. CODE § 37.005(b); or being placed on homebound instruction as a disciplinary placement for more than three school days. TEX. EDUC. CODE § 37.008(h).

- B. See Discipline Chart entitled A Student with a Disability Engages in Any Conduct Which Results in Series of Short-Term Removals, @ which outlines procedures for disciplining students with disabilities under IDEA, its implementing regulations and Chapter 37 of the Texas Education Code.²

C. Caselaw Interpreting Short-Term Removals

1. Court Cases: *Jefferson Parish Sch. Bd. v. Picard*, 27 IDELR 824 (E.D. La. 1998) (district ordered to provide to student with autism one day of compensatory education when an emergency removal was unwarranted).

2. Texas Hearing Officer Decisions: *Eanes Independent School Dist.*, 29 IDELR 647 (placement in AEP³ for 12 consecutive days constituted a change in placement, which required functional behavioral assessment and manifestation determination under IDEA); *Northeast Indep. Sch. Dist.*, 28 IDELR 1004 (SEA TX 1998) (three-day suspension not a change in placement); *Ted H. v. Carrollton-Farmers Branch*, Docket No. 257-SE-498 (SEA TX 1998) (three-day emergency removal to AEP when student=s behavior was out of control was permissible).
3. Hearing Officer Decisions from Other States: *Smith County Sch. Sys.*, 27 IDELR 764 (SEA TENN 1998) (student with disabilities entitled to compensatory education because her IEP was not implemented during in-school suspension).

IV. Series of Short-Term Removals which Cumulate to More than Ten Days in School Year

A. General Rule

1. A series of short-term removals that constitute a pattern because they cumulate to more than ten school days in a school year may be a change in placement. 34 C.F.R. ‘ 300.519(b). A pattern is determined by reviewing such factors as the length of each removal, the total amount of time the student is removed, and the proximity of the removals to one another. *Id.*
2. An in-school suspension@ (ISS) is not included in determining whether a student has been removed for more than ten cumulative school days as long as the student is afforded the opportunity to continue to appropriately progress in the general curriculum, continue to receive the services specified in the IEP and continue to participate with nondisabled students to the extent they would have in their current placement. Comment to 34 C.F.R. ‘ 300.520. If bus transportation is part of a student=s IEP, a bus suspension would be counted as a day of suspension. *Id.*

B. See Discipline Chart entitled A Student with a Disability Engages in Any Conduct Which Results in Series of Short-Term Removals.@

C. Cumulative Removals of Ten Days or More In a School Year:

1. Caselaw: There are no cases interpreting what constitutes a change of placement under 34 C.F.R. ‘ 300.519(b). The following cases, decided

prior to the new regulations, provide guidance on whether a series of removals totaling more than ten days in a school year constitute a change of placement, i.e., A pattern of exclusion@: *Student W. v. Puyallup School District No. 3*, 31 F.3d 1489, 1495-96 (9th Cir. 1994) (15 days of suspension per semester constitute a change in placement); *Manchester School Dist. v. Charles M.F.*, 21 IDELR 732 (D. N.H. 1994) (short-term suspensions which totaled more than ten days was a denial of FAPE); *Fairfax County Pub. Schs.*, 29 IDELR 1008 (SEA VA 1998) (change of placement occurred when student was removed after an initial day suspension); *Pottstown Sch. Dist.*, 29 IDELR 119, 121 (SEA PA 1998) (under state law which defines 15 cumulative days in a school year as a change in placement, A[a]n ISS does not count *per se* toward [this] requirement@), *School Bd. Volusia County*, 25 IDELR 276, 285 (SEA FA 1996) (a second nine-day suspension for the same type of behavior, i.e., 18 days in a school year, was found to have been Apunitive, unwarranted, and a denial of educational opportunity in light of the earlier determination that the conduct was disability-related; no further suspensions were permitted until there was a determination that the behavior was not a manifestation of the student=s disability). See also *Ponca City (OK) Sch. Dist.*, 20 IDELR 816 (OCR 1993) (for three different students with disabilities, three suspensions which totaled 12 in school year, two suspensions which totaled 11 days in a three-month period, and four suspensions which totaled 23 days in a school year were not changes in placement).

V. Long-Term Removals for Weapon or Drug Offenses

A. General Rule

1. A school may place a student in an AEP for no more than 45 days if a student: (a) possesses or carries a weapon to school or to a school function⁴; or (b) knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance at school or a school function. 20 U.S.C. ‘ 1415(k)(1)(ii); 34 C.F.R. ‘ 300.520(a)(2).
2. The parents cannot invoke the Astay-put@ provision by filing a request for due process hearing to prevent the student=s placement in an AEP during the pendency of the hearing. 34 C.F.R. ‘ 300.526(a).

B. See Discipline Chart entitled AStudent with a Disability Commits a Weapon or Drug Offense.@

C. Caselaw Addressing Long-term Removals for Weapon or Drug Offenses

1. Supporting Removal: *Vista Unified School Dist.*, 29 IDELR 749 (SEA CA 1998) (knife); *Freeport Pub. Sch.*, 26 IDELR 1251 (SEA MA 1997) (knife); *Oconee County Sch. Sys.*, 27 IDELR 629 (SEA GA 1997) (shotgun); *Georgetown Indep. Sch. Dist.*, 28 IDELR 904 (SEA TX 1998) (Dkt. No. 214-SB-398) (switchblade); *Poteet Indep. Sch. Dist.* 29 IDELR 29 IDELR 423 (SEA TX 1998) (Dkt. No. 382-SE-898) (possession of marijuana).
2. Rejecting removal: *Indep. Sch. Dist. No. 279*, 30 IDELR 645 (Minn. 1999)(paintball gun is not a dangerous weapon); *Vista Unified Sch. Dist.*, 29 IDELR 749 (SEA CA 1998) (student, who was involved in an after-school incident at a park, was not placed in AEP because there was no evidence he had knife at school or a school function); *In Re: Student with a Disability*, 27 IDELR 935 (SEA IN 1998) (decision to place student in AEP for threatening student with a knife on school property belonged to the ARD committee and not the principal).

