

The Educator's Guide to Student Discipline and Supports

A Practical Legal Guide for School Personnel in Idaho



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Table of Contents

Introduction	14
General Discipline	15
Required Policies Regarding Student Conduct and Discipline.....	15
1) What is the responsibility of local school districts in setting standards for student behavior and discipline?	15
2) What requirements must be followed by local school boards when implementing disciplinary rules?	15
3) What are the overarching requirements for a school district's disciplinary policies and practices?.....	16
4) How must a school district inform students, staff, and families about its discipline policies?	16
The Range of Disciplinary Options.....	17
5) What discipline options are permissible under state law?	17
6) What actions are not permissible as discipline?	22
7) Do teachers have the authority to discipline students?	22
8) May a school district deny enrollment to a student who has been expelled from another district?	23
The Scope of the School's Jurisdiction.....	24
9) May schools discipline students for misconduct occurring off school grounds?.....	24
Discipline for Possession of Firearms	25
10) What does the federal Gun-Free Schools Act require regarding firearms at school?	25
11) What does Idaho law require regarding firearms at school?.....	25
12) What is the definition of "firearm"?	26
13) May a school district ban a dangerous or deadly weapon that does not fall within the definition of "firearm"?	27
14) What reporting obligations do school districts have regarding firearms violations?	27
15) What does the IDEA require regarding students who possess firearms at school?	28
Alcohol and Controlled Substances	29
16) Must districts address concerns about using or being under the influence of alcohol or controlled substances?	29

17) What are controlled substances?	29
18) Must school officials inform law enforcement officials about a student’s use or suspected use, of alcohol or a controlled substance?	29
19) What disciplinary act can be taken against a student using or under the influence of drugs or alcohol?	30
20) What is the definition of “reasonable suspicion” that a student is using or under the influence of drugs or alcohol?	30
21) Does disclosure of drug or alcohol use provide school officials with reasonable suspicion at a later date?.....	31
22) Must students and parents be notified of the district’s drug and alcohol policy?	31
Requirements Regarding Threats of Harm or Violence	32
23) What actions may be taken if a student makes a threat of violence?	32
24) What actions may be taken if a student possesses a weapon?	32
25) Does a school district have authority to discipline a student for making a threat, even if the student is also criminally charged?	32
Threat Assessments.....	33
26) What is a threat?	33
27) How might a student come to the attention of school personnel regarding a threat?....	33
28) What is a threat assessment?.....	33
29) What is the purpose of a threat assessment?.....	33
30) Does Idaho require schools to utilize threat assessments?	33
31) Should each Idaho school district have a threat assessment process?	34
32) Is a threat assessment an evaluation for purposes of the IDEA?.....	34
33) Who may be on a threat assessment team?.....	34
34) Is a threat assessment team limited to school personnel?.....	34
35) When should a threat assessment be initiated?.....	34
36) How quickly should a threat assessment be initiated?.....	35
37) How in-depth is a threat assessment?	35
38) What information should a threat assessment team consider?.....	35
39) Should a threat assessment team utilize profiling when considering a student’s risk for violence?.....	35
40) Does FERPA come into play?	35

41) Can a student be referred to law enforcement or another public entity based on information gathered during a threat assessment inquiry or investigation?	36
42) Is a threat assessment report pertaining to a student an education record?	36
43) Is there a process to follow if a parent objects to a threat assessment in a student’s education file?	36
Issues Regarding Discipline and Free Expression	37
44) What is considered "speech"?.....	37
45) When may school officials discipline a student for speech or other types of expression?	37
46) When may school officials discipline a student for off-campus speech, including postings on the Internet and social media?.....	40
47) Can school officials discipline for off-campus Internet speech that includes threats of violence?	41
48) Can school officials discipline students for off-campus social media speech directed at school officials?.....	42
Harassment, Intimidation, and Bullying	43
49) Has the Idaho Legislature addressed “harassment, intimidation or bullying” in Idaho schools?	43
50) What is the definition of student “harassment, intimidation and bullying”?.....	43
51) Can harassment, intimidation or bullying occur using an electronic device, such as a computer or cell phone?	43
52) What information must local school boards disseminate regarding harassment, intimidation, and bullying?	44
53) What actions are school personnel expected to take regarding harassment, intimidation or bullying?	44
54) What consequences must local school boards use regarding harassment, intimidation or bullying?.....	44
Suicide Prevention.....	45
55) How prevalent is suicidal ideations among youth in Idaho?.....	45
56) How prevalent is suicide among youth in Idaho?	45
57) Are Idaho school districts required to have a policy addressing suicide prevention?.....	45
58) What trainings are required for Idaho school district personnel regarding suicide prevention?.....	46
59) What duty exists to inform parents of a student’s possible suicidal tendencies?	46

60) How is “suicidal tendencies” defined?	46
61) What is “direct evidence” of a student’s suicidal tendencies?	46
62) What liability exists for failure to provide suicide prevention training to district personnel?	46
63) What liability exists for failure to identify a student’s suicidal tendencies?.....	47
64) How can teachers be proactive?	47
Requirements Regarding Search and Seizure.....	48
65) What is a search?.....	48
66) Under what conditions can a school official conduct a search and seizure at school?	48
67) What are some examples of reasonable and unreasonable searches?	49
68) Are there exceptions to the "reasonable suspicion" requirement?	50
69) How does the law regarding search and seizure apply in specific contexts?	51
Due Process: Required and Recommended Steps for Imposing Discipline	56
70) What is due process in general?.....	56
71) What due process is required for suspension?	56
72) Is due process required for in-school suspensions?.....	57
73) What due process is required for expulsion?.....	58
74) How should school officials prepare for an expulsion proceeding?	58
75) Who has the authority to expel or deny enrollment to a student?	59
76) May the student be suspended during the expulsion process?	59
77) What notice is required for an expulsion hearing?.....	59
78) How should the notice be delivered?.....	59
79) When must the notice be delivered?	60
80) Who conducts the expulsion hearing?	60
81) Must the expulsion hearing be scheduled at the parent's convenience?	60
82) Is an expulsion hearing open to the public?.....	60
83) How should the district representative prepare for the expulsion hearing?	60
84) How should the district representative present the school's case at the expulsion hearing?	61
85) What is the procedure at the expulsion hearing?.....	62
86) May the student be compelled to testify?	63

87) Does the student have a right to confront his or her accusers?	63
88) Who has the burden of proof at the hearing?	64
89) What should the hearing body's decision include?.....	64
90) What procedures should be followed at the board level?.....	65
91) What procedure should be followed if the student waives the right to a hearing?.....	65
92) May a district proceed with an expulsion hearing if a student has withdrawn from school?.....	65
93) May the district proceed with an expulsion hearing if criminal charges are pending?	65
94) What due process procedures are required for denial of school enrollment?.....	66
95) What documentation should schools maintain regarding student discipline?	66
96) Are there requirements to transfer student disciplinary records to another school?	66
97) Are there notification requirements when a student of compulsory school age is expelled?.....	67
98) Can a student appeal a disciplinary decision to state court?	67
99) When may school officials call the police?.....	67
Discipline of Students with Disabilities.....	68
IDEA: General Questions.....	68
100) Do students with disabilities have additional rights?.....	68
101) How may students with disabilities under the IDEA be disciplined?	68
102) Do general disciplinary rules apply to students with disabilities?.....	68
103) Does the "general education curriculum" have any bearing on disciplining students with disabilities?	68
104) How does the IDEA define the word "day"?.....	69
105) What disciplinary removal options are available under the IDEA?	69
106) What special requirements apply when removals exceed ten cumulative school days in a school year?.....	71
107) When does a removal constitute a "change in educational placement"?	71
IDEA: Services During Disciplinary Removal.....	72
108) Are educational services required by the IDEA if a student is suspended or expelled? ..	72
109) What educational services must be provided if a student is removed for more than ten cumulative school days?.....	72

110) Who decides what services must be provided to a student removed for more than ten cumulative school days?.....	72
IDEA: Serial Suspensions.....	73
111) When does a series of suspensions constitute a "pattern"?.....	73
112) Are bus suspensions considered when determining whether a series of suspensions constitute a "pattern"?.....	73
113) What is an example of a series of suspensions that do not constitute a pattern?	73
114) What is an example of a series of suspensions that constituted a pattern?	73
115) Is there a limit to the number of cumulative short-term removals if no pattern exists?	73
116) Who determines whether short-term cumulative day removals are a change in placement?	74
117) Should a student's IEP team convene to discuss short-term cumulative day removals that are not a change in placement?.....	74
118) How has the Ninth Circuit Court of Appeals treated serial suspensions?	74
119) May a parent contest a district's decision regarding whether multiple suspensions create a pattern?	74
IDEA: Counting Days of Disciplinary Removal	75
120) What counts as a disciplinary removal?	75
121) Does "in-school suspension" count as a disciplinary removal?.....	75
122) Does a bus suspension count as disciplinary removal from school?.....	75
123) How is a partial school day of suspension counted?	75
124) Do removals by one district count when the student transfers to another district?	75
125) If a student is placed on a shortened day by the IEP team due to behavior issues, does the reduction in the student's day count as disciplinary removal?	76
126) If a student is placed on a shortened day by a school administrator due to behavior concerns without going through the IEP process, does the reduction in the student's day count as a disciplinary removal?	76
127) If a parent is asked to pick up his or her child from school early due to behavior and does so, does the reduction in the student's day count as a disciplinary removal?	76
128) If a teacher removes a student from an individual class period for behavioral infractions, does the missed class period count as a disciplinary removal?	76
129) If short removals are part of a student's behavioral intervention plan, are they counted as suspensions?	77
130) Is "restarting the clock" still allowed?	77

IDEA: Use of 45-Day Interim Alternative Educational Settings.....	78
131) What is an IAES?	78
132) What services must be provided in an IAES?.....	78
133) Under what circumstance may a student be sent to an IAES and for how long?	78
134) What are the roles of school personnel, the IEP team, and a hearing officer regarding an IAES?	79
135) Is the maximum length of an IAES measured in school days or calendar days?	79
136) May an IAES carry over to the following school year?	79
IDEA: IAES for Weapons or Drug Violations or Infliction of Serious Bodily Injury	80
137) When may school personnel impose an IAES?.....	80
138) Who selects the location for this type of IAES?.....	80
139) What constitutes a "weapons violation" for purposes of an IAES?.....	80
140) What is a "weapon" for purposes of placement in an IAES?.....	80
141) What is a "drug violation" for purposes of placement in an IAES?	81
142) What is a "drug" for purposes of an IAES?	81
143) What constitutes "serious bodily injury" for purposes of removal to an IAES?.....	82
144) Can school personnel place a student in an IAES if the student intended to cause serious injury to another but failed?	82
145) May a parent object to an IAES ordered by school personnel?	82
146) May a parent invoke the 10-day objection rule to prevent a student’s placement in an IAES?	82
147) Is a manifestation determination required for an IAES placement for weapons or drug violations or infliction of serious bodily injury?	83
148) What behavioral assessments and interventions are required when school personnel remove a student to an IAES for a weapons or drug violation or the infliction of serious bodily injury?	83
149) What notice must be provided to parents in connection with an IAES placement for weapons or drug violations or infliction of serious bodily injury?	83
IDEA: IAES for "Injurious Behavior"	84
150) When may a hearing officer order a student to an IAES?	84
151) What must a district prove to the hearing officer to obtain this type of IAES?	84
152) Who selects the IAES, and what criteria must it meet?	84

153) May a district ask a hearing officer to extend an IAES placement for injurious behavior? 84	
154) Is a manifestation determination required for removal to an IAES by a hearing officer for injurious behavior?	84
155) Are a functional behavioral assessment and a behavior intervention plan required for an IAES placement ordered by a hearing officer?	85
IDEA: Honig Injunction	86
156) For removing dangerous students, is there an alternative to requesting an IAES from a hearing officer?	86
157) What is the procedure for obtaining a <i>Honig</i> injunction?	86
158) What will the district have to prove to the court when seeking a <i>Honig</i> injunction?	87
159) What documentation will be necessary for a <i>Honig</i> injunction?	87
160) What educational services must be provided if a <i>Honig</i> injunction is granted?	87
IDEA: Manifestation Determination	88
161) What is a "manifestation determination"?	88
162) Who makes the "manifestation determination"?	88
163) What happens if the team cannot reach consensus on the manifestation determination? 88	
164) When must a manifestation determination be conducted?	89
165) May a school district elect to conduct a manifestation determination even when no decision for a change in placement has occurred?	89
166) How is a manifestation determination conducted?	89
167) What disciplinary actions may be taken if the student's misconduct was a manifestation of his or her disability?	90
168) What additional actions must be taken if the student's conduct is determined to be a manifestation of the student's disability?	91
169) What disciplinary actions may be taken if the student's misconduct was not a manifestation of his or her disability?	91
170) Does the IEP team have a role if the misconduct has been determined not to be a manifestation of the student's disability?	92
IDEA: Functional Behavioral Assessment ("FBA") and Behavior Intervention Plan ("BIP")	93
171) When are an FBA and a BIP required?	93
172) Is parental consent required before conducting a functional behavioral assessment? ..	93