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VI. Long-Term Removals for Dangerousness to Self or Others

A. General Rule

1. A hearing officer may order the placement of a student in an AEP for not more than 45 days if the hearing officer: a) determines that the district has demonstrated by substantial evidence that maintaining the current placement is substantially likely to result in injury to the student or others; b) considers the appropriateness of the current placement; c) considers whether the district has made reasonable efforts to minimize the risk of harm in the student=s current placement, including the use of supplementary aids and services; and d) determines that the AEP can enable the student to participate in the general curriculum and advance toward achieving his or her IEP goals, including services and modifications designed to address the behaviors that led to the student=s placement in the AEP. 20 U.S.C. ‘ 1415(d)(2); 34 C.F.R. ‘ 300.521.
2. The district can place the student in an AEP or other setting for up to ten school days. If the district does not obtain an order from the hearing officer placing the student in an AEP within ten days of the removal, the student shall return to his or her placement prior to the removal pending the decision of the hearing officer, unless otherwise agreed upon by the school and the parent.

3. In addition to proving that the student=s placement is substantially likely to result in injury to the student or others, the school bears the burden of proving that it has made reasonable efforts to minimize the risk of harm in the student=s current placement. Congress codified the standard adopted in *Light v. Parkway C-2 School District*, 41 F.3d 1223, 1228 (8th Cir. 1994). See *School Dist. Philadelphia v. Stephan M.*, 25 IDELR 506 (E.D. Pa. 1997) (pre-IDEA amendments application of the *Parkway* standard).
- B. See Discipline Chart entitled AStudent with a Disability is Dangerous to Self or Others.@
- C. Placement in AEP Ordered by Hearing Officer
1. Cases Authorizing AEP Placement: *Community Consolidated Sch. Dist. 15*, 30 IDELR 448 (SEA ILL 1999) (student with unspecified disability who bit, kicked and hit classmates and teachers, and bolted into parking lot); *Hempfield Sch. Dist.*, 27 IDELR 406 (SEA PA 1997) (student with mental retardation who pushed other students to the ground, tried to crawl over a bathroom stall, ran out of the classroom and down the hallway, tried to strike a teacher with scissors and to kick the cane out from under a student with spina bifida). See also *James G. v. Alief Independent School District*, Docket No. 214-SE-399 (SEA TX 1999)(hearing officer entered order authorizing removal from a single class [band] because of a dysfunctional relationship between student and his teachers and the need for a cooling off period, which was later vacated on the grounds that a change in an elective was not a change in placement);
 2. Cases Denying AEP Placement: *Cabot Sch. Dist.*, 27 IDELR 304 (SEA AR 1997) (student with ADD who used obscenities toward staff, failed to follow directions, and threatened to harm an assistant principal was not dangerous); *Pottstown Sch. Dist.*, 30 IDELR 651 (SEA PA 1999) (hearing officer found that physical altercation with student and assault of a principal more than two years ago prior to the hearing were insufficient to meet the substantial evidence standard); *Oregon City School Dist.*, 28 IDELR 96 (SEA OR 1998) (even though student with ADHD, anxiety disorder and obsessive compulsive disorder was found to be substantially likely to injure someone because of his aggressive conduct towards his teacher and classmates, he was not placed in AEP, because the psychological, counseling and social behavioral services called for in his IEP could not be provided in the AEP); *Scranton School Dist.*, 29 IDELR 133 (SEA PA 1998) (AEP placement denied because

student=s aggressive behavior had never caused injury); *Hempfield Sch. Dist.*, 27 IDELR 406 (SEA PA 1997) (even though school district proved that student was dangerous and that it made reasonable efforts to minimize the risk of harm, the student was not placed in AEP because it did not provide the services and modifications designed to address the behaviors that led to the student=s placement in the AEP).

D. Placement Ordered by Court (*AHonig Injunction*@)

1. School districts still have the option of obtaining a *Honig v. Doe* injunction in addition to being able to seek an order from a hearing officer to place a student in an AEP for being dangerous to self or others under 20 U.S.C. ‘ 1415(k)(2). Comment to 34 C.F.R. ‘ 300.521. See OSEP Memorandum 97-7, 26 IDELR 981, 983 (OSEP 1997), citing *Honig v. Doe*, 484 U.S. 305 (1988). See also *Gadsen City Bd. Of Educ.*, 28 IDELR 166, 169 (N.D. Ala. 1998) (district is not required to exhaust administrative remedies, i.e., seek an order from a hearing officer, before seeking a *Honig* injunction.
2. *Honig* Injunction Granted: *Walton Central School Dist.*, 28 IDELR 597 (N.D.N.Y. 1998) (student punched, kicked and bit school employees and threatened to kill several classmates and school employees); *Horry County Sch. Dist. v. P.F.*, 29 IDELR 354 (D.S.C. 1998); *School Bd. of Pinellas County, Florida v. J.M. by L.M.*, 25 IDELR 748 (M.D. Fla. 1997).
3. *Honig* Injunction Denied: *School Dist. of Philadelphia v. Stephen M.*, 25 IDELR 506 (E.D. Pa. 1997) (school district failed to show that a student with learning disability who cut classmate with razor was sufficiently dangerous or that it took steps to mitigate risk by student); *Phoenixville Area Sch. Dist. v. Marquis B.*, 25 IDELR 452 (E.D.Pa. 1997).

VII. Long Term Removals for Student Code of Conduct Violations

- A. See Discipline Chart entitled AStudent with a Disability Violates the Student Code of Conduct.
- B. State Law Prohibits Placement in AEP for Discretionary AEP Offenses⁵
 1. Courts have recognized that state law can afford greater procedural protections to students with disabilities than does IDEA. See *Town of Burlington v. Depart. of Educ. Com of Mass.*, 736 F.2d 773, 784-85(1st Cir.) , affirmed other grounds, 471 U.S. 359 (1985); *Geis v. Board of Educ. of Parisippany-Troy Hills, Morris County*, 774 F.2d 575, 583 (3rd Cir. 1985); *David D. V. Dartmouth School Committee*, 775 F.2d 411,

420 (1st Cir. 1985); *Bonnie Ann F. v. Calallen Indep. Sch. Dist.*, 835 F. Supp. 340, 348-49 (S.D. Tex. 1993). *See also Stanislaus County Office of Educ./Ceres Unified Sch. Dist.*, 27 IDELR 409, 410-11 (SEA CA 1997) (school district not entitled to expedited hearing to place student in AEP for dangerousness because state law required obtaining a court order to remove a student with a disability for such behavior).