173) Who is qualified to conduct a functional behavioral assessment?	94
174) If a student's IEP already contains behavior strategies, must a separate behavior intervention plan be created?	94
175) May short removals be used as part of a student's behavioral intervention plan?.....	94
IDEA: Continuation of Educational Services During Removals	95
176) Must educational services be provided to a student who is suspended or expelled beyond ten cumulative school days?	95
177) What services are required?.....	95
178) To enable the student to "continue to participate in the general education curriculum," must the district provide all of the services the student was receiving prior to the disciplinary removal?.....	96
179) Who decides what services will be provided?.....	96
180) Must a parent be consulted when the district determines the educational services to be provided during disciplinary removals that are not a change in placement?.....	96
IDEA: Parent Appeals.....	97
181) May a parent appeal special education disciplinary decisions?.....	97
182) If a parent appeals, who has the burden of proof?	97
183) Who conducts the due process hearing?	97
184) Does the parent have a right to an expedited due process hearing?	97
185) What are the procedures for an expedited hearing?	97
186) May a due process hearing decision be appealed to court?	98
187) Where is the student's placement during the due process hearing procedure?.....	98
IDEA: Notification Requirements.....	99
188) What parental notification requirements apply to disciplinary actions?.....	99
IDEA: Protection for General Education Students	100
189) What if a general education student facing disciplinary action asserts that he or she qualifies for special education?	100
190) When is the district deemed to have "knowledge" that a student has a disability?	100
191) When is the district not deemed to have "knowledge" of a disability?.....	100
192) If the district did not have "knowledge," what disciplinary actions may be taken?	101
193) What actions are required if there is no "deemed knowledge" of a disability but the student requests an eligibility evaluation while the disciplinary action is pending?.....	101

194) Is there a specific timeline for completing an expedited evaluation?	102
195) What is required if the student is found eligible for special education under the IDEA? 102	
196) May the district continue disciplinary removal despite a determination of eligibility? 102	
IDEA: Law Enforcement and Record Issues	103
197) May a student with a disability be reported to law enforcement?.....	103
198) When may educational records be shared with law enforcement?	103
199) Must a manifestation determination occur if a student is reported to law enforcement? 103	
IDEA: Transportation Issues	104
200) How should a student be disciplined for bus violations?	104
201) May the district change the mode of transportation for disciplinary reasons?.....	104
202) Does a bus suspension count as suspension from school?	104
203) Does a bus suspension count as a suspension from school even though the suspended student attended school?.....	105
Section 504: General Questions About Section 504 of the 1973 Rehabilitation Act ("Section 504")	106
204) What is Section 504?	106
205) Do students with disabilities under Section 504 have additional rights regarding discipline?	106
206) Do students with disabilities under Section 504 have the same rights as students with disabilities under the IDEA regarding discipline?	106
Section 504: Suspension and Placement Changes	107
207) What suspensions are permitted under Section 504 without additional procedural requirements?	107
208) What constitutes a "significant change in placement" under Section 504?	107
209) When does a series of suspensions create a "pattern of exclusion"?.....	107
210) Does in-school suspension count as suspension from school?	107
Section 504: Manifestation Determination.....	108
211) Does a "manifestation determination" requirement apply to Section 504?	108
212) Who must participate in a manifestation determination?.....	108
213) When must a manifestation determination be conducted?	108

214) How is a manifestation determination conducted?	108
215) What information and behavior must be reviewed in a manifestation determination? 109	
216) What actions are allowed if the student's misconduct was not a manifestation of his or her disability?	109
217) What happens if the student's misconduct was a manifestation of his or her disability? 109	
Section 504: Assessment and Behavior Plans	111
218) Is the school required to conduct a functional behavioral assessment in connection with a disciplinary removal?	111
219) Are individual behavior management plans required under Section 504?.....	111
Section 504: Due Process Requirements.....	112
220) Do parents have additional due process rights under Section 504?.....	112
221) May a parent request an administrative hearing to challenge the results of a manifestation determination?	112
222) Is an "impartial hearing" under Section 504 the same as a "due process hearing" under the IDEA?	112
Section 504: Drugs and Alcohol.....	113
223) Is addiction to illegal drugs or alcohol a disability under Section 504?.....	113
224) Is marijuana considered to be an illegal drug?.....	113
225) Is a current user of illegal drugs or alcohol protected under Section 504?	113
226) Is a current illegal drug or alcohol user entitled to special disciplinary treatment under Section 504?	113
227) What constitutes current use?	114
228) What constitutes "illegal use of drugs"?	114
229) What if the current user is also eligible under the IDEA?.....	114
Section 504: Law Enforcement	115
230) May police be notified of illegal conduct committed by a Section 504 student?	115
Section 504: Transportation.....	116
231) May a student eligible under Section 504 be suspended from the bus?.....	116

Introduction

The disciplining of students in public schools has become an increasingly daunting endeavor, controlled by a complex and growing body of federal and state law. In this edition, the name has changed from *The Educator's Guide: Student Discipline in Idaho* to *The Educator's Guide to Student Discipline and Supports - A practical Legal Guide for School Personnel in Idaho* to better reflect the Guide's content and continues to be a comprehensive, up-to-date, and practical handbook on the laws that govern student discipline:

- a. Part I covers general discipline, including discipline options, discipline of students for misconduct occurring off school grounds, weapons violations, threats of harm or violence, free-speech issues, search and seizure, constitutional due process, and procedures for suspension and expulsion.
- b. Part II covers the discipline of students with disabilities, including discipline under the Individuals with Disabilities Act ("IDEA") and Section 504.

The author hopes you find this publication to be a clear and practical guide through the maze of student discipline law.

*Please note that unless otherwise indicated, the word "parent" as used in this Guide includes a legal guardian.

** Unless otherwise indicated, the term "school district" includes Idaho public charter schools.

|| General Discipline

Required Policies Regarding Student Conduct and Discipline

1) What is the responsibility of local school districts in setting standards for student behavior and discipline?

In Idaho, local school districts are responsible for establishing discipline policies within legal parameters. With some exceptions, state law regarding student discipline is fairly general and grants discretion to school districts to adopt their own rules governing student conduct and discipline.¹

2) What requirements must be followed by local school boards when implementing disciplinary rules?

School districts are required by law to develop rules, in the form of policy, for the disciplining of unruly or insubordinate students, including rules on student harassment, intimidation, and bullying. Each district's board of trustees must establish and formally adopt the district's disciplinary code. A written, summarized version of the disciplinary code must be provided to teachers and students at the beginning of each school year. The summarized version must be prepared in a manner that is consistent with the student's age, grade, and level of academic achievement.²

A combination of case law, statutes, and regulations set forth the necessary elements for all disciplinary rules adopted by school districts. Each district's disciplinary policies must be reasonable and must provide adequate procedures for due process. Each policy must have a legitimate educational purpose and a rational relationship to the achievement of the stated educational purpose. Additionally, each policy must be reasonably clear and must not violate any constitutional or statutory rights of students.

According to the Idaho Administrative Procedures Act (IDAPA), school boards must adopt comprehensive districtwide policies and procedures in the following broad areas related to a safe environment and student discipline:

- School climate;
- Discipline;
- Student health;
- Violence prevention;
- Possessing weapons on campus;
- Substance abuse, including tobacco, alcohol, and other drugs;

¹ School districts, Idaho Code §§ 33-512(6) and (11); schools, Idaho Code § 33-512(6); and classrooms, Idaho Code §§ 33-1224 and 33-1612.

² Idaho Code § 33-512(6).

- Suicide prevention;
- Student harassment;
- Drug-free school zones;
- Building safety, including evacuation drills; and
- Relationship abuse and sexual assault prevention and response.

Districts are required to conduct an annual review of these policies and procedures.³

3) What are the overarching requirements for a school district's disciplinary policies and practices?

A school district's disciplinary policies and practices should be designed to:

- Have a legitimate educational purpose;
- Have a rational relationship to the achievement of the educational purpose;
- Be reasonably clear;
- Not violate any constitutional rights of students; and
- Be consistently and reasonably applied and enforced.⁴

4) How must a school district inform students, staff, and families about its discipline policies?

An Idaho school district is required to:

- Include the disciplinary rules in a district discipline code adopted by the board of trustees; and
- Provide a summarized version of the disciplinary code in writing at the beginning of each school year to the teachers and students in the district in a manner consistent with the student's age, grade and level of academic achievement.⁵

³ IDAPA 08.02.03.160; Idaho Code § 33-1612.

⁴ See *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

⁵ Idaho Code § 33-512(6).

The Range of Disciplinary Options

5) What discipline options are permissible under state law?

The following types of discipline are generally available to address student misconduct unless prohibited by school district policy:

- Suspension;
- Expulsion;
- Conditional readmission;
- Suspension of driving privileges;
- Restitution;
- Grade reduction;
- Corporal punishment;
- Detention;
- Time-out; and
- Restrictions on interscholastic or ceremonial activities.

Suspension

A student may be suspended when certain minimum procedures are followed (see Question 71). The board of trustees must establish the procedure to be followed for suspension, which must conform to the minimum requirements of due process.

A student who has been suspended may be readmitted to school by the principal or superintendent who suspended him or her upon such reasonable conditions as the principal or superintendent may prescribe.⁶

Expulsion

Expulsion is a disciplinary exclusion that exceeds twenty (20) school days in Idaho.⁷ Expulsion may exceed one calendar year and could be permanent.⁸

Expulsion may be recommended to the board of trustees whenever staff believes a student is habitually truant, is incorrigible, or whose conduct is continuously disruptive of school discipline, or of the instructional effectiveness of the school, or whose presence is detrimental to the health or safety of other students. Further, a student can be recommended to the board for expulsion if the student has been expelled from another school district within Idaho or any other state.⁹ Due process requirements for expulsion are outlined in Questions 73-99.

⁶ Idaho Code § 33-205.

⁷ Idaho Code § 33-205.

⁸ Idaho Code § 33-205.

⁹ Idaho Code 33-205.

Conditional readmission/delayed expulsion or suspension

When suspending or expelling a student, the district may offer the student the option of conditional readmission, unless prohibited by board policy. This involves allowing the student to remain in school or to return to school sooner than would otherwise be allowed subject to certain conditions. If the conditions are not satisfied, the full disciplinary sanction can be imposed, after providing due process.

For example, a student subject to expulsion for a drug violation could be offered a delayed suspension or expulsion, on a conditional basis, if the student and her parents were to agree that the student would:

- (1) Submit to a substance-abuse evaluation;
- (2) Agree to participate in a drug-treatment or drug-awareness program;
- (3) Agree to remain drug-free for at least one year or the remainder of his or her K-12 education; and
- (4) Consent to random drug testing during the probationary period.

Delayed suspensions or expulsions should be carefully documented and agreed to in writing by the student and his or her parent. A specific staff person should be assigned to monitor the student's compliance with the terms of the delayed suspension or expulsion.

Suspension of driving privileges

Whenever a student under the age of 18 has dropped out of school or is not meeting all relevant attendance requirements, the principal or designee is required by state law to provide written notification to the student and parent of the school's intent to request that the Idaho Department of Transportation suspend the student's driving privileges.¹⁰

Within 15 days of receiving the notice of intent to request suspension of the student's driving privileges, the student or parent may request a hearing before the principal or designee. The hearing is required to be conducted within 30 calendar days after receiving the hearing request.

The purpose of the hearing before the principal or designee is to determine whether the requirement to seek suspension of the student's driving privileges should be waived due to personal or family hardship that requires the student to have a driver's license for the student's or his or her family's employment or medical care. When determining whether a hardship exists, the principal or designee is required to consider the recommendations of teachers, other school officials, guidance counselors or academic advisors prior to determining whether to grant a waiver.

In the event the principal or designee refuses to grant a hardship waiver, the student or parent may appeal the denial to the board of trustees, which has the authority to grant or

¹⁰ Idaho Code § 49-303A.

deny the hardship waiver. If the hardship waiver is denied, the Idaho Department of Transportation is notified of the student's failure to meet the school attendance requirements.

Restitution

If a student is responsible for the willful destruction or damage to school property, discipline may include the payment of restitution. The reasonable cost of repairing or replacing school property may be assessed against the student and his or her parent. If restitution is not paid, the district may file a legal action against the student and the parent (if the student is under the age of 18 and living with the parent) to recover an amount not to exceed \$2,500.¹¹

Corporal punishment

Corporal punishment is defined as physical punishment "that is inflicted upon the body."¹² In the school setting, corporal punishment typically refers to the use of physical force by a school official to punish a student for school-related misconduct.¹³ The U.S. Supreme Court has upheld the use of reasonable corporal punishment in public schools,¹⁴ and Idaho law does not prohibit its use.¹⁵

In the event a school district allows corporal punishment, the following guidelines derived from the U.S. Supreme Court case of *Ingraham v. Wright*¹⁶ should be followed:

1. A teacher is not allowed to inflict corporal punishment based on anger;
2. The punishment must be reasonable;
3. The punishment must be related to the age, sex, size, and physical condition of the student;
4. The punishment must not leave permanent effects; and
5. The punishment must not be performed to enforce an unreasonable rule.

Other minimum procedures regarding corporal punishment should also be followed, including:

1. Students should be informed beforehand that specific misbehavior may result in corporal punishment;

¹¹ Idaho Code § 6-210.

¹² BLACK'S LAW DICTIONARY 1353 (9th ed. 2004).

¹³ *Ingraham v. Wright*, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977).

¹⁴ *Id.*

¹⁵ Idaho Code § 18-917(3). Cases dealing with corporal punishment involving Idaho school districts include *P.B. v. Koch*, 96 F.3d 1298 (9th Cir. 1996) (a high school principal's conduct in hitting a student in the mouth, grabbing and squeezing a student's neck, punching a student in the chest, and throwing a student headfirst into lockers was unreasonable corporal punishment); and *State v. Stears*, Fifth Judicial District, Minidoka County, Case No. CR 93-00158D (1993) (although the discipline by the principal of pushing a student was performed in an unusual manner, it was consistent with the guidelines of the U.S. Supreme Court, and the principal was not guilty of committing criminal battery).

¹⁶ *Ingraham v. Wright*, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977).

2. Students should receive rudimentary due process prior to corporal punishment being inflicted;
3. Corporal punishment should only occur in the presence of a second school official; and
4. The parent, upon request, should be provided with a written explanation of the reason for the punishment and the names of the school officials involved.¹⁷

If a district allows corporal punishment, a specific policy must be in place that, at a minimum, has the provisions outlined in this section. Any teacher or administrator implementing corporal punishment should not deviate from the policy. It is also important to recognize that corporal punishment may not be used when disciplinary infractions are related to a student's disability.¹⁸

Although the definition of corporal punishment is intended to be broad, it does not include physical pain or discomfort not involving disciplinary action, such as:

1. Training for or participation in athletic competition or recreational activity voluntarily engaged in by the student;
2. Physical exertion shared by all students in a teacher-directed class activity such as physical education exercises, field trips, or vocational education projects; and
3. Physical restraint or the use of aversive techniques as part of a behavioral management program in a special education student's individualized education program (IEP) or Section 504 plan.

Corporal punishment does not include the use of reasonable force by school personnel to protect themselves and others.

Detention

"Detention" refers to a disciplinary measure in which students are detained and kept for a short time after the rest of the class has been dismissed, or the school is closed.¹⁹ The courts have generally upheld schools' rights to impose detention and have found it a nonaggressive method of discipline.²⁰ Detention does not constitute false imprisonment of the student.²¹ Before detention is imposed, the rudimentary due process should be given to the student. Similar to corporal punishment, detention may not be used when disciplinary infractions are related to a student's disability.

Grade reduction

To reduce a grade for disciplinary reasons, the school must be able to show a relationship between the misconduct and the academic achievement. Cheating, for example, could

¹⁷ *Id.*

¹⁸ OCR Letter of Finding: EHLR DEC. 37:352 (OCR 1985); *Fee v. Herndon*, 900 F.2d 804 (1990).

¹⁹ James A. Rapp, EDUCATION LAW § 9.10[5][a] at p. 9-458, Matthew Bender (Rel. 53—12/2011).

²⁰ See *M.S. v. Eagle-Union Cmty. Sch. Corp.*, 717 N.E. 2d 1255 (Ind. Ct. App. 1999) (detention was assigned for the third tardy as a disciplinary measure.)

²¹ *Fertich v. Michener*, 11 N.E. 605 (Ind. 1887).

support a grade reduction. Absenteeism or misconduct may not be the sole criterion for a grade reduction.

Time-out

A frequently used disciplinary technique is the use of “time-out.” The U.S. Department of Education has defined “time-out” as a “behavior management technique that is part of an approved program, involves the monitoring separation of the student in a non-locked setting, and is implemented for the purpose of calming.”²² While a time-out may result in a temporary exclusion from class, due process does not typically apply, as the use of time-out is a means by which a teacher can manage his or her classroom; requiring a hearing prior to placing the student in timeout would undermine such management.²³

Restrictions on extracurricular or ceremonial activities

Participation in extracurricular activities is a privilege, not a right.²⁴ Disciplinary sanctions can include limitations on the opportunity to participate in extracurricular activities, so long as students are given advanced notice of the relevant policies and are provided with basic due process. Courts recognize that schools have the discretion to impose discipline involving extracurricular activities.²⁵

Courts have generally upheld schools' right to suspend student-athletes from extracurricular activities for violating rules prohibiting them from using or possessing alcohol, drugs, or tobacco—even off campus and during nonschool hours.²⁶

Courts have also upheld schools' right to exclude students from ceremonial activities, such as graduation, for violating discipline policies.²⁷ Again, a school must give clear notice of the rules and follow due process procedures.

²² U.S. Department of Education, *Restraint and Seclusion: Resource Document*, Washington, D.C., 2012.

²³ *Couture v. Board of Educ. of Albuquerque Public Schools*, 535 F.3d 1243 910th Cir. 2008).

²⁴ Idaho Code § 33-512(12).

²⁵ For example, in *Ferguson v. Phoenix-Talent Sch. Dist. #4*, 172, Or. App. 389, 19 P.3d 943 (2001), the Oregon Court of Appeals upheld a school district's right to strip a student of his position as student body president for bringing marijuana to school in violation of district policy. The court found that the policy emphasized the importance of controlling student drug use and that the right to attend school was not at stake.

²⁶ See *Whipple v. OSAA*, 52 Or. App. 419, 423, 629 P2d 384, rev denied, 291 Or 504 (1981) (“While we think that participation in interscholastic sports is an important part of the educational process, we are not persuaded by plaintiff's argument that it is a liberty or property interest of constitutional proportions.”); *Cooper v. OSAA*, 52 Or App 425, 440, 629 P2d 386, rev denied, 291 Or 504 (1981) (“the right to participate in interscholastic sports is not by itself a 'fundamental' interest”); see also *Lowery v. Euverard*, 497 F.3d 584, 588 (6th Cir 2007) (“It is well-established that students do not have a general constitutional right to participate in extracurricular athletics.”).

²⁷ See, e.g., *Khan v. Fort Bend Indep. Sch. Dist.*, 561 F. Supp. 2d 760 (S.D. Tex. 2008) (district had authority and discretion to prohibit student and other students who violated policies from participating in its graduation ceremony as a sanction).

6) What actions are not permissible as discipline?

Certain actions are generally not permissible as a discipline, including (a) withholding credit or a diploma for disciplinary reasons in certain circumstances; and (b) prohibiting a student from attending school when credit will not be earned.

Withholding credit or diploma

A district may not withhold credit for a course, or the issuance of a diploma, as a means of discipline if the credit or diploma has already been earned.²⁸ Although a diploma may not be withheld, a student may be denied the privilege of participating in the graduation ceremony.²⁹

The courts have generally held that they will not second-guess educators' academic evaluations of students;³⁰ however, this must be distinguished from academic sanctions based on misconduct and absenteeism. Courts have generally considered the reduction of grades based on nonacademic misconduct as an unwarranted "double punishment" that fails to correctly represent a student's academic performance.³¹

Although grade-reduction policies used for *nonacademic* discipline are usually held invalid by the courts, grade reduction policies implemented for *academic* purposes are usually held valid by the courts. For example, if a student fails to attend class, grade reduction may be imposed as an academic penalty. Where a policy dealing with grade reduction is considered a discipline policy rather than an academic policy, due process is required.³²

Prohibiting a student from attending school

Unless a student has received appropriate due process and has been suspended or expelled, a student has a right to attend school, even if the student will not earn credit due to low grades or absenteeism.

7) Do teachers have the authority to discipline students?

Yes. By statute, teachers have the right to maintain order and classroom discipline.³³ In fact, a teacher has the right to direct how and when each student will attend to appropriate duties and the way students must act while attending school. Each teacher must also carry out the policies of the board of trustees for controlling and maintaining discipline. A teacher's

²⁸ *Gutierrez v. School District*, 585 P.2d 935 (Colo. 1978); *Dorsey v. Bale*, 521 S.W.2d 76 (Ky. Ct. App. 1975).

²⁹ *Valentine v. Independent Sch. Dist.*, 183 N.W. 434 (1921); Idaho Code § 33-603 (as a condition of graduation or the issuance of the diploma, the board of trustees can require that all outstanding debts be paid).

³⁰ *Susan M. v. New York Law Sch.*, 556 N.E.2d 1104 (1990); *Tobias v. University of Texas at Arlington*, 824 S.W.2d 201 (Tex. Ct. App. 1992).

³¹ *Gutierrez v. School District*, 585 P.2d 935 (Colo. 1978); *Kateman v. Cumberland Valley Sch. Dist.*, 479 A.2d 671 (Pa. 1984).

³² *State ex rel. Yarber v. McHenry*, 915 S.W. 2d 325 (Mo. 1995).

³³ Idaho Code §§ 33-1224 and 33-1612(2).

classroom rules must not conflict with the board’s policies, state or federal law, case law, or State Board of Education rules.

8) May a school district deny enrollment to a student who has been expelled from another district?

Yes. For further discussion see Question 94.

The Scope of the School's Jurisdiction

9) May schools discipline students for misconduct occurring off school grounds?

A student may be disciplined for off-campus misconduct when the school can show a clear nexus between the misconduct and school discipline, safety, or welfare.³⁴ Students and parents may be more likely to challenge discipline for off-campus conduct as being beyond the school's jurisdiction, so school officials should carefully document the conduct and its impact, or likely impact, on the school. For misconduct involving off-campus speech, such as social media postings, see Questions 46-48.

Factors to consider in imposing discipline for off-campus conduct

School officials should take the following factors into consideration when determining whether to impose discipline for off-campus conduct:

- Is the off-campus conduct related to something that occurred at school?
- Does the off-campus conduct involve other students or staff from the school?
- Did the off-campus conduct cause or is it likely to cause a disruption at the school? (Note that if school officials are basing the discipline on the belief that the off-campus conduct is likely to cause a disruption, the school official should be specific in the documentation; a generalized fear of disruption is not sufficient to support discipline for off-campus conduct.)
- Did the off-campus conduct occur on the way to or from school?
- Did the off-campus conduct occur near school property during school hours, when the student should have been in school?

Examples of off-campus conduct that could lead to discipline

The following are examples of situations in which a school may discipline a student for off-campus behavior if school officials can document a clear nexus with the school, based on the factors above:

- Fighting, selling drugs, or consuming alcohol on the way to or from school or a school activity;
- Fighting in connection with an incident that occurred at school;
- Throwing rocks at a school bus;
- Vandalizing the property of a school official in retaliation for something that happened at school;
- Vandalizing the property of a rival school; and
Assaulting or menacing another student or a district employee in connection with something that occurred at school.

³⁴ See generally *C.R. v. Eugene Sch. Dist. 4J*, 835 F3d 1142 (9th Cir 2016); *Collins v. Prince William Cty. Sch. Bd.*, 142 F App'x 144 (4th Cir 2005).

Discipline for Possession of Firearms

A student's possession of firearms is one of the most serious disciplinary offenses. Both federal and state law impose requirements when a student brings firearms to school, including mandatory expulsion and notification of authorities.

10) What does the federal Gun-Free Schools Act require regarding firearms at school?

The federal Gun-Free Schools Act (the "GFSA")³⁵ requires that each state receiving federal funds under the Elementary and Secondary School Act enact a law requiring local school districts to expel for at least one year a student who is determined to have possessed a firearm at school. The GFSA defines "school" as "any setting that is under the control and supervision of the local educational agency for the purpose of student activities approved and authorized by the local educational agency." Under the GFSA, the chief administering officer³⁶ has the power to modify the expulsion on a case-by-case basis as long as the modification is in writing. The GFSA specifies that it does not apply to a firearm that is lawfully stored inside a locked vehicle on a school campus or to any activities approved and authorized by the local school district.³⁷

The GFSA must be construed consistently with the IDEA, thereby allowing districts to discipline students with disabilities in accordance with the IDEA's special requirements.

The GFSA requires school districts to report any expulsions imposed under the law to the state, including the name of the school, the number of students expelled, and the type of firearm involved in the expulsion. The GFSA also requires local school districts to have a policy requiring referral to the local criminal or juvenile justice system of any student who brings a prohibited firearm to school.

Idaho law is consistent with the GFSA and provides additional detail and guidance to schools. Therefore, schools are in compliance with the federal GFSA if they follow the state law as outlined below.

11) What does Idaho law require regarding firearms at school?

General rule regarding possession of firearms on school property

Idaho Code Section 18-3302D addresses possession of weapons or firearms on school property and provides:

- (a) It shall be unlawful and is a misdemeanor for any person to possess a firearm or other deadly or dangerous weapon while on the property of a school or in those portions of any building, stadium or other structure on school grounds which, at the

³⁵ 20 U.S.C. § 7961.

³⁶ Idaho Code § 33-205 provides that the board of trustees has the authority to modify an expulsion on a case-by-case basis.

³⁷ 20 U.S.C. § 7961(g).

time of the violation, were being used for an activity sponsored by or through school in this state or while riding school provided transportation.

- (b) The provisions of this section regarding the possession of a firearm or other deadly or dangerous weapon on school property shall also apply to students of schools while attending or participating in any school-sponsored activity, program or event regardless of location.

Authorized district personnel have the right to search all students and minors, as well as their belongings and lockers when it is reasonably believed that the student or minor is carrying a deadly or dangerous weapon.³⁸ (See Questions 65-69.)

Exception to the general rule regarding possession of firearms on school property

There is no violation of the Idaho weapon law if a firearm is being carried as part of the requirement for a hunter safety course that is being offered by or is approved by the district.³⁹ As indicated above, the federal GFSA also provides an exception for firearms that are legally possessed and locked in a vehicle on a school campus.⁴⁰

General rule requiring expulsion for possession of firearms

The provisions of Idaho Code § 33-205 require a board of trustees to expel a student for not less twelve (12) calendar months, whenever a student brings a weapon or firearm on school property.

Modification of a mandatory expulsion by the board of trustees

Idaho Code § 33-205 allows the board of trustees, on a case-by-case basis, to waive the expulsion requirement or authorize less than a full year expulsion if circumstances warrant.⁴¹ It also allows the school to reconcile the expulsion requirement with the IDEA and Section 504 of the Rehabilitation Act of 1973 ("Section 504"),⁴² which restrict expulsion of a student with a disability for misconduct that is a manifestation of the student's disability. (See Questions 161-170 and 211-216.)

12) What is the definition of "firearm"?

Idaho law uses the federal definition of "firearm" for the purposes of mandatory expulsions. Under 18 USC § 921, the term "firearm" has a lengthy and complicated definition. It includes any weapon (including a starter gun) that will, is designed to, or may readily be converted to

³⁸ Idaho Code § 18-3302D(3).

³⁹ Idaho Code § 18-3302G(2).

⁴⁰ 20 U.S.C. § 7961(g).

⁴¹ Idaho Code § 33-205 states in part: "[T]he board shall expel from school for a period of not less than one (1) year, twelve (12) calendar months, or may deny enrollment to, a student who has been found to have carried a weapon or firearm on school property in this state or any other state, except that the board may modify the expulsion or denial of enrollment order on a case-by-case basis."