2. TEX. EDUC. CODE ' 37.004 specifically provides: AA student with a disability who receives special education services may not be placed in alternative education programs solely for educational purposes if the student does not also meet the criteria for alternative placement in Section 37.006(a) or 37.007(a).@ State regulations governing special education also state that AAll disciplinary actions regarding students with disabilities shall be in accordance with federal requirements and the Texas Education Code (TEC), Chapter 37, Subchapter A (concerning Alternative Settings for Behavior Management).@ 19 TAC ' 89.1050(f).
3. A mandatory AEP offense occurs if a student commits the following on or within 300 feet of school property, as measured from any point on the school=s real property, boundary line, or while attending a school-sponsored or school-related activity on or off school property: conduct punishable by a felony; assault; terroristic threat; selling, possessing or using drugs; selling, possessing or under the influence of alcohol; abuse of glue or aerosol paint; or public lewdness or indecent exposure. TEX. EDUC. CODE ' 37.006(a). Whereas, a mandatory expellable offense occurs if a student commits the following on school property or while attending a school-sponsored or school-related activity on or off school property: use or possession of a firearm, illegal knife, club, or prohibited weapon; aggravated assault, sexual assault, or aggravated sexual assault; arson; murder; indecency with a child; aggravated kidnaping; or the sale or possession of drugs or alcohol that is punishable as a felony. TEX. EDUC. CODE ' 37.007(a).
4. Two hearing officer decisions support the prohibition against placing special education students in AEPs for non-mandatory AEP and non-expellable offenses. *See Lonnie I. v. Garland Independ. Sch. Dist.*, Docket No.150-SE-1295 (SEA TX 1996) (A Texas Education Code provides that the student may only be placed in an alternative education program if the misconduct criteria for the alternative placement has been engaged in by the student. [TEX. EDUC. CODE ' 37.004] One of the criteria for placement in an alternative education program is if the student, while on school property, is under the influence of marijuana. [TEX. EDUC. CODE ' 37.006(2)(A)].@); *Jonah B. v. Poteet Independ. Sch.*

Dist., Docket No. 124-SE-1295 (SEA TX 1996) (placement in AEP authorized under TEX. EDUC. CODE ‘ 37.004 because special education student committed an offense related to aerosol paint under TEX. EDUC. CODE ‘ 37.006(a)(4)).

VIII. Functional Behavioral Assessment

A. Functional Behavioral Assessment for Disciplinary Purposes

1. IDEA mandates that when a student with a disability is subject to a disciplinary action involving weapons, drugs, or a student code of conduct violation which could result in an AEP placement for more than ten days, the school must convene an ARD to develop a plan for a functional behavioral assessment within ten business days if there is no BIP. After the functional behavioral assessment is completed, an ARD must be convened to develop and implement a BIP to address the behavior that resulted in the disciplinary action. 20 U.S.C. ‘ 1415(k)(1)(B)(I); 34 C.F.R. ‘ 520 (b)(1). If a BIP exists, the school must convene an ARD within ten business days to review and/or modify the existing BIP. 20 U.S.C. ‘ 1415(k)(1)(B)(ii); 34 C.F.R. ‘ 300.520(b)(2). See Discipline Charts for AStudent with a Disability Commits a Weapon or Drug Offense@ and AStudent with a Disability Violates the Student Code of Conduct.@
2. A functional behavioral assessment is not required when a student with a disability is subject to a short-term removal of not more than ten days. Comment to 34 C.F.R. ‘ 300.520. However, cumulative removals of more than ten school days in a school year may trigger the functional behavioral assessment requirement. 34 C.F.R. ‘ 300.520(b)(1). See Discipline Chart for AStudent with a Disability Engages in Any Conduct Which Results in Series of Short-Term Removals.@
3. IDEA and its implementing regulations do not define functional behavioral assessment or establish any guidelines for a functional behavioral assessment.

B. Functional Behavioral Assessments for Non-Disciplinary Purposes

1. As Part of the Evaluation Process: School district must A use a variety of assessment tools and strategies to gather functional and developmental information . . . that may assist in determining . . . the content of the child=s individualized education program, including information related to enabling the child to be involved in and progress in the gen-

eral curriculum@ 20 U.S.C. ‘ 1414 (a)(2)(A).

2. As a Positive Behavioral Intervention: If a student=s behavior impedes the ability to progress in the general curriculum, a functional behavioral assessment may be warranted as part of the student=s initial evaluation or reevaluation before there is misconduct that requires a functional behavioral assessment under 20 U.S.C. ‘ 1415(k)(1)(B). See Comment to 34 C.F.R. ‘ 300.520 (AThe obligation to conduct a functional behavioral assessment . . . is not linked in the statute only to situations that constitute a >change in placement.= As a policy matter, it makes a great deal of sense to attend to behavior of children with disabilities that is interfering with their education or that of others, so that the behavior can be addressed, even when that behavior will not result in a change in placement.@). A functional behavioral assessment shall be completed in a timely fashion when it is determined to be necessary in developing positive behavioral interventions by the ARD committee. Comment to 34 C.F.R. ‘ 300.523.

C. Caselaw Dealing with Functional Behavioral Assessments

1. Texas Hearing Officer Decisions: *Matthew C. v. El Paso ISD*, (SEA TX 1999)(Dkt. No. 174-SE-0299) (an ARD committee=s use of a Afunctional behavioral assessment@ checklist to document its consideration of behaviors that were to be subject of a BIP did not constitute a functional behavioral assessment under IDEA; A[c]onducting a functional behavioral assessment may not always involve the same process as analyzing behaviors in preparation for developing an individualized behavior management plan@); *Daire R. v. Harlingen Consolidated ISD*, Dkt. No. 078-SE-1198 (TX SEA 1999) (district was ordered to conduct functional behavioral assessment by behavior specialist to collect data and review behavioral data, develop behavioral strategies, monitor student in behavior program and train staff).
2. Hearing Officer Decisions from Other States: *William S. Hart Union High Sch. Dist.*, 26 IDELR 1258 (SEA CA 1997) (district=s failure to conduct a functional behavioral assessment resulted in the reversal of an AEP placement for the possession of marijuana); *Bd. of Educ. of the Akron Central Sch.*, 28 IDELR 909 (SEA NY 1998) (placement in AEP for purchasing marijuana reversed because district failed to conduct a functional behavioral assessment); *Indep. Sch. Dist. No. 279, Osseo Area Sch.*, 30 IDELR 645 (SEA MN 1999)(district was ordered to conduct functional behavioral assessment because of failure to conduct one within the required time frame and after parent=s earlier request).