⁴² 29 U.S.C. § 794.

expel a projectile by the action of an explosive, the frame or receiver of any such weapon, any firearm muffler or silencer, or any "destructive device" (defined below). The term "firearm" does not include an antique firearm.⁴³

The term "destructive device" is defined as any explosive, incendiary, or poison gas (a) bomb, (b) grenade, (c) rocket having a propellant charge of more than four ounces, (d) missile having an explosive or incendiary charge of more than one-quarter ounce, (e) mine, or (f) similar device; any weapon (other than a shotgun or a shotgun shell) that will, or that may be readily converted to, expel a projectile by the action of an explosive or other propellant, and that has a barrel with a bore of more than one-half inch in diameter; and any combination or parts either designed or intended for use in converting any device into a destructive device as described above and from which a destructive device may be readily assembled.⁴⁴

The term "destructive device" does not include any device that (1) is not designed or redesigned for use as a weapon or (2) has been redesigned for use as a signaling, pyrotechnic, line-throwing, safety, or similar device. Further, it does not include any device that the U.S. Secretary of the Treasury has found is not likely to be used as a weapon, is an antique, or is a rifle that the owner intends to use solely for sporting, recreational, or cultural purposes.⁴⁵

13) May a school district ban a dangerous or deadly weapon that does not fall within the definition of "firearm"?

Yes. A school district may ban an item that it considers dangerous or deadly even though the item does not fit the definition of "firearm" under federal and Idaho law. The legally mandated one-year expulsion does not apply, but district policy can provide for an appropriate sanction up to and including expulsion or another sanction.

14) What reporting obligations do school districts have regarding firearms violations?

Two types of reports for mandatory firearms violations are required:

- Every school district must provide an annual report to the Idaho State Department of Education including of the name of each school that imposed a mandatory expulsion for a firearms violation, the number of students expelled from each school, and the type of firearms involved.⁴⁶
- A school district must report to law enforcement any student expelled for a firearms violation.⁴⁷

⁴³ 18 U.S.C. § 921(3).

⁴⁴ 18 U.S.C. § 921(4).

⁴⁵ 18 U.S.C. § 921(4).

⁴⁶ 20 U.S.C. § 7961(d).

⁴⁷ 20 U.S.C. § 7961(h)(1).

15) What does the IDEA require regarding students who possess firearms at school?

The Individuals with Disabilities Education Act (IDEA), as amended in 2004, provides for removal to an interim alternative educational setting of up to 45 school days for a student with a disability who possesses a weapon at school or a school function.⁴⁸ The definition of "weapon" in the IDEA is different from the one used in Idaho's weapons law. The IDEA adopts the following definition of "dangerous weapon" from 18 USC § 930(g)(2):

The term "dangerous weapon" means 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 fewer than 2½ inches in length.

If the student has been identified as a child with disabilities, the district must provide the student with a free and appropriate public education ("FAPE") in an alternative setting even if the basis for expulsion is a weapons violation.⁴⁹

(See further discussion beginning at Question 137.)

⁴⁸ 20 USC § 1415(k)(1)(G)(i). *See also* OAR 581-015-2425(2)(a).

⁴⁹ 34 C.F.R. 300.530g.

Alcohol and Controlled Substances

16) Must districts address concerns about using or being under the influence of alcohol or controlled substances?

Yes. The Idaho Legislature has mandated that every school district in the state address concerns regarding students using or being under the influence of alcohol or controlled substances.⁵⁰

17) What are controlled substances?

Controlled substances (also referred to in this Guide as “drugs”) include, but are not limited to:

1. Opiates;
2. Opium derivatives;
3. Hallucinogenic substances, including cocaine, and cannabis and synthetic equivalents of the substances contained in the plant, any material, compound, mixture or preparation with substances having a stimulant effect on the central nervous system;
4. Stimulants; and
5. Any narcotic drug except when administered by or under the direction of a person licensed to dispense, prescribe, or administer such drug.⁵¹

18) Must school officials inform law enforcement officials about a student’s use or suspected use, of alcohol or a controlled substance?

It depends on whether the student has volunteered that he or she is using alcohol or drugs *before* being suspected of such activity:

Student volunteers that he or she is using drugs or alcohol

Students who voluntarily disclose using or being under the influence of alcohol or controlled substances, *before* reasonably suspected of such activity, must be provided anonymity to the extent that: (1) the disclosure will be held confidential on a faculty need-to-know basis, (2) the student’s parents are notified, and (3) the school offers counseling.

The method by which the district notifies parents and the nature of the counseling offered by the district is not specified in the statute. These items should be specifically addressed in district policy.⁵²

Student is suspected of using or being under the influence of drugs or alcohol

Once a student is reasonably suspected of using or being under the influence of drugs or alcohol, regardless of any previous voluntary disclosure, school administrators are required to: (1) contact the student’s parent, and (2) report the incident to law enforcement.⁵³

⁵⁰ Idaho Code § 33-210.

⁵¹ Idaho Code §§ 33-210, 37-2705(b)-(f), 37-2707(b)-(d), and 37-2732C(a); *also see* Idaho Code § 37-2701, et seq., for a complete list of controlled substances.

⁵² Idaho Code § 33-210(1).

⁵³ Idaho Code § 33-210.

The district is responsible for developing a process for referring a reasonably-suspected student to law enforcement. It must be remembered that reasonable suspicion alone is not sufficient to justify a law enforcement search of a student or the student’s possessions, or a breath or blood test for the presence of alcohol or a controlled substance, as probable cause is required. Because the referral requires cooperation from the local law enforcement agency, the process will vary depending on what role that agency takes in evaluating the student and in taking him or her into custody.⁵⁴

19) What disciplinary act can be taken against a student using or under the influence of drugs or alcohol?

Regardless of whether the student voluntarily discloses or is reasonably suspected of using or being under the influence of drugs or alcohol, an Idaho school district may be subject to other disciplinary or safety policies, as determined by its board of trustees.⁵⁵

20) What is the definition of “reasonable suspicion” that a student is using or under the influence of drugs or alcohol?

“Reasonable suspicion” is defined as:

[A]n act of judgment by a school employee or independent contractor of an educational institution which leads to a reasonable and prudent belief that a student is in violation of school board or charter school governing board policy regarding alcohol or controlled substance use, or the “use” or “under the influence” provisions of section 37-2732C, Idaho Code. Said judgment shall be based on training in recognizing the signs and symptoms of alcohol and controlled substance use.⁵⁶

School employees and/or independent contractors are prohibited from finding reasonable suspicion solely for the purpose of intentional harassment of a difficult student. “Intentional harassment” is a knowing and willful course of conduct directed at a specific student that seriously alarms, annoys, threatens, or intimidates the student and which serves no legitimate purpose. To constitute intentional harassment, the course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress.⁵⁷

Persons who in good faith and with appropriate foundation exercise the authority granted in Idaho Code Section 33-210 are immune from civil liability arising from the exercise of that authority. However, if it is determined that the person is intentionally harassing a student through the misuse of such authority, he or she is not immune from civil liability and may be found guilty of a misdemeanor punishable by a fine not to exceed \$300.⁵⁸

⁵⁴ Idaho Code § 33-210(1).

⁵⁵ Idaho Code § 33-210(2).

⁵⁶ Idaho Code § 33-210(5)(a).

⁵⁷ Idaho Code § 33-210(5)(b).

⁵⁸ Idaho Code § 33-210(4).

21) Does disclosure of drug or alcohol use provide school officials with reasonable suspicion at a later date?

No. A student’s prior disclosure of the use of drugs or alcohol may not be used as a basis for determining reasonable suspicion at a later date. Without reasonable suspicion, district personnel may not refer a student to law enforcement or, in some cases, conduct a search (a search requires reasonable suspicion, prior consent, or exigent circumstances—see Questions 65-69).⁵⁹

22) Must students and parents be notified of the district’s drug and alcohol policy?

Yes. The district must provide each student and parent with a copy of its drug and alcohol policy, including:

1. The conditions under which law enforcement will be notified;
2. The process by which law enforcement may assume the custodial responsibility of a reasonably-suspected student; and
3. The procedure for notification of the parent at the time of original registration in the district.

The district may also want to include its drug and alcohol policy in the student handbook.⁶⁰

⁵⁹ Idaho Code § 33-210(1).

⁶⁰ Idaho Code § 33-210(3).

Requirements Regarding Threats of Harm or Violence

23) What actions may be taken if a student makes a threat of violence?

Idaho Code 18-3302I prohibits any person, including a student, from threatening violence while on school grounds or to disrupt normal school operations.⁶¹ “Any person, including a student, who willfully threatens by word, electronic means or act to use a firearm or other deadly or dangerous weapon to do violence to any person on school grounds or to disrupt the normal operations of an educational institution by making a threat of violence is guilty of a misdemeanor.”⁶² In the event a threat of violence is received, it should be referred to law enforcement, and the student may be criminally charged.

24) What actions may be taken if a student possesses a weapon?

Idaho Code 18-3302I provides that possessing a weapon with the intent of carrying out a threat of violence on school grounds or to disrupt normal school operations is a felony. “Any person, including a student, who knowingly has in his possession a firearm or other deadly or dangerous weapon, or who makes, alters, or repairs any firearm or other deadly or dangerous weapon, in the furtherance of carrying out a threat made by word, electronic means or act to do violence to any person on school grounds or to disrupt the normal operation of an educational institution by making a threat of violence is guilty of a felony.”⁶³

25) Does a school district have authority to discipline a student for making a threat, even if the student is also criminally charged?

Yes. A student can be disciplined for making a threat, or other criminal actions even if criminal charges or convictions are levied against the student. The provisions of “double jeopardy” do not apply.⁶⁴

Further, even if the criminal charges are dropped against the student, the school district has the authority to discipline the student for violations of the code of student conduct.⁶⁵

⁶¹ “School grounds” includes the property of a public or private elementary or secondary school. Idaho Code § 18-3302I.

⁶² Idaho Code § 18-3302I(1)(a).

⁶³ Idaho Code § 18-3302I(1)(b).

⁶⁴ “Double jeopardy” is prohibited by the Fifth Amendment and is defined as being prosecuted twice for substantially the same offense. BLACK’S LAW DICTIONARY 564 (9th ed. 2004).

⁶⁵ *The Idaho School Violence/Safety Policies/ Procedures Manual* (2008), published by the Idaho State Department of Education’s Safe and Drug Free Schools Program, provides a more complete discussion of Idaho Code § 18-3302I and its application to Idaho schools.

Threat Assessments

26) What is a threat?

A threat is an expression of intent to do harm or act out violently against someone or something. A threat may be spoken, written, or symbolic, and can be expressed directly or indirectly and may be explicit or implied.⁶⁶

27) How might a student come to the attention of school personnel regarding a threat?

Students can come to the attention of school personnel in a variety of ways. Students may bring attention to themselves by engaging in communications that cause concerns. Individuals, including other students, school personnel, community members or parents may be concerned about a student and bring those concerns to school officials.⁶⁷

28) What is a threat assessment?

A threat assessment is a structured group process used to evaluate the risk that may be posed by a student and is typically a response to an actual or perceived threat or concerning behavior.⁶⁸

A threat assessment is concerned with risk reduction and prevention efforts rather than statements of prediction.⁶⁹

29) What is the purpose of a threat assessment?

The primary purpose of a threat assessment is to prevent targeted violence by a student.⁷⁰ It is to keep schools safe and to help potential offenders overcome the underlying sources of their anger, hopelessness or despair. A threat assessment may also provide useful information about other potential student risks, such as suicide, alcohol and drug use, physical abuse, dropping out, and criminal activity.⁷¹

30) Does Idaho require schools to utilize threat assessments?

No. Unlike some states, Idaho does not require public schools to use threat assessments to determine the risk that may be posed by a student.

⁶⁶ [Threat Assessment for School Administrators & Crisis Teams.](#)

⁶⁷ [Threat Assessment in Schools, U.S. Secret Service and U.S. Dept. of Education, p. 45 \(July 2004\).](#)

⁶⁸ [Threat Assessment in Schools, U.S. Secret Service and U.S. Dept. of Education, p. 44 \(July 2004\).](#)

⁶⁹ [Threat Assessment for School Administrators & Crisis Teams.](#)

⁷⁰ [WA state OPI School Safety Center.](#)

⁷¹ [Threat Assessment for School Administrators & Crisis Teams.](#)

31) Should each Idaho school district have a threat assessment process?

Yes. The U.S. Department of Education and various national law enforcement agencies recommend that a threat assessment process is utilized to assess the risk that may be posed by a student.⁷²

32) Is a threat assessment an evaluation for purposes of the IDEA?

No. An Idaho hearing officer ruled that a threat assessment conducted by a district pursuant to its threat assessment protocol is not an IDEA evaluation requiring parental consent.⁷³ If a threat assessment recommends a functional behavioral assessment (FBA) be conducted, parental consent would be required.⁷⁴

33) Who may be on a threat assessment team?

The membership of a threat assessment team will depend on the student and the circumstances surrounding the reason for a threat assessment, but in any event, should be made up of a multidisciplinary team.⁷⁵ A threat assessment team may include such individuals as a school administrator, school resource officer, and school psychologist. It may also be appropriate to include other professionals who can contribute to the threat assessment process, such as guidance counselors, teachers, and coaches. If a student has an IEP or Section 504 plan, the student's case manager should also be included.

34) Is a threat assessment team limited to school personnel?

Not necessarily. Depending on the circumstances, the parent may be invited, as well as individuals from the community, such as a student's probation officer, member of the clergy, or a social service worker may be helpful in conducting a threat assessment investigation. When inviting individuals from the community, Family Educational Rights and Privacy Act (FERPA) provisions should be reviewed to ensure school personnel do not violate student confidentiality requirements.