IX. Manifestation Determinations

A. Manifestation Determination Requirements

1. IDEA mandates that when a student with a disability is subject to disciplinary action involving weapons, drugs, dangerous behavior, a student code of conduct violation which could result in an AEP placement for more than ten days or a series of short-term removals which culminate to more than ten school days in a school year which constitute a change in placement, the school must convene an ARD to conduct a manifestation determination review within ten school days. 20 U.S.C. ' 1415(k)(4). See Discipline Charts for AStudent with a Disability Commits a Weapon or Drug Offense,@ AStudent with a Disability is Dangerous to Self or Others,@ AStudent with a Disability Violates the Student Code of Conduct,@ and AStudent with a Disability Engages in Any Conduct Which Results in Series of Short-Term Removals.@
2. A manifestation determination review for removals of ten days or less are not required. Comment to 34 C.F.R. ' 300.523.
3. ARD members and other qualified personnel shall review the relationship between the child=s disability and the behavior subject to disciplinary action. 20 U.S.C. ' 1415(k)(4)(B); 34 C.F.R. ' 300.523. Other qualified personnel includes those with knowledge of the student and the disabilities, or those knowledgeable about how a child=s disability can impact on behavior. Comment to 34 C.F.R. ' 300.523. The manifestation determination review may be conducted at the same ARD meeting that is convened to develop the plan for a functional behavioral assessment or modify the BIP under 34 C.F.R. ' 300.520(b). 34 C.F.R. ' 300.523(e).
4. Standards for Manifestation Determination Review:
 - a. The ARD committee must **first** consider all relevant information including evaluations and diagnostic results, including those provided by the parents; observations of the child, and the child=s IEP and placement. 20 U.S.C. ' 1415(k)(4)(C)(I); 34 C.F.R. ' 300.5238)(1). Review could consider previously unidentified disability of the child and antecedents to the behavior that is subject to discipline. Comment to 34 C.F.R. ' 300.523.
 - b. **Then** the ARD committee must determine whether: 1) the

student=s IEP and placement were appropriate; 2) special education services, supplemental aids and services, and behavior intervention strategies were provided; and 3) the student=s disability did not impair his or her ability to understand and control the behavior subject to the disciplinary action. 20 U.S.C. ‘ 1415(k)(4)(C)(ii); 34 C.F.R. ‘ 300.5238)(2).

5. If the Behavior Is a Manifestation of the Student=s Disability: If any of the standards [set forth in subsection (4) above] were not met, the behavior must be considered a manifestation of the student=s disability. A student with a disability may not be disciplined for behavior through a change in placement for behavior that is a manifestation of his or her disability. Comment to 34 C.F.R. ‘ 300.523. The only exceptions to this general rule are the 45-day placements when student carries or possesses a weapon at school or to a school function, or possesses or uses illegal drugs, or sells or solicits the sale of drugs at school or a school function (34 C.F.R. ‘ 300.520(a)(2)); when hearing office orders the placement because student is dangerous to self or others (34 C.F.R. ‘ 300.521); and when the school district obtains an order from a hearing officer during the pendency of an expedited hearing that the return of the student to the prior placement would be dangerous to the student (34 C.F.R. ‘ 300.5268)). Comment to 34 C.F.R. ‘ 300.523.
6. If Behavior Is Not Manifestation of the Disability: If ARD committee determines behavior is not a manifestation of the student=s disability, the student may be subject to same disciplinary action applicable to non-disabled students, except that FAPE must be provided consistent with 20 U.S.C. ‘ 1412(a)(1) and 34 C.F.R. ‘ 300.121(d). 20 U.S.C. ‘ 1415(k)(5)(A); 34 C.F.R. ‘ 300.524.
7. Deficiencies in IEP or Placement: If deficiencies in the student=s IEP or placement or their implementation are identified during the review, the school must take immediate steps to remedy those deficiencies. 34 C.F.R. ‘ 300.523(f).

B. Caselaw Dealing with Manifestation Determination Reviews

1. Texas Hearing Officer Decisions

- a. Not Manifestation of Disability: *Georgetown Indep. Sch. Dist.*, 28 IDELR 904 (SEA TX 1998) (Dkt. No. 214-SE-398) (student=s bringing knife to school was not a manifestation of his learning disability or his ADHD); *Jourdanton Indep. Sch. Dist.*, 27 IDELR

898 (SEA TX 1998) (student=s exposing himself to another student was not related to his disability); *Poteet Indep. Sch. Dist.*, 29 IDELR 423 (SEA TX 1998)(Dkt. No. 382-SE-898) (possession of marijuana was not related to a student=s learning disability); *Allen Indep. Sch. Dist.*, 26 IDELR 628 (SEA TX 1997) (Dkt. No.015-SE-996) (aggravated assault and off-campus burglary was related to his oppositional defiant disorder [ODD], which does not constitute a serious emotional disturbance, and not his ADHD); *Jonathan L. v. New Boston ISD*, Dkt. No. 181-SE-299 (SEA TX 1999) (student shoving teacher when he refused to return notes that student had in his possession prior to taking test was not manifestation of his learning disability).

- b. Manifestation of Disability: *Ylario G. v. Northeast Indep. Sch. Dist.*, Dkt. No. 210-SE-399 (SEA TX 1999)(since arguing and threatening to fight another student was a manifestation of student=s emotional disturbance, he could not be expelled to a juvenile justice alternative education program [JJAEP]⁶); *Martin M. v. Deer Park ISD*, Dkt. No. 221-SE-399 (SEA TX 1999) (for student who should have, but has not yet been determined eligible for special education, ARD committee could not conduct manifestation determination in which they speculated or hypothesized whether student=s misconduct would still have occurred if he had been provided an appropriate IEP).

2. Hearing Officer Decisions from Other States

- a. Not Manifestation of Disability: *Oconee County Sch. Sys.*, 27 IDELR 629 (SEA GA 1997)(bringing gun to school was due to poor judgment and not manifestation of student=s ADHD); *In re: Student with a Disability*, 27 IDELR 935 (SEA IND 1998)(threatening student with knife on school property was not a manifestation of student=s ADHD).
- b. Manifestation of Disability: *Hacienda La Puente Unified Sch. Dist.*, 26 IDELR 666 (SEA CA 1997)(school district was not permitted to expel student with learning disability because his misconduct was a manifestation of his ADD, and he was inappropriately placed at the time of his expulsion); *Freeport Pub. Schs.*, 26 IDELR 1251 (SEA ME 1997) (even though bringing knife to school was a manifestation of student=s disability, placement in AEP for 45 days upheld); *Indep. Sch. Dist. No. 279, Osseo Area Sch.*, 30 IDELR 645 (SEA MN 1999) (bringing paintball gun to school was a mani-

festation of the student=s disability which was characterized by impulsivity and failure to consider the consequences of his actions); *Dallas School Dist.*, 28 IDELR 1225 (SEA OR 1998) (determination that conduct was related to student=s disability because IEP team only considered academic but not behavioral portions of the IEP); *Jessieville Sch. Dist.*, 28 IDELR 697(SEA ARK 1998) (misconduct which was caused by how the BIP was implemented was a manifestation of the student=s disability); *Fort Smith Pub. Schs.*, 29 IDELR 399 (SEA ARK 1998) (even though student with mental retardation knew his violent behaviors were inappropriate, they were found to be a manifestation of his disability because he was unable to control the inappropriate behaviors).

X. Provision of Special Education and Related Services to Students with Disabilities Subject to Disciplinary Actions

A. Suspensions or Expulsions for Ten School Days or Less in a School Year

1. School district does not have to provide services to a student with a disability who has been removed from his or her current placement for ten school days or less in that school year, if services are not provided to nondisabled students who have been similarly removed. 34 C.F.R. ‘ 300.121(d)(1).

B. Placement in AEP for Drug or Weapons Offenses or by Order of a Hearing Officer for Dangerous Behavior

1. When a student with a disability is placed in an AEP for drug or weapons offense or by order of a hearing officer because the student is dangerous to self or others, 34 C.F.R. ‘ 300.121(d)(2)(ii), the student must be able to continue to participate in the general curriculum, and to continue to receive those services and modifications, including those described in the student=s current IEP, that will enable the student to meet the goals set out in that IEP. 20 U.S.C. ‘ 1415(k)(3)(B)(I); 34 C.F.R. ‘ 300.522(b)(1). The student must also receive services and modifications designed to prevent the behavior which resulted in the AEP from recurring. 20 U.S.C. ‘ 1415(k)(3)(B)(ii); 34 C.F.R. ‘ 300.522(b)(2).
2. See Discipline Chart entitled AMiscellaneous Provisions and Relevant Texas Law.@
3. Recent hearing officer decisions have addressed the issue of implementing a student=s current IEP in the AEP.

- a. Texas Hearing Officer Decisions: *Poteet Indep. Sch. Dist.*, 29 IDELR 423 (SEA TX 1998) (Dkt. No. 382-SE-898) (modular program in AEP was appropriate for student with learning disability who, prior to the AEP, had been in regular education for all classes with classroom modifications and content mastery support); *Kenneth Gregory H. v. Decatur Indep. Sch. Dist.*, 101-SE-1197(SEA TX 1998) (despite the fact that school district failed to implement modifications in student=s IEP in the AEP, the hearing officer did not grant any compensatory relief because the school district promptly corrected the omission that rendered his IEP inappropriate and the student=s Afailure in AEP resulted from his own behaviors, not from IEP omissions@).
- b. Hearing Officer Decisions from Other States: *Freeport Pub. Sch.*, 26 IDELR 1251(SEA ME 1997)(2.5 hours of tutoring per day at the local library failed to allow a student with a behavioral disorder who drew a knife during an argument at school to continue to receive the services and modifications to meet his IEP goals and to prevent the behavior which resulted in the student=s removal); *Oregon City Sch. Dist.*, 28 IDELR 96(SEA OR 998)(proposed interim placement of two hours of tutoring with behavioral counseling failed to continue to provide the psychological services, social/behavioral services and counseling required by the student=s current IEP); *Bd. of Educ. of the Akron Central Sch. Dist.*, 28 IDELR 909(SEA NY 1998) (interim alternative placement of home instruction was inappropriate because it failed to provide a student who bought marijuana at school with any of the special education services in his IEP); *William S. Hart Union Sch. Dist.*, 26 IDELR 1258 (SEA CA 1997) (despite the exception to the Astay put@ provision for drug offenses, the hearing officer ordered a student found smoking marijuana during lunch to return to his regular campus, because the school district had withdrawn its offer to provide home study as a 45-day interim placement, and failed to provide any interim educational services to the student); *Oconee County School System*, 27 IDELR 629 (SEA GA 1997) (parents of a student with ADHD who was offered only two hours per week of services during his 45-day suspension failed to raise and thereby waived any objections to the educational program in the alternative educational program).

C. Series of Short-Term Removals of More than Ten Days in a School Year that Do Not Constitute a Change in Placement or a Removal that Constitutes a Change in Placement for Behavior that is Not a Manifestation of the Student=s

Disability

When a student with a disability is subject either to a series of short-term removals of more than ten school days in a school year that do not constitute a change in placement or a removal that constitutes a change in placement for behavior that is not a manifestation of the student=s disability, the school must provide services which are necessary to enable the student to appropriately progress in the general curriculum and advance toward achieving the goals set out in the students IEP. 34 C.F.R. ‘ 300.121(d)(2). For a series of short-term removals in a school year that do not constitute a change in placement, school personnel, in consultation with the student=s special education teacher, determine which services are necessary to enable the student to appropriately progress in the general curriculum and advance toward achieving the goals in the IEP. 34 C.F.R. ‘ 300.121(d)(3)(I). For a student whose removal constitutes a change in placement for behavior that is not a manifestation of the student=s disability, the ARD committee makes this determination. 34 C.F.R. ‘ 300.121(d)(3)(ii).

D. Expulsion for More Than Ten School Days

1. School district must provide FAPE to a student with a disability who has been expelled for more than ten school days. 20 U.S.C. ‘ 1412(a)(1)(A). If a student is expelled, the school must provide educational services in a juvenile justice alternative education program (JJAEP) or other setting to the extent necessary to enable the student to progress in the general curriculum and advance toward achieving his or her IEP goals. 34 C.F.R. ‘ 300.121(d)(2)(I). See Comment to 34 C.F.R. ‘ 300.524; TEX. EDUC. CODE ‘ 37.011(b). Note: A student with a disability shall not be expelled for behavior that is a manifestation of the student=s disability.
2. Prior to the IDEA Amendments of 1997, the school district was only required to provide a student with a disability who was expelled with services designed to assist him or her in returning the student to school and preventing significant regression. 19 TAC ‘ 89.1050(f). This typically consisted of four hours per week of home-bound instruction.