35) When should a threat assessment be initiated?

When information about a student's behavior and/or communications result in a potentially threatening situation, school officials should initiate a threat assessment. The safety of the school and community become the priority considerations of the threat assessment team.⁷⁶

⁷² [Threat Assessment in Schools, U.S. Secret Service and U.S. Dept. of Education, p. 44 \(July 2004\)](#), [Making Prevention a Reality: Identifying, Assessing, and Managing the Threat of Targeted Attacks, U.S. Dept. of Justice and Federal Bureau of Investigation, p. 21, 24 \(2017\)](#).

⁷³ *Independent School District of Boise city #1*, 66 IDELR 28 (ID SEA 2015).

⁷⁴ *Letter to Christiansen*, 48 IDELR 161 (OSEP 2007).

⁷⁵ [Threat Assessment in Schools, U.S. Secret Service and U.S. Dept. of Education, p. 37 \(July 2004\)](#).

⁷⁶ [Threat Assessment in Schools, U.S. Secret Service and U.S. Dept. of Education, p. 48 \(July 2004\)](#).

36) How quickly should a threat assessment be initiated?

A threat assessment team should be convened immediately, if possible, whenever a student's behavior or communications result in a potentially threatening situation.⁷⁷

37) How in-depth is a threat assessment?

It depends. Threat assessments may be brief and limited, or extensive and complex, depending on the information gathered.⁷⁸

38) What information should a threat assessment team consider?

A threat assessment team should seek information in a variety of areas, including:

1. Facts that drew attention to the student, the situation, and possibly the targets.
2. Information about the student.
3. Information about "attack-related" behaviors.
4. Motives.
5. Target Selection.⁷⁹

While a checklist may be used to ensure relevant topics and information are considered by a threat assessment team, a checklist should not be used for deciding how much weight to place on each fact and circumstance or for assessing a case.⁸⁰

39) Should a threat assessment team utilize profiling when considering a student's risk for violence?

No. The use of profiling (i.e., ranking a student's behaviors and risk factors against a set of criteria) increases the likelihood of misidentifying students who are thought to pose a threat. Additionally, the use of profiling typically focuses on identification, not intervention, and fails to provide the necessary help to students.⁸¹

40) Does FERPA come into play?

The Family Educational Rights and Privacy Act (FERPA) regarding confidentiality of student records can come into play when addressing a threat assessment situation, especially if individuals from outside the school setting are threat assessment team members, or a referral to law enforcement occurs. If the threat assessment team determines disclosing information found in a student's education record is necessary to protect the health or safety of that student or other individuals, relevant information can be shared with those parties whose knowledge of the information is necessary to immediately protect the safety of the student or other individuals.

⁷⁷ [Threat Assessment in Schools](#), U.S. Secret Service and U.S. Dept. of Education, p. 48 (July 2004).

⁷⁸ [Threat Assessment in Schools](#), U.S. Secret Service and U.S. Dept. of Education, p. 43 (July 2004).

⁷⁹ A more in-depth discussion regarding developing a plan to seek information can be found in [Threat Assessment in Schools Guide](#), U.S. Secret Service and U.S. Dept. of Education, p. 49-51.

⁸⁰ [Making Prevention a Reality: Identifying, Assessing, and Managing the Threat of Targeted Attacks](#), U.S. Dept. of Justice and Federal Bureau of Investigation, p. 21, 24 (2017).

⁸¹ [Threat Assessment for School Administrators & Crisis Teams](#).

41) Can a student be referred to law enforcement or another public entity based on information gathered during a threat assessment inquiry or investigation?

Yes. A threat assessment team can determine that a referral to law enforcement due to imminent danger consisting of criminal behavior, or to another public entity, such as the Department of Health and Welfare, due to possible suicidal tendencies can occur. The amount of information that can be shared with another public or private entity will depend on whether the threat assessment team determines that a health or safety emergency exists, or whether it receives a subpoena.⁸² (See Question 99.)

42) Is a threat assessment report pertaining to a student an education record?

Yes, a threat assessment report is an education record for the duration it is maintained by the school district.⁸³

43) Is there a process to follow if a parent objects to a threat assessment in a student's education file?

Possibly. If a parent believes that an education record regarding his/her child contains information that is inaccurate, misleading, or in violation of the student's right of privacy, the parent may seek to amend the record in question by requesting a hearing.⁸⁴ However, a parent may not seek to amend, or challenge substantive decisions made by an educational institution.⁸⁵

⁸² 34 C.F.R. §99.31.

⁸³ 34 C.F.R. §99.3.

⁸⁴ 34 C.F.R. §99.20.

⁸⁵ *Letter to Anonymous* (FPCO 8/2/2000).

Issues Regarding Discipline and Free Expression

Disciplining students for speech and expression can be very challenging for school officials and is one of the most litigated issues in the education setting. On occasion, school officials must respond to speech, including off-campus social media, to maintain a safe and orderly school environment. Yet students and parents often claim that student speech is protected under the First Amendment.⁸⁶ To minimize legal claims, school officials should carefully review the law and document their decision-making and the process that was followed.

In general, school officials should base the reason for the discipline on issues other than the pure content of a student's speech. For instance, if the student's speech is demeaning of other students, school officials should base the reason for the discipline on the disruption to the school and the impact on other students, rather than the offensive content. As an example, in a case in which a school disciplined a student based on the student's poem describing a mass murder and a suicide at school, the court upheld the school's disciplinary action because the school disciplined the student based on the legitimate concern for the safety of other students at school, the threats in the poem, and other information that raised a genuine safety concern.⁸⁷

44) What is considered "speech"?

"Speech" refers to a wide variety of expression, including oral speech, written documents, pictures, words or slogans on clothing or other personal possessions, and social media postings.⁸⁸

45) When may school officials discipline a student for speech or other types of expression?

In *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*,⁸⁹ the U.S. Supreme Court famously stated that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." But students do not have unlimited First Amendment rights at school. The U.S. Supreme Court issued three additional opinions after *Tinker* regarding students' First

⁸⁶ The pertinent portion of the U.S. Constitution, Amendment I provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press." The Idaho Constitution provides: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty." Art I, § 9.

⁸⁷ *LaVine v. Blaine Sch. Dist.*, 257 F3d 981 (9th Cir 2001).

⁸⁸ See *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

⁸⁹ 393 US 503, 506, 89 S Ct 733, 21 L Ed 2d 731 (1969). In *Tinker*, the Court held that public school students could not be suspended for wearing black armbands to protest the Vietnam War because their protest was expressive activity and was being suppressed solely because school officials wanted to avoid the controversy that might result from the expression. The school did not have sufficient evidence that the armbands would cause a disruption. Yet the Court did not leave the school without recourse. It held that speech or expressive conduct that "for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others" is not protected by the First Amendment. 393 US at 513.

Amendment rights.⁹⁰ According to these decisions, a student may be disciplined for speech or another expression that:

- a. Is vulgar, lewd, obscene, or plainly offensive;
- b. Substantially disrupts or interferes with the school's work (or is likely to do so);
- c. Violates others' rights;
- d. Promotes the use of illegal drugs or alcohol; or
- e. Violates reasonable restrictions on school-sponsored speech.

Speech that is vulgar, lewd, obscene, or plainly offensive

A student can be disciplined for vulgar, lewd, obscene, or plainly offensive language.⁹¹ The school does not have to also show that the speech was disruptive or violated the rights of others. School officials have the discretion to determine what type of student expression falls within this category.⁹²

Speech that substantially disrupts or interferes with the school's work, or is likely to do so

School officials may discipline a student for speech that causes substantial disruption of school activities or interferes with school activities or operations.⁹³ It is not enough that school officials are offended by the expression. The officials must be able to document with specificity the substantial disruption or interference.

In some instances, school officials may also prevent in advance a student's expressive activity at the school if the officials have reason to believe that it will substantially disrupt or interfere with school activities.⁹⁴ School officials do not have to wait until a disruption

⁹⁰ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 US 675, 683, 106 S Ct 3159, 92 L Ed 2d 549 (1986) (The Court upheld the exclusion of a high school student who gave a sexually suggestive speech during a school assembly, noting that the speech had provoked raucous behavior by some students and embarrassed others, and concluded that "vulgar and offensive" language need not be tolerated in the public schools whether it is disruptive or not. The Court also noted that setting the parameters of appropriate student expression should be left to the school district's discretion: "The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 US 260, 273, 108 S Ct 562, 98 L Ed 2d 592 (1988) (The Court upheld a high school principal's decision to delete from the school newspaper articles on student pregnancies and the impact of divorce on students. Noting that the newspaper was an official school publication, the Court authorized censorship by school officials, "so long as their actions are reasonably related to legitimate pedagogical concerns."); *Morse v. Frederick*, 551 US 393, 127 S Ct 2618, 168 L Ed 2d 290 (2007) (The Court held that a student attending a school-sponsored event across the street from his high school who unfurled a banner that read "BONG HiTS 4 JESUS" could be suspended. The Court held that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use. The principal did not violate the student's First Amendment rights by confiscating the banner or imposing suspension.)

⁹¹ *Bethel Sch. Dist. No. 403*, 478 US 675.

⁹² *Id.*

⁹³ *Tinker*, 393 US 503 ("[C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.")

⁹⁴ *Id.*

occurs before addressing and stopping the potentially disruptive speech, and in some cases, school officials are in fact responsible for taking action to prevent disturbances that may occur as a result of a student's expressive activity.⁹⁵ But the officials should have a clear basis for the concern of disruption and should carefully document this evidence. Without clear evidence of the potential disruption, a student could claim that there was an unreasonable "prior restraint" on the student's expressive activity.

School officials must have a reasonable basis for believing that the expression will be disruptive, not just a generalized concern.⁹⁶ For instance, the Ninth Circuit held that a school could require students to remove shirts with images of the American flag during a school-sponsored Cinco de Mayo celebration because there was a significant history of racial tension and violence at the school and the presence of the shirts did in fact cause disruption.⁹⁷ Again, school officials should document their concerns carefully and with specificity.

Speech that violates the rights of others

In *Tinker*, the U.S. Supreme Court held that student speech may not be protected if it collides "with the rights of other students to be secure and to be let alone."⁹⁸ Student speech that bullies, intimidates, or harasses others is not protected by the First Amendment. A student can be disciplined for speech that violates the rights of another student, but school officials must be specific about the rights that have been violated to avoid infringing on First Amendment rights.

Speech that promotes the use of illegal drugs or alcohol

The U.S. Supreme Court has held that schools can discipline students for speech that promotes the use of illegal drugs or alcohol.⁹⁹ For instance, school policy can prohibit depictions of illegal drugs or alcohol on students' clothing, and if a student violates the rule, the student can be required to substitute the clothing with appropriate attire and can be disciplined for violating the school policy.

Speech that violates reasonable restrictions on school-sponsored speech

School officials may exercise extensive control over a wide range of student expression in this category (e.g., a school play or an official school publication), so long as the decision is reasonably related to "legitimate pedagogical concerns."¹⁰⁰

⁹⁵ *Dariano v. Morgan Hill Unified Sch. Dist.*, 745 F.3d 354; amended opinion 767 F.3d 764, 776 (9th Cir 2014), cert denied, 135 S Ct 1700 (2015) (because the record demonstrated that students' shirts bearing images of the American flag might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities due to racial tensions, the school officials' actions were permissible, and did not violate the student's freedom of expression, due process or equal protection rights.)

⁹⁶ *Tinker*, 393 US 503.

⁹⁷ *Dariano v. Morgan Hill Unified Sch. Dist.*, 745 F.3d 354; amended opinion 767 F.3d 764, 776 (9th Cir 2014), cert denied, 135 S. Ct 1700 (2015).

⁹⁸ *Tinker*, 393 U.S. at 508.

⁹⁹ *Morse*, 551 U.S. 393.

¹⁰⁰ *Kuhlmeier*, 484 U.S. 260.

46) When may school officials discipline a student for off-campus speech, including postings on the Internet and social media?

Disciplining students for off-campus speech is perhaps the most complicated First Amendment issue for schools. But school officials cannot ignore the substantial disruption or violation of other students' rights that may be caused by off-campus speech.

School officials can discipline students for off-campus speech when (1) there is a nexus between the speech and the school and (2) it is reasonably foreseeable that the off-campus speech will "spill over into the school environment."¹⁰¹

Nexus

To determine whether there is a "nexus"¹⁰² between the school and the speech, school officials should look to factors such as:

- (1) The proximity in time between the speech and the school day or school-sponsored activity.
- (2) The proximity in location between where the speech occurred and the school or school-sponsored activity.
- (3) The connection between the speech and activities that occurred at school or a school-sponsored activity.

Reasonable Foreseeability

To determine whether there is "reasonable foreseeability" that the speech would reach the school environment, school officials should look to factors such as:

- (1) Would the students who heard or saw the speech reasonably be impacted by the speech during school? The Ninth Circuit recently found that "reasonable foreseeability" existed because "a student who is routinely subject to harassment while walking home from school may be distracted during school hours by the prospect of the impending harassment."¹⁰³
- (2) Would the off-campus speech be a likely subject of discussion at school? In the same case, the Ninth Circuit noted that "[a]dministrators could also reasonably expect students to discuss the harassment in school."¹⁰⁴

School district policies aimed at off-campus speech must put students on notice of what speech might violate policy and must not overreach. District policies aimed at student speech, including off-campus or Internet speech, should be as specific as possible when

¹⁰¹ *C.R. v. Eugene School District 4J*, 835 F.3d 1142, 1151 (9th Cir. 2016) (court upheld discipline for off-campus sexually harassing speech when it occurred in close proximity to the school, right after school was dismissed, and it was likely that the harassed students would be distracted during the school day as a result of the harassing speech).