XI. Appeals of Disciplinary Actions under IDEA

A. Parent Appeals

1. If parent disagrees with a determination that the student=s behavior was not a manifestation of his or her disability, or disagrees with any

decision regarding placement, the parent may request a due process hearing. 20 U.S.C. ‘ 1415(k)(6)(A)(I); 34 C.F.R. ‘ 300.525(a). Upon request, a parent must be given an expedited hearing. 20 U.S.C. ‘ 1415(k)(6)(A)(ii). A[A] parent=s right to an expedited hearing is limited to disciplinary situations involving a change in placement, which would occur if a child were removed from the child=s current placement for more than ten school days at a time or if there were a series of removals from the child=s current placement educational placement in a school year as described in ‘ 300.519.@ Comment to 34 C.F.R. ‘ 300.325. A parent=s request for an expedited due process hearing does not prevent a school district from seeking a *Honig* injunction. *Id.*

2. Standard of Review for an Appeal of the Manifestation Determination: Hearing officer must determine whether the school district has demonstrated that the student=s behavior was not a manifestation of his or her disability consistent with the manifestation determination review requirements. 20 U.S.C. ‘ 1415(k)(6)(B)(I); 34 C.F.R. ‘ 300.525(b)(1).
3. Standard of Review for an Appeal of Placement in AEP: Hearing officer must determine whether the school demonstrated by substantial evidence that maintaining the current placement is substantially likely to result in injury to the student or others; consider the appropriateness of the current placement; consider whether the school has made reasonable effort to minimize the risk of harm in the student=s current placement, including the use of supplementary aids and services; and determine that the AEP can enable the student to continue to participate in the general curriculum and advance toward achieving his IEP goals, including services and modifications designed to prevent the misconduct from recurring. 20 U.S.C. ‘ 1415(k)(6)(B)(ii); 34 C.F.R. ‘ 300.525.

B. Placement during Appeals

1. If the student is placed in AEP for possession of a weapon or drugs or by order of a hearing officer because the student is dangerous to self or others, the student remains in the AEP pending the decision of the hearing officer or until expiration of 45 days, whichever occurs first, unless the parents and school district agree otherwise. 20 U.S.C. ‘ 1415(k)(7)(A); 34 C.F.R. ‘ 300.526(a). See *Poteet Indep. Sch. Dist.*, 29 IDELR 423 (SEA TX 1998) (Dkt. No. 382-SE-898) (45-day placement in AEP exception to Astay-put@ provision for student possessing marijuana at school); *Vista Unified Sch. Dist.*, 29 IDELR 749 (SEA CA 1998) (the Astay-put@ provision was invoked where student was involved in

an incident with a knife outside of school and school district was ordered to return the student to his prior placement during the pendency of the due process hearing).

2. If the school district is seeking to place the student in an AEP for more than ten days for a student code of conduct violation, the student remains in his or her prior placement prior to the removal pending the decision of the hearing officer, unless the parents and school district agree otherwise. 20 U.S.C. ‘ 1415(j); 34 C.F.R. ‘ 300.5248), 300.514(a).
3. If the school district proposes to change the placement of a student placed in the AEP for a drugs/weapon offense or by order of the hearing officer because the student is dangerous to self or others after the expiration of the AEP placement, the student shall remain in the current placement (i.e., the student=s placement prior to the AEP) during the pendency of any proceeding to challenge the proposed change. 20 U.S.C. ‘ 1415(k)(7)(B); 34 C.F.R. ‘ 300.526(b). However, if the school district maintains that it is dangerous for the student to return to the prior placement during the pendency of the due process hearing, the school district may request an expedited hearing to obtain an order to place the student in an AEP or another appropriate placement. 20 U.S.C. ‘ 1415(k)(7)(C)(I); 34 C.F.R. ‘ 300.5268)(1). The hearing officer must apply the standard of review for an appeal of a placement in an AEP. 20 U.S.C. ‘ 1415(k)(7)(C)(ii); 34 C.F.R. ‘ 300.5268)(2). The hearing officer may order the placement of the student in the AEP or another appropriate placement for no longer than 45 days. 34 C.F.R. ‘ 300.5268)(3). This procedure may be repeated as necessary. 34 C.F.R. ‘ 300.5268)(4).

C. Expedited Due Process Hearings

1. States must establish a timeline for expedited due process hearings that result in a written decision being mailed to the parties in less than 45 days, with no extensions in time that result in a decision more than 45 days from the filing of a due process hearing. 34 C.F.R. ‘ 300.528(b)(1). The timeline must be the same for hearings requested by parents or school districts. 34 C.F.R. ‘ 300.528(b)(2). The Texas Education Agency has not promulgated any regulations establishing a timeline for expedited due process hearings at this time.

XII. Protections for Student Not Yet Eligible for Special Education

A. General Rule

1. A student, who has not been determined eligible for special education and has violated the Student Code of Conduct, may assert the procedural protections under IDEA, including 20 U.S.C. ‘ 1415(k), if the school had knowledge that the student was a student with a disability before the behavior that precipitated the disciplinary action occurred. 20 U.S.C. ‘ 1415(k)(8)(A); 34 C.F.R. ‘ 300.527(a).
 2. The school district is deemed to have knowledge that the student has a disability if:
 - (a) the parent stated concerns in writing or orally if the parent does not know how to write or has a disability that prevents a written statement to school personnel that the student needs special education and related services;
 - (b) The behavior or performance of the student demonstrates a need for special education;
 - 8) The parent has requested a special education evaluation; or
 - (d) The teacher or other school personnel have expressed concern about the behavior or performance of the student to the special education director or other personnel as part of the school=s child find procedures or special education referral process. 20 U.S.C. ‘ 1415(k)(8)(B); 34 C.F.R. ‘ 300.527(b).
 3. A school district is not deemed to have knowledge that the student has a disability if either it conducted an evaluation or determined the student was not eligible for special education or determined that an evaluation was not necessary and provided the parents with notice of that determination. 34 C.F.R. ‘ 300.5278).
 4. If the school district did not have prior knowledge that the student had a disability, the student may be subject to the disciplinary measures for nondisabled students. 34 C.F.R. ‘ 300.527(d).
 5. If a report is made for an evaluation during the disciplinary period, the evaluation should be conducted in an expedited fashion. Until the evaluation is completed, the student shall remain in the educational placement determined by school personnel, which can include an AEP or expulsion. 34 C.F.R. ‘ 300.527(d).
- B. See Discipline Charts AMiscellaneous Provisions and Relevant Texas Law Regarding Discipline.@
- C. Caselaw Dealing with Students Not Yet Eligible for Special Education