¹⁰² "Nexus" is defined as a "connection or link, often a causal one <cigarette packages must inform consumers of the nexus between smoking and lung cancer>." BLACK'S LAW DICTIONARY 1142 (9th ed. 2004).

¹⁰³ *C.R. v. Eugene School District 4J*, 835 F.3d at 1151

¹⁰⁴ *Id.*

describing inappropriate or offensive conduct at school and should focus on conduct, not speech content, whenever possible.

Other means of curbing off-campus or Internet speech should include educating students about the negative impacts of harassing or demeaning speech. Even if an Internet posting falls short of meeting the "nexus" and "reasonable foreseeability" tests for discipline, school officials can also discuss the negative impacts of Internet postings with students without necessarily imposing discipline.

47) Can school officials discipline for off-campus Internet speech that includes threats of violence?

Another difficult issue for school officials is determining whether a student can be disciplined for threatening Internet speech. School officials must consider whether the threatening language is a "true threat." A true threat exists when "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault."¹⁰⁵

In assessing whether Internet postings constitute a true threat for which a student could be disciplined, school officials should consider:

- (1) Whether the threatening language is general or specific;
- (2) Whether there is evidence that the student has the actual intent or ability to carry out the threat; and
- (3) Whether there is other evidence (such as past disciplinary concerns) supporting the existence of a true threat to the school.

In an early case about student discipline for threats posted on the Internet, the court found that a school could not discipline a student who had posted mock obituaries of students and solicited input on who should "die" next." The court found that the school district had "presented no evidence that the mock obituaries and voting on this website were intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever."¹⁰⁶ In contrast, the Ninth Circuit upheld the discipline imposed on a student who sent violent and threatening instant messages in which he was "bragging about his weapons, threatening to shoot specific classmates, intimating that he would 'take out' other people at a school shooting on a specific date, and invoking the image of the Virginia Tech massacre."¹⁰⁷

Social media posts involving threats of violence can be shared widely and cause school disturbance. School officials should also consider analyzing whether the threatening Internet speech meets the test discussed in Question 46 above that (1) there is a nexus between the speech and the school and (2) it is reasonably foreseeable that the off-campus speech will "spill

¹⁰⁵ *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir 1996) (internal quotation marks and citation omitted).

¹⁰⁶ *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1090 (WD Wash 2000).

¹⁰⁷ *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1064-65 (9th Cir 2013).

over into the school environment."¹⁰⁸ If so, school officials may be able to discipline for the threatening posts even if they are not "true threats."

48) Can school officials discipline students for off-campus social media speech directed at school officials?

Social media posts by students that are offensive and demeaning to school staff can cause significant concern and disruption at school. However, in contrast to the cases discussed above about social media posts that involve threats, courts are more skeptical of discipline on the basis of social media posts about the staff.¹⁰⁹ As the Ninth Circuit stated, "[a] student's profanity-laced parody of a principal is hardly the same as a threat of a school shooting."¹¹⁰ The fact that a social media post contains vulgar language or criticism of school personnel is generally insufficient to support discipline. Of course, if the student speech goes beyond offensive to actual threats to school personnel, the analysis regarding threatening speech above applies.

¹⁰⁸ *C.R.*, 835 F3d at 1151.

¹⁰⁹ *See, e.g., Evans v. Bayer*, 684 F Supp 2d 1365 (SD Fla 2010) (Facebook postings disparaging staff not sufficient to support student discipline); *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F Supp 2d 698 (WD Pa 2003) (Internet messages criticizing teacher insufficient basis for discipline).

¹¹⁰ *Wynar*, 728 F3d at 1069.

Harassment, Intimidation, and Bullying

49) Has the Idaho Legislature addressed “harassment, intimidation or bullying” in Idaho schools?

Yes. Idaho Code 18-917A provides that “[n]o student or minor present on school property or at school activities shall intentionally commit, or conspire to commit, an act of harassment, intimidation or bullying against another student.”¹¹¹ Any student who violates this code section may be found guilty of an infraction.

50) What is the definition of student “harassment, intimidation and bullying”?

Idaho Code Section 18-917A(2) provides, in part, that:

“[H]arassment, intimidation or bullying” means any intentional gesture, or any intentional written, verbal or physical act or threat by a student that:

(a) A reasonable person under the circumstances should know will have the effect of:

- (i) Harming a student; or
- (ii) Damaging a student’s property; or
- (iii) Placing a student in reasonable fear of harm to his or her person; or
- (iv) Placing a student in reasonable fear of damage to his or her property;

OR

(b) Is sufficiently severe, persistent or pervasive that it creates an intimidating, threatening or abusive educational environment for a student.

It is important to recognize that “harassment,” “intimidation,” and “bullying” are not defined separately in Idaho Code Section 18-917A. Instead, the phrase “harassment, intimidation or bullying” is defined as “any intentional gesture, or any intentional written, verbal or physical act or threat, by a student.”

51) Can harassment, intimidation or bullying occur using an electronic device, such as a computer or cell phone?

Yes. Idaho Code Section 18-917A(2) specifically provides that “[a]n act of harassment, intimidation or bullying may also be committed through the use of a landline, car phone or wireless telephone or through the use of data or computer software that is accessed through a computer, computer system, or computer network.”¹¹²

¹¹¹ Idaho Code § 18-917A(1).

¹¹² The *Idaho School Violence/Safety Policies/ Procedures Manual* (2008), published by the Idaho State Department of Education’s Safe and Drug Free Schools Program, provides a more in-depth discussion of Idaho Code § 18-917A and its application to Idaho schools.

52) What information must local school boards disseminate regarding harassment, intimidation, and bullying?

All school districts are required to make reasonable efforts to ensure that information on harassment, intimidation, and bullying of students is disseminated annually to all school personnel, parents and students. The information must include an affirmation that school personnel are authorized and expected to intervene or facilitate intervention on behalf of students facing harassment, intimidation or bullying.¹¹³

53) What actions are school personnel expected to take regarding harassment, intimidation or bullying?

All school employees are authorized and expected to intervene or facilitate intervention on behalf of students facing harassment, intimidation or bullying. Such interventions include correction the problem behavior, preventing another occurrence of the problem, protecting and supporting the victim, and taking corrective action for documented systemic problems related to harassment, intimidation or bullying.¹¹⁴

54) What consequences must local school boards use regarding harassment, intimidation or bullying?

School district policies must include a series of graduated consequences that may be used that are appropriate to the severity of the violation, such as referral to counseling, diversion, use of juvenile specialty courts, restorative practices, on-site suspension and expulsion for any student who commits an act of bullying, intimidation, harassment, violence, or threats of violence.¹¹⁵

The graduated consequences should consider the nature of the behavior, the developmental age of the student, and the student's history of problem behaviors and performance.¹¹⁶

¹¹³ Idaho Code § 33-1631; IDAPA 08.02.02.111.01.

¹¹⁴ IDAPA 08.02.02.111.04.

¹¹⁵ Idaho Code § 33-1631; IDAPA 08.02.02.111.03.

¹¹⁶ *Id.*

Suicide Prevention

55) How prevalent is suicidal ideations among youth in Idaho?

A study completed in 2017 revealed that 21 percent of Idaho students seriously considered attempting suicide.¹¹⁷

56) How prevalent is suicide among youth in Idaho?

Idaho is consistently among the states with the highest suicide rates, and in 2016 Idaho had the eighth highest suicide rate in the United States. In 2015, suicide was the second leading cause of deaths among youth aged 10 to 19.¹¹⁸ During this same time period, 25 Idahoans between ages 10 and 19 completed suicide.¹¹⁹ In the last five years, Idaho lost 105 school-aged children to suicide, of which 27 were age 14 or younger.¹²⁰

57) Are Idaho school districts required to have a policy addressing suicide prevention?

Yes. Both state law and Idaho State Board of Education (SBE) rule require Idaho school districts have a policy in place that addresses suicide prevention.

State Law

Idaho Code § 33-136, added by the Idaho Legislature in 2018, requires every Idaho school district to adopt policy on student suicide prevention. The Idaho State Department of Education is required to develop and maintain a model policy to serve as a guide for school districts. The policy must, at a minimum, include provisions regarding suicide prevention, intervention and postvention.¹²¹

SBE Rule

IDAPA 08.02.030.160 entitled “Safe Environment and Discipline” requires each school district have comprehensive districtwide policies and procedures on a variety of topics, including suicide prevention. Districts are further required to conduct an annual review of the required policies and procedures.

¹¹⁷ *Idaho Youth Risk Behavior Survey*, p. 16 (2017).

¹¹⁸ [Suicide in Idaho: Fact Sheet \(February 2018\)](#).

¹¹⁹ *Idaho Youth Risk Behavior Survey* p. 16 (2017), citing to *Idaho Vital Statistics 2013*, Idaho Department of Health and Welfare, Division of Public Health, Bureau of Vital Records and Health Statistics, April 2017.

¹²⁰ [Youth Suicide: Helping Your Student \(October 2017\)](#). Additional resources can be found at the Idaho State Department of Education website, [Youth Suicide Prevention](#) and the [Suicide Prevention Action Network of Idaho](#).

¹²¹ “Postvention” is defined as counseling or other social care given to students after another student’s suicide or attempted suicide. Idaho Code §33-136(2)(b). Information for schools regarding postvention guidelines can be found on the [Suicide Prevention Action Network of Idaho](#).

58) What trainings are required for Idaho school district personnel regarding suicide prevention?

Idaho Code §33-136 requires that a minimum level of suicide awareness and prevention training be provided to all Idaho public school personnel.¹²² The SBE is required to adopt rules supporting suicide awareness and prevention training to occur yearly for public school personnel. The training can occur within existing in-service training programs, or as part of professional development activities.

A list of approved training materials, including training on how to identify appropriate mental health services within the school setting and community, and when and how to refer students and their families to the services are required to be maintained by the SBE and the Idaho State Department of Education (SDE).

59) What duty exists to inform parents of a student’s possible suicidal tendencies?

A duty to warn exists if a teacher has direct evidence of a student’s suicidal tendencies.

60) How is “suicidal tendencies” defined?

“Suicidal tendencies” is narrowly defined to mean a present aim, direction or trend toward taking one’s own life.¹²³

61) What is “direct evidence” of a student’s suicidal tendencies?

“Direct evidence” is defined as “evidence which directly proves a fact without inference and which in itself, if true, conclusively establishes that fact.”¹²⁴ “Direct evidence” includes “unequivocal and unambiguous oral or written statements by a student which would not cause a reasonable teacher to speculate regarding the existence of the fact in question.”¹²⁵ “Direct evidence” does not include oral or written statements by a student that are equivocal or ambiguous and cause a reasonable teacher to speculate. Whether “direct evidence” exists is determined by a court as a matter of law.¹²⁶

62) What liability exists for failure to provide suicide prevention training to district personnel?

Idaho Code 33-136(4)(a) and (b) specifically provide that no cause of action exists for any loss or damage caused by any act or omission resulting from any training or lack of training. Further, the requirement to have suicide prevention training, or failure to have such training “shall not be construed to impose any specific duty of care.”¹²⁷

¹²² RS26229, Statement of Purpose (2018).

¹²³ *Carrier v. Lake Pend Oreille School Dist.*, 134 Idaho 804, 809, 134 P.3d 655, 660 (2006).

¹²⁴ Idaho Code §33-512B(2).

¹²⁵ *Id.*

¹²⁶ Idaho Code §33-512B(3).

¹²⁷ Idaho Code §33-136(4)(b).

63) What liability exists for failure to identify a student’s suicidal tendencies?

An Idaho school district has a duty to act affirmatively to prevent foreseeable harm to students while in the District's custody.¹²⁸ While districts must exercise due care and take reasonable precautions to protect their students, the duty is not an absolute mandate to prevent all harm.¹²⁹ Direct evidence of suicidal tendencies must exist before liability can occur.

64) How can teachers be proactive?

Research shows that fostering the emotional sense of connectedness, belonging and capability are essential to prevent suicide and other risky behaviors.¹³⁰ Teachers and school staff can be proactive by providing all students with the sense of connectedness, belonging and capability in the classroom, school setting, and school activities.¹³¹

¹²⁸ Idaho Code §33-512(4); *Summers v. Cambridge Joint School Dist. No. 432*, 139 Idaho 953, 956, 88 P.3d 772, 775 (2004).

¹²⁹ *Sherer v. Pocatello School Dist. No. 25*, 143 Idaho 486, 491, 148 P.3d 1232, 1237 (2006).

¹³⁰ *Sources of Strength (n.d.)* available at <https://sourcesofstrength.org/discover/evidence/>.

¹³¹ *Additional resources and classroom activities intended to promote the sense of belonging can be found on the Suicide Prevention Action Network of Idaho (SPAN Idaho) at spanidaho.org.*

Requirements Regarding Search and Seizure

At times, school officials may need to search a student or his or her belongings to maintain a safe school environment and enforce disciplinary rules. Students have privacy rights in their bodies and personal possessions; these rights are protected under the Fourth Amendment prohibition against unreasonable searches and seizures.¹³²

School officials must be aware of the legal parameters for search and seizure and should maintain documentation on all searches and seizures. In general, a search is permissible if:

- A school official has a reasonable suspicion, based on specific and articulable facts that a student has violated a disciplinary rule; and
- The scope of the search is reasonable under the circumstances.¹³³

Because this area of law is fertile ground for litigation and frequently involves situations in which school officials must make quick, on-the-spot decisions, school districts must adopt clear policies regarding search and seizure, provide appropriate training to staff, and ensure that these policies are shared with students, staff, and families.

65) What is a search?

A "search," as it relates to students in public schools, is any action by school officials that intrudes on or invades a student's justifiable expectation of privacy. It includes a variety of actions, such as a pat down of the student's clothing; requiring the student to empty his or her pockets; going through the student's backpack or vehicle looking for contraband; requiring the student to submit to a breathalyzer test; and looking through the student's cell phone or other personal technology. A student does not have a justifiable expectation of privacy in locations under the school's control, such as desks or open cubbies. (See Question 69 for a discussion of locker searches and other specific examples).

66) Under what conditions can a school official conduct a search and seizure at school?

As a general rule under the Fourth Amendment, searches must be reasonable in both inception and scope. A school official should be able to answer "yes" to the following two questions

¹³² U.S. Const, Amend 4. The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Article I, Section 17, of the Idaho Constitution also protects against unreasonable searches and seizures.

¹³³ *New Jersey v. T.L.O.*, 469 US 325, 105 S Ct 733, 83 L Ed 2d 720 (1985) (U.S. Supreme Court set out the standard for student searches under the Fourth Amendment, holding that because of the need for prompt discipline in the school setting and school officials' duty to maintain a safe and orderly educational environment, school officials may search a student without a warrant or "probable cause" (which is the higher standard applicable to the police) when the search is reasonable under the circumstances).

before conducting a search: (a) whether the search is reasonable at the inception and (b) whether the scope of the search is reasonable under the circumstances.

Is the search reasonable at the inception?

To show that a search is "reasonable at inception," it must be demonstrated that there is a reasonable basis for suspecting that the student violated a law or school rules and that a search will discover evidence of that violation.

The school official's "reasonable suspicion" must be based on specific, articulable facts such as the student's behavior or appearance, reports from reliable sources, the student's disciplinary history, or similar specific and current information. Generalized suspicion, without current and specific supporting information, is not sufficient to justify a search.

Is the scope of the search reasonable under the circumstances?

A search must be no more intrusive than necessary under the circumstances. For instance, if a school official has a reasonable suspicion based on clear and reliable evidence that a student has drugs in his or her backpack, it is reasonable to search the backpack. But it would not be reasonable to then search the student's vehicle or look through the student's cell phone without additional evidence justifying a search of the vehicle or the phone. To show that a search is "reasonable in scope," it must be demonstrated that the areas searched are related to the evidence available to the administrator, the search is not overbroad, and the search is not excessively intrusive in light of the violation's nature and the student's age and sex.¹³⁴

67) What are some examples of reasonable and unreasonable searches?

In *State of Idaho v. Voss*,¹³⁵ an assistant principal's search of a student's vehicle on school grounds for tobacco was found to be justified at its inception and reasonably related in scope to the circumstance based on the administrator's reasonable suspicion that the student was in possession of tobacco, when he smelled tobacco on the student. The search uncovered not only tobacco, but also a pipe with marijuana residue and brass knuckles, and the student was cited for possession of paraphernalia and a concealed weapon. Although the student was 18 years of age and could legally possess tobacco, such possession violated school policy. Citing *T.L.O.*, the Idaho Court of Appeals recognized that a search of a student is justified at its inception "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating *either the law or the rules of the school.*" (Emphasis original).¹³⁶

In contrast, the U.S. Supreme Court held in *Safford Unified Sch. Dist. #1 v. Redding*,¹³⁷ that the scope of a search was too broad when, looking for over-the-counter pain-relief pills, a school

¹³⁴ *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 129 S. Ct 2633, 174 L. Ed 2d 354 (2009).

¹³⁵ 267 P.3d 735 (App. 2011).

¹³⁶ Citing *T.L.O.*, 469 U.S. at 341-42 (emphasis added).

¹³⁷ 557 U.S. 364, 129 S. Ct 2633, 174 L. Ed 2d 354 (2009).

official required a 13-year-old girl to pull out her bra and underwear. The Court ruled that the scope of the search was unreasonably broad given the lack of an immediate threat of danger and in light of reasonable societal expectations of personal privacy and the student's age.

68) Are there exceptions to the "reasonable suspicion" requirement?

There are limited exceptions to the reasonable suspicion requirement, including (a) consent, (b) exigent circumstances, and (c) no expectation of privacy. These should be used carefully and in limited circumstances to avoid a potential violation of a student's constitutional rights.

Consent

Even without reasonable suspicion, school officials may search a student or his or her property if the student (or the student's parent) consents to the search.¹³⁸ It is often best practice for an administrator to ask a student for consent to search before conducting the search. The consent, however, must be voluntary. Consent obtained under duress (such as the threat of disciplinary action for refusal) is not true consent. A court may also take into consideration a student's age when determining whether consent was truly voluntary. For instance, an elementary school student may not understand that he or she has the right to refuse a principal's request to search the student's backpack, and thus the student's "consent" is not truly voluntary. If a student gives consent, the administrator should carefully document the circumstances to avoid a later claim of duress by the student.

Exigent circumstances

The courts have recognized a general exception that applies when exigent circumstances pose a significant threat to school safety. One court has defined "exigent circumstances" for the purposes of a school search to exist when there is a threat to a school's order and discipline that requires swift action to prevent danger to life, a suspect's escape, or destruction of evidence.¹³⁹ For example, a reliable report that a gun or bomb is present in the school justifies a general, suspicionless search.¹⁴⁰

No expectation of privacy

As indicated above, the protections against unreasonable search apply only when a student has a reasonable expectation of privacy. A student has a reasonable expectation of privacy in his or her personal belongings, such as backpacks, gym bags, purses, vehicles, and smartphones. A student also has a reasonable expectation of privacy in his or her body and clothing. There is no reasonable expectation of privacy in school-controlled locations, such as desks or cubbies. When a student does not have a reasonable expectation of privacy, individualized suspicion is not required. For example, if students have been informed that

¹³⁸ *State ex rel Juv. Dept. v. Stephens*, 175 Or App 220, 27 P3d 170 (2001) (student consent must be voluntary, and search must not exceed scope of consent); *Fewless v. Bd. of Educ. of Wayland Union Sch.*, 208 F. Supp. 2d 806 (WD Mich. 2002) (consent to search based on totality of circumstances, including age and intelligence and the existence of coercive conditions; student with ADHD did not voluntarily consent to search).

¹³⁹ *State v. Brown*, 240 P3d 1175 (Wash Ct App 2010).

¹⁴⁰ *Id.* (exigent circumstances exist when swift action is required to prevent danger to life, a suspect's imminent escape, or destruction of evidence).

lockers and desks are school property and subject to search at any time without advanced warning, students have no reason to believe that those areas are private, and school officials may search desks and lockers without individualized suspicion. (For further discussion regarding lockers, see Question 69.)

69) How does the law regarding search and seizure apply in specific contexts?

Smartphones and other personal technology

Smartphones and other personal technology may contain direct evidence of student misconduct. At the same time, students have a right to privacy in their smartphones, and thus searches of smartphones must satisfy the reasonable suspicion and reasonable scope requirement. The fact that a student uses a smartphone in violation of school rules does not justify a search.¹⁴¹ Similarly, outdated evidence and/or generalized suspicion about a student cannot be the basis for a smartphone search.¹⁴²

If a school administrator has current, specific, and reliable evidence that a student's smartphone may contain evidence of a violation of law or school policy, the administrator should search only those areas of the phone that are related to such evidence. For instance, if an administrator has credible information that a student is sending text messages related to selling drugs, the administrator may search the text applications on the student's phone. But it would not be appropriate to then search the student's pictures or private social media postings unless additional information suggested that evidence might be present in those areas of the smartphone.

If a school loans a technology device to students for school-related use, the school should adopt clear policies (and preferably an agreement signed by students and parents) that students have no expectation of privacy in the school-issued technology.

Lockers

Student lockers present a unique issue because a locker is school property that is used by students to secure personal property. Because the locker is under the joint control of the student and the school, the student generally has a diminished expectation of privacy with respect to the locker. Yet a student could arguably assert a right to privacy in a school-issued locker if the student had sole use of the locker, the student uses his or her own lock for the locker, and there is no written policy stating that the locker is the property of the school and can be searched at any time. It is best practice to have a school policy that clearly states that lockers are not the "property" of students and that students do not have a right of privacy in the contents of their lockers.

¹⁴¹ *G.C. v. Owensboro Pub. Sch.*, 711 F3d 623, 633 (6th Cir 2013) ("[U]sing a cell phone on school grounds does not automatically trigger an essentially unlimited right enabling a school official to search any content stored on the phone that is not related either substantively or temporally to the infraction.")

¹⁴² *G.C.*, 711 F3d at 633-34 ("We disagree, though, that general background knowledge of drug abuse or depressive tendencies, without more, enables a school official to search a student's cell phone when a search would otherwise be unwarranted.").

Lockers may be searched on a random or preannounced basis, without individualized suspicion, if the school has adopted and communicated to students a policy clearly stating that: (1) lockers are school property and remain in the school's possession and control at all times; (2) students are permitted to use lockers for the limited purpose of temporarily storing items needed for classes and other school activities; (3) students are prohibited from storing weapons, drugs, or other contraband in lockers or using their lockers for any other prohibited purpose or activity; and (4) lockers are subject to search by school officials at any time, with or without notice, to be sure that the lockers are not used for improper purposes.¹⁴³

Note that if a student does have personal property, such as a backpack or smartphone, in a locker, the student does have a right of privacy in those personal items, and the stricter limitations on searches apply to those possessions.

Vehicles

A student's vehicle is personal property and is protected from unreasonable search by the Fourth Amendment.¹⁴⁴ When a vehicle is parked on school property, it may be searched if: (1) the vehicle's owner or the student who brought the vehicle to school voluntarily consents to the search, (2) school officials have reasonable suspicion that the vehicle contains evidence of a violation (including when evidence can be seen through windows without opening the vehicle), or (3) exigent circumstances, including an urgent and immediate safety concern, justify a search. School officials should not search vehicles that are not on school property, as the reasonableness standard has not been applied to searches of student vehicles located off school property.

Strip or body searches

Searches for which students are required to remove articles of clothing (other than outerwear such as jackets, hats, socks, or shoes) are highly risky and should be avoided. Similarly, school officials should avoid physically touching a student (for instance, in a "pat down") during a search if possible. Whenever searches involve a student's person or clothing, it is best practice to have two adults present (at least one adult should be the same sex as the student) and to document what occurred.

As discussed in Question 67, the U.S. Supreme Court found a search unconstitutional when it involved looking in the underwear of a middle-school girl for prescription drugs although school officials had no specific evidence that she was hiding drugs in her underwear.¹⁴⁵ Even

¹⁴³ James A. Rapp, EDUCATION LAW § 9.08[10][g][ii] at pp. 9-324, Matthew Bender (Rel. 63-9/2016).

¹⁴⁴ See *State of Idaho v. Voss*, 267 P.3d 735 (App. 2011) (an assistant principal's search of a student's vehicle on school grounds for tobacco, was found to be justified at its inception and reasonably related in scope to the circumstance based on the administrator's reasonable suspicion that the student was in possession of tobacco).

¹⁴⁵ *Redding*, 557 US at 374-75 (Student's "subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating. The reasonableness of her expectation (required by

if there is a suspicion that a student is hiding a prohibited item in his or her underclothes, the best practice is to call the student's parent or law enforcement unless there is an immediate and urgent safety concern.

Random drug testing

In general, breath, blood, and urine tests to detect drug use are considered searches that are subject to the Fourth Amendment requirement of reasonableness.¹⁴⁶ School district policies requiring that students submit to random drug testing as a condition of participation in extracurricular activities are legal but must be enacted with caution. Courts have generally found that drug testing of students not participating in extracurricular activities (1) violates a student's Fourth Amendment right, which prohibits unlawful searches; and (2) fails to meet the criteria for random drug testing.

The U.S. Supreme Court determined in *Vernonia Sch. Dist. 47J v. Acton*¹⁴⁷ that a school district could require students participating in athletics to submit to random urinalysis drug testing without individualized suspicion. The Court held that the school's interest in preventing drug use outweighed the students' privacy rights.

In a later case, the Court expanded the scope of *Vernonia* to allow random drug testing of students participating in any extracurricular activities, not just student-athletes.¹⁴⁸ The Court did not require a school to justify the drug testing on the basis that there was an identifiable drug-abuse problem among a sufficient number of those subject to testing. Rather, the Court found that as long as a district's drug-testing policy is a reasonably effective means of addressing the district's legitimate concerns about drug use, and the policy is not shown to be unreasonable, it meets the requirements of the Fourth Amendment.

A school district wishing to implement a random drug-testing requirement for students participating in extracurricular activities should carefully review the law and develop clear

Group searches

As discussed in Question 66, the Fourth Amendment usually requires "individualized suspicion" to justify a search. On some occasions, a school administrator may want to search a group of students but lacks individualized suspicion for each student searched. For instance, an administrator may believe that one student in a group of students may possess stolen property but may not have individualized suspicion related to a specific student.

the Fourth Amendment standard) is indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure.").

¹⁴⁶ *Skinner v. Ry., Labor Execs.' Ass'n.*, 489 US 602, 109 S Ct 1402, 103 L Ed 2d 639 (1989).

¹⁴⁷ 515 US 646, 115 S Ct 2386, 132 L Ed 2d 564 (1995).

¹⁴⁸ *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 US 822, 122 S Ct 2559, 153 L Ed 2d 735 (2002).

Courts are mixed on whether group searches are permissible,¹⁴⁹ and an administrator should proceed carefully with group searches. The administrator should first ask the students for consent to search. If it is necessary to search a student who refuses consent, the search should be as minimally invasive as possible and should be well documented.

Metal detectors

Requiring students and others to pass through a metal detector before entering the school is considered a search. A school may use metal detectors when school officials can establish that weapons or violence is a significant problem in the school, or establish a similar reasonable basis justifying the need for metal detectors. Courts have found that metal detectors are reasonable given a school's need to preserve safety, and do not violate a student's expectation of privacy.¹⁵⁰ The school should inform students in advance that metal detectors will be in use.