1. Texas Hearing Officer Decisions: *Dickinson Indep. Sch. Dist.*, 29 IDELR 290 (SEA TX 1998) (Dkt. No. 166-SE-298) (student who had been referred but not found qualified for special education services was not entitled to IDEA protections); *Timothy C. v. Eanes Indep. Sch. Dist.*, Dkt. No. 424-SE-797(SEA TX 1998) (school district breached its Achild find@ duty when it knew or should have known of the need to evaluate a student with a depression prior to placement in AEP); *Melissa S. v. Corpus Christi ISD*, Dkt. No. 133-SE-199 (SEA TX 1999) (student with ADD who was identified as Section 504 eligible was not entitled to a manifestation determination under IDEA⁷); *Martin M. v. Deer Park ISD*, Dkt. No. 221-SE-399 (SEA TX 1999) (hearing officer held that a) a student was entitled to Astay-put@ protection because his independent educational evaluation was still pending when the misconduct occurred; b) the manifestation determination provisions did not apply because the school district had knowledge that he was disabled but had not yet received special education services, and c) the school district could only remove the student from his current placement for misconduct by order of the hearing officer because he was dangerous to self or others or by obtaining a *Honig* injunction from a court).
2. Hearing Officer Decisions from Other States: *North Pocono Sch. Dist.*, 29 IDELR 111 (SEA PA 1998)(appeals panel held that a hearing officer could not impose a one year Aevidentiary@ statute of limitations on the evidence that can be adduced to prove whether a school district knew or should have known the student was eligible for special education).

XIII. Referral to and Action by Law Enforcement and Judicial Authorities

A. Background

1. Prior to the IDEA Amendments of 1997, IDEA did not address the reporting by schools of crimes committed by students with disabilities.
2. *Morgan v. Chris L.*, 106 F.3d 401 (6th Cir. 1997)
 - a. This case dealt with a school-filed delinquency petition against a student with ADHD accused of kicking a lavatory water pipe. The student had a long history of academic and behavioral difficulties. Even though school staff were aware of his diagnosis and treatment for ADHD, they treated his difficulties as a discipline problem. School district did not initiate an evaluation under IDEA or provide appropriate special education and related services. A special education evaluation requested by the parents was pending at

the time of the incident.

- b. Sixth Circuit held that school district violated its duty under IDEA to identify, evaluate and provide Chris with FAPE, unlawfully attempted to secure a program for him from the juvenile court instead of providing services itself, and had, by filing a delinquency petition with juvenile court, improperly sought to change his educational placement without following IDEA's change in placement procedures. The court further held that the filing of the delinquency petition constituted a change in educational placement entitling Chris to IDEA procedural protections, including convening of IEP team meeting prior to the change in placement. Because the school district violated its substantive obligation to provide FAPE, denied the student necessary services and filed a punitive delinquency petition against him, the Sixth Circuit upheld the hearing officer's fashioning of appropriate equitable relief by ordering the school district to seek dismissal of the delinquency petition.

B. Reporting a Crime to Appropriate Authorities under IDEA Amendments of 1997

1. A school district is not prohibited from **reporting** a crime committed by a student with a disability to **appropriate** law enforcement or judicial authorities. 20 U.S.C. ' 1415(k)(9)(A); 34 C.F.R. ' 300.529(a).
2. The legislative history explains that schools may not report crimes even to appropriate authorities where doing so would circumvent the schools obligation to the student under IDEA. See statement of Sen. Harkin, one of the legislation's co-sponsors, at Cong. Rec. May 14, 1997 at S4403 (The bill also authorizes...proper referrals to police and appropriate authorities when disabled children commit crimes, so long as the referrals, do not circumvent the school's responsibilities under IDEA.).
3. The comments to the new federal regulations clearly state that the school's ability to report crimes does not authorize school districts to circumvent any of their responsibilities under the Act. Comment to 34 C.F.R. ' 300.529.
4. Section 504 of the Rehabilitation Act of 1973 would be violated if a school were discriminating against children with disabilities in how they were acting under this authority (e.g., if they were only reporting crimes committed by children with disabilities and not committed by nondisabled students). Comment to 34 C.F.R. ' 300.529.

5. The term "reporting a crime" is not defined by IDEA or its implementing regulations. The phrase should be interpreted consistent with its ordinary meaning. Therefore, 20 U.S.C. § 1415(k)(9)(A) and 34 C.F.R. § 300.529(a) limit schools to notifying law enforcement agencies, i.e., police, and not the judiciary, i.e., juvenile or adult courts. IDEA does authorize school officials to file juvenile delinquency petitions with the courts. The comments to the federal regulations state that "[t]he Act does not address whether school officials may press charges against a child with a disability when they have reported a crime by that student. Again, school districts should take care not to exercise their responsibilities in a discriminatory manner." Comment to 34 C.F.R. § 300.529.
1. 6. Nothing in IDEA shall be construed . . . to prevent . . . 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)(9); 34 C.F.R. § 300.529(a).
7. If a student with a disability is arrested and placed in a juvenile detention facility by juvenile authorities after the school district makes a report to law enforcement authorities, the student with a disability is entitled to receive special education and related services while being detained. If the juvenile detention facility is located within the school district and the student is expected to remain in the facility for more than ten school days, an ARD meeting should be convened because of this change in placement. If the student is going to be detained for more than ten days in a juvenile detention facility located in another school district, this is a transfer to another school district, which other district assumes the obligation to deliver free appropriate public education. *Northside Indep. Sch. Dist.*, 26 IDELR 1118, 1121 (SEA TX 1998) (Dkt. No. 106-SE-1297). Under the "child find" requirement, 20 U.S.C. § 1412(a)(3)(A), a school district in which a juvenile detention facility is located must identify, evaluate and serve the students with disabilities who are placed in the juvenile detention facility for more than ten days.

C. Transmitting Education Records

1. A school district that reports a crime committed by a student with a disability may transmit copies of the student's special education and disciplinary records to the appropriate law enforcement or judicial authorities to the extent permitted by the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. 20 U.S.C. § 1415(k)(9)(B); 34 C.F.R. § 300.529(b). In other words, the special education and disci-

pline records may only be disclosed with prior written consent of the parent or a student over 18, or when the disclosure is made in accordance with a lawfully issued subpoena or court order if the school makes a reasonable attempt to notify the parents of the student in advance of compliance. Comment to 34 C.F.R. § 300.529. See *Northside Indep. Sch. Dist.*, 26 IDELR 1118, 1112 (SEA TX 1998)(Dkt. No. 106-SE-1297) (decided prior to the new IDEA regulations, holding that § 1415(k)(9) was an exception to FERPA's consent requirements, and it was reasonable to expect districts to transmit records within ten school days after making the report to law enforcement authorities).

D. Impact of the IDEA Amendments of 1997 on *Morgan v. Chris L.*

1. Since 20 U.S.C. § 1415(k)(9)(A) deals with reporting a crime, it has no impact on the holding in *Morgan v. Chris L.* Even if 20 U.S.C. § 1415(k)(9)(A) is erroneously construed as permitting a school district to file a juvenile court petition against a student with a disability, *Morgan* would still prohibit the school district from making a referral to the juvenile court to circumvent its obligations under IDEA to provide the student with FAPE. Before filing a delinquency petition, the school must follow IDEA change in placement procedures.

E. Post-*Morgan v. Chris L.* Caselaw:

1. *Northside Indep. Sch. Dist.*, 28 IDELR 1118(SEA TX 1998)(Dkt. No. 106-SE-1297)(AIDEA does not curtail the authority of law enforcement authorities to arrest and detain a child determined to have committed a crime. IDEA does not prohibit a public school district from reporting a crime committed by a child with disabilities to law enforcement authorities. 20 U.S.C. § 1415(k)(9)(A). It is not necessary for school officials to comply with IDEA's procedural safeguards, including notice and ARD Committee deliberations, before reporting criminal activity committed by a student with a disability. This is regardless of the child's eligibility classification and regardless of whether school discipline options were modified in the child's IEP. Making a report that leads to the child's detention by juvenile authorities does not constitute a cessation of services, in the nature of an expulsion, because IDEA requires states to provide appropriate special education to all eligible children regardless of their location, including children in state custody. 20 U.S.C. § 1412. In Texas, each local school district serves eligible children within district geographical boundaries, including children who come from other school districts and are placed in detention facilities in the local district.); *Poteet Indep. Sch. Dist.*, 29 IDELR 423 (SEA TX

1998) (Dkt. No. 382-SE-898) (ARudy=s status as a student with a learning disability does not immunize him from truancy charges, and the district did not violate IDEA by filing truancy charges against him@)⁸.

1. 2. Hearing Officer Decisions and Court Cases from Other States: *Jonesboro Pub. Sch.*, 26 IDELR 1073 (SEA ARK 1997)(hearing officer rejected parents= contention that the district proposed changing the student=s placement when it reported the student=s two assaults on staff); *Cabot Sch. Dist.*, 29 IDELR 300 (SEA ARK 1998) (even though school district was authorized to report crimes to law enforcement authorities, the hearing officer held that the school district was using the juvenile court system to effect a change in the student=s placement and to avoid complying with IDEA but did not order the dismissal of the juvenile delinquency petition because ‘ 1415(k)(9) overturned *Morgan v. Chris L.*); *Fort Smith Pub. Schs.*, 29 IDELR 399 (SEA ARK 1998) (after finding that the student=s misconduct was related to his disabilities, the hearing officer admonished the school district for filing criminal charges for the sole purpose of wanting the student to realize the Aseriousness of his behavior@ and needing Aa more serious consequence@ for him, but did not dismiss the delinquency petition because he did not have jurisdiction over juvenile court); *State of Connecticut v. David F.*, 29 IDELR 376 (Conn. Super. Ct. 1998) (in refusing to dismiss juvenile proceeding based on the *Morgan v. Chris L.* change of placement argument, the state court held that its jurisdiction would not frustrate the IDEA provisions or end the school district=s responsibility to serve students who enter the juvenile justice system).

¹The docket numbers for Texas hearing officer decisions are being provided so that copies of these decisions may be downloaded from the TEA Web site at <http://www.tea.state.tx.us/special.ed>

²The discipline charts contain references to the pertinent sections of the applicable laws.

³In this paper, a disciplinary placement for students with disabilities are referred to as an AAEP@ or Aalternative education program.@ IDEA refers to such placements as Aalternative educational setting,@ which is not defined. See 20 U.S.C. ‘ 1415(k). In Texas, the alternative educational setting is an AEP. See TEX. EDUC. CODE ‘ 37.008 *et seq.* (Vernon 1999). Though Congress clearly envisioned a range of alternative settings for students with disabilities who are subject to disciplinary actions under IDEA, students with disabilities in Texas are most likely to be placed in an AEP.

⁴IDEA was amended by the Education Flexibility Partnership Act of 1999 (P.L. 106-25, enacted April 29, 1999) to clarify that school districts have the authority to place a child who possesses a weapon at school or a school function in an AEP for no

more than 45 days. IDEA now provides that removing a child to an interim alternative placement is permitted if the child **carries** or **possesses** a weapon to or at school, on school premises, or to or at a school function.⁴ 20 U.S.C. § 1415(k)(1)(A)(ii)(I) (emphasis added).

⁵TEX. EDUC. CODE § 37.001(a)(2) authorizes school districts to specify violations of the Student Code of Conduct that allow a principal or other school administrator to place a student without a disability in an AEP. These discretionary AEP offenses do not include the mandatory AEP offenses under TEX. EDUC. CODE § 37.006(a) or the mandatory expellable offenses under § 37.007(a) in which the school districts are **required** to place a student in an AEP.

⁶See TEX. EDUC. CODE § 37.011 for the requirements for a JJAEP.

⁷Although the student would have been eligible for a manifestation determination under Section 504 of the Rehabilitation Act, *S-1 v. Turlington*, 635 F.2d 342, 346 (5th Cir.), cert. denied, 454 U.S. 1030 (1981), the hearing officer did not have jurisdiction to consider Section 504 violations. There is no indication in the record that the student had requested a manifestation determination under Section 504.

⁸One commentator has argued that § 1415(k)(9) does not authorize or condone school-filed petitions alleging status offenses such as Child in Need of Supervision or truancy petitions because such offenses technically are not considered as Crimes.⁸ Regardless of whether the courts will agree with this interpretation of § 1415(k)(9), it is clear that the school district must comply with its obligations under IDEA before filing such charges. For example, if a student has excessive absences, the school district must employ positive behavioral interventions to address this problem before filing a truancy petition. See *Carlos T. v. Northside Indep. Sch. Dist.*, Dkt. No. 090-SE-1096(SEA TX 1997) (a pre-IDEA Amendment case in which a school district was found in violation of IDEA because a student's BMP did not identify or address his primary behavior problem, persistent absenteeism).