Drug-sniffing dogs

The use of drug-sniffing dogs may be a valuable tool for school administrators concerned about drugs, weapons, or destructive devices, but use of drug-sniffing dogs at school must be implemented with caution. There is a significant distinction between using dogs to sniff students themselves and using dogs to sniff property, such as backpacks or lockers. Courts have generally upheld schools' right to use drug-sniffing dogs to sniff lockers, school premises, or vehicles parked on school property on a random, suspicionless basis.¹⁵¹ In general, a dog sniff of a person's property located in a public place has been held to not constitute a search within the meaning of the Fourth Amendment.¹⁵² An alert by the dog to a particular locker, backpack, or vehicle provides the reasonable suspicion for a search of that locker, backpack, or vehicle.¹⁵³

In contrast, the Ninth Circuit has held that a dog sniff of a student (including the student's clothing and items in the student's possession) is an invasion of the student's reasonable

¹⁴⁹ See *Smith v. McGlothlin*, 119 F3d 786 (9th Cir 1997) (individualized suspicion not required to search group of students suspected of smoking when administrator observed a cloud of smoke hovering over the group but did not observe any particular student smoking); but see *Herrera v. Santa Fe Pub. Sch.*, 956 F Supp 2d 1191 (DNM 2013) (pat down of all students entering prom lacked individualized suspicion and was unconstitutional).

¹⁵⁰ See *In re Latasha W.*, 70 Cal Rptr 2d 886, 887 (Ct App 1998); *State v. J.A.*, 679 So 2d 316, 317 (Fla Dist Ct App 1996).

¹⁵¹ See *Burlison v. Springfield Pub. Sch.*, 708 F3d 1034, 1040 (8th Cir 2013) (*cert. denied* 134 S.Ct. 151 (2013) (use of a drug-sniffing dog is "minimally intrusive," and is "an effective means for adducing the requisite degree of individualized suspicion to conduct further, more intrusive searches") (internal quotation marks and citation omitted); see also *Commonwealth v. Cass*, 709 A2d 350 (Pa 1998) (a search of all student lockers by using drug-detecting dogs was a practical means to address the principal's compelling concerns about possible drug use, was minimally intrusive and was compatible with the Fourth Amendment).

¹⁵² *Hearn v. Bd. of Pub. Educ.*, 191 F3d 1329, 1332 (11th Cir 1999) ([T]he Constitution does not provide . . . any expectation of privacy in the odors emanating from her car."). And the U.S. Supreme Court has held that the use of a trained dog to sniff unattended luggage is not a search within the meaning of the Fourth Amendment. *United States v. Place*, 462 US 696, 707, 103 S Ct 2637, 77 L Ed 2d 110 (1983).

¹⁵³ See *Burlison*, 708 F3d at 1040.

expectation of privacy and constitutes a search for purposes of the Fourth Amendment.¹⁵⁴ Dog sniffing of students, therefore, requires individualized suspicion, voluntary consent, or exigent circumstances.

While a school is not required to give notice of a dog-sniffing search of school property, it is best practice to notify students and parents that the school reserves the right to conduct such a search. The school should ensure that clear procedures are in place, including protocols to ensure that students or staff are not in the area where the dogs are sniffing.

¹⁵⁴ *B.C. v. Plumas Unified Sch. Dist.*, 192 F3d 1260 (9th Cir 1999).

Due Process: Required and Recommended Steps for Imposing Discipline

70) What is due process in general?

The Fifth and Fourteenth Amendments to the United States Constitution guarantee that no person may be deprived of liberty or property without due process of law. Under these provisions, a public school student may not be excluded from school without due process.¹⁵⁵ Where school discipline is concerned, due process requires prior notice of publicly available policies and fair and reasonable discipline procedures.

Prior notice of school district policies and rules

Due process requires that district policies be communicated in advance to parents and students and be sufficiently specific for students to understand what conduct is prohibited.¹⁵⁶ Given a school's need to be able to respond to and impose discipline for a wide range of unanticipated misconduct, however, school rules do not have to be as detailed as a criminal code.¹⁵⁷

Fair and reasonable discipline procedures

Due process requires a school follow fair and reasonable procedures before imposing discipline. The extent of the process that is due depends on the extent of the potential punishment and exclusion from school. For example, more process is required for expulsion than suspension. At a minimum, due process requires that the student is given (1) notice of what he or she is accused of and the basis of the accusation, (2) a fair opportunity to respond, and (3) a decision based on the available evidence.¹⁵⁸

71) What due process is required for suspension?

The process due a student facing suspension includes providing the student with:

- Notice and explanation of the charges;
- A chance to present his or her side of the story; and
- A decision based on the available evidence.¹⁵⁹

Also referred to as “rudimentary due process” the due process for a suspension does not require a formal hearing. It is sufficient to have an informal meeting in which the suspending official explains the charges to the student and allows the student a reasonable opportunity to present his or her side of the story in response to the charges.¹⁶⁰ There need be no delay

¹⁵⁵ *Goss v. Lopez*, 419 US 565, 95 S Ct 729, 42 L Ed 2d 725 (1975).

¹⁵⁶ See Question 2 regarding Idaho’s requirements for the distribution of student discipline policies; Idaho Code § 33-205.

¹⁵⁷ *Bethel Sch. Dist. No. 403*, 478 US at 686.

¹⁵⁸ *Goss*, 419 US at 582.

¹⁵⁹ *Id.*

¹⁶⁰ *Meyer v. Austin Indep. Sch. Dist.*, 161 F3d 271 (5th Cir 1998).

between the time that notice is given and the time of the informal discussion between the student and the school official.

Typically, the due process occurs prior to the decision to suspend a student. However, in an emergency situation where there is a serious risk that substantial harm will occur to the student or others if the suspension does not take place immediately, these procedures may be postponed until the emergency condition has passed.¹⁶¹

Idaho law provides that a student may be suspended for up to 20 days for a single disciplinary infraction:

- a. The principal may temporarily suspend any student for up to five (5) school days for disciplinary reasons, including student harassment, intimidation or bullying, or for other conduct that is disruptive or interferes with the effectiveness of the school;
- b. The superintendent may extend the temporary suspension an additional ten (10) school days¹⁶² for disciplinary reasons or for other conduct that is disruptive or interferes with the effectiveness of the school; and
- c. The board of trustees may extend the temporary suspension an additional five (5) school days if it finds that returning the student to school would be detrimental to the other students' health, welfare, or safety.¹⁶³

In addition to the principal providing rudimentary due process, if a suspension is extended by the superintendent or the board, the student must also be given his or her due process rights, typically prior to the suspension extension. For example, if the superintendent extends a suspension for an additional five (5) school days, the superintendent must provide rudimentary due process.¹⁶⁴

The board of trustees must be notified of all temporary suspensions, the reasons, and the student's responses if any.¹⁶⁵

A student who has been suspended may be readmitted to school by the principal or superintendent who suspended him or her upon such reasonable conditions as the principal or superintendent may prescribe.¹⁶⁶

72) Is due process required for in-school suspensions?

Because a student serving an in-school suspension is excluded from the regular classroom environment, the rudimentary due process should be provided for an in-school suspension. As

¹⁶¹ Idaho Code 33-205; *Goss v. Lopez*, 419 U.S. at 577-84.

¹⁶² School districts must take into account those students on an IEP or on a 504 plan. A suspension of more than 10 cumulative school days may constitute a change in placement, and all procedural due process rights under the IDEA and/or Section 504 must be extended by the school district.

¹⁶³ Idaho Code § 33-205.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

with an out-of-school suspension, this due process should include (a) notice and explanation of the charges, (b) a chance for the student to present his or her side of the story, and (c) a decision based on the available evidence. The parent should be notified of the in-school suspension.

73) What due process is required for expulsion?

When expulsion is a possibility, the student is entitled to greater due process protection than that required for suspension. Also referred to as “formal due process,” a student facing expulsion is entitled to written notice of the charges, an opportunity for a hearing, and a decision based on the evidence presented at the hearing. The following sections outline in detail how school staff should prepare for and conduct an expulsion proceeding.

74) How should school officials prepare for an expulsion proceeding?

Expulsions are serious matters and require careful preparation. The school should identify: (a) an impartial hearing panel that will conduct the hearing and make a recommendation (unless the hearing is before the board; see Question 90), and (b) a district representative, who will collect and present the evidence supporting the expulsion recommendation. The district representative should not be part of the hearing body. Before initiating an expulsion, the district representative should review applicable district policy and legal requirements, consider whether special procedures are required due to a disability, and conduct a thorough investigation of the facts.

Required considerations and limitations on expulsions

School officials must comply with legal requirements and district policies regarding expulsion. If the district representative and hearing panel or board of trustees are not thoroughly familiar with these requirements, they should review them before proceeding.

Considering the rights of students with disabilities

If a student has been identified as having a disability under the IDEA or Section 504, several special rules apply. Many have time limits that can delay, if not completely derail, the expulsion process. Therefore, it is important to determine as soon as possible whether the student has been determined to have a disability or has been referred for a disability evaluation. (See discussion beginning at Question 100.) Under some circumstances, even an unidentified disability may allow the student to invoke the IDEA's procedural protection.¹⁶⁷ (See discussion beginning at Question 189.)

Investigating the facts

Before recommending expulsion, the district representative should conduct a thorough investigation of the facts and prepare documentation that can be presented at the hearing. The documentation should include:

- (1) Statements from participants and witnesses; and

¹⁶⁷ 34 C.F.R. § 300.534.

- (2) Information regarding the reliability of each student witness (e.g., the student's general reputation for truthfulness and the existence or absence of bias against the accused)—particularly if a student witness will remain anonymous for safety reasons or if a student witness is not known to the investigator.

The documentation may also include background information on the accused, such as academic standing, previous disciplinary record, and whether he or she is a student with a disability.

75) Who has the authority to expel or deny enrollment to a student?

Only the school board has authority to expel or deny enrollment to a student.¹⁶⁸ Board policy may allow for a hearing before an impartial hearing body, subject to a hearing before the board, in the event expulsion is recommended by the hearing body.

76) May the student be suspended during the expulsion process?

Generally, the student may be suspended pending completion of expulsion proceedings. For students with disabilities, however, the right to suspend may be limited. (See discussion beginning at Question 120.)

77) What notice is required for an expulsion hearing?

Written notice of the district's intent to expel and the student's rights, including the right to a hearing, must be given to the student and the parent before an expulsion hearing is held. At a minimum, the notice must contain the following:

- (1) The grounds for the proposed expulsion and the time and place where the parent may appear to contest the proposed expulsion;
- (2) The rights of the student to be represented by legal counsel, to produce witnesses, to submit evidence on his or her behalf, and to cross-examine any adult witnesses who may appear against him or her.¹⁶⁹

Additionally, the notice should also include the following information:

- (1) Notice that an interpreter will be provided at district expense if the student or parent cannot hear or understand spoken English;
- (2) Notice of all procedural safeguards available to the student under the IDEA or Section 504 if the student has been identified as having a disability.¹⁷⁰

78) How should the notice be delivered?

The notice should be delivered in person or sent by certified mail to allow for verification that the parent has received the information. If notice is given by personal service, the person

¹⁶⁸ Idaho Code § 33-205.

¹⁶⁹ Idaho Code § 33-205.

¹⁷⁰ 20 USC § 1415(k)(1)(H); 34 CFR 104.36. This requirement is satisfied by attaching and referencing a copy of the procedural safeguards notice.

delivering the notice should document where, when, and to whom the notice was delivered. A school should avoid sending an expulsion notice only by electronic mail.

79) When must the notice be delivered?

The notice must be provided to the parent within a reasonable time before the scheduled expulsion hearing to allow the student and the parent an adequate opportunity to prepare for the hearing.¹⁷¹

80) Who conducts the expulsion hearing?

Under Idaho law, only the board of trustees has the final authority to deny enrollment or attendance by expulsion. However, state law does not prohibit the board from having a policy that allows an impartial hearing body, such as a hearing panel, to hear the matter and make a recommendation regarding expulsion. If an expulsion is recommended by the hearing body, the student and parent must have the right to a full hearing in front of the board.¹⁷²

81) Must the expulsion hearing be scheduled at the parent's convenience?

No. As a courtesy, however, the school may contact the parent in advance to arrange a mutually convenient date and time for the hearing. As an alternative, the notice may state that the parent can request a rescheduling of the hearing date. The statement should include the name and contact information of the person whom the parent should contact to request rescheduling.

82) Is an expulsion hearing open to the public?

No. The hearing is conducted in executive session (if the hearing is before the board) or in a private session (if the hearing is conducted by a hearing body).¹⁷³ If the hearing is conducted in executive or private session, there should be no public release of information regarding the name of the student, the issue, the evidence discussed at the hearing, or the vote of any board member.¹⁷⁴

83) How should the district representative prepare for the expulsion hearing?

The district representative who will present the case for expulsion should prepare thoroughly for the hearing. Preparation should include anticipating arguments that may be raised on behalf of the student, as well as planning the most effective means of presenting the school's case. Although the necessary preparation will depend on the circumstances, the following suggestions will apply in most cases:

1. Collect copies of relevant district policies, rules, and information regarding how and when students were made aware of them.
2. Select the witnesses. Decide what evidence will be presented by live testimony and arrange for those witnesses to be present at the hearing.

¹⁷¹ Idaho Code § 33-205.

¹⁷² Idaho Code § 33-205.

¹⁷³ 34 C.F.R. part 99; Idaho Code 74-206(b).

¹⁷⁴ *Id.*

3. Prepare the witnesses. Meet with each witness before the hearing to discuss his or her role. Review any documents that the witness will be asked about at the hearing.
4. If evidence will be presented based on information from an anonymous student, prepare to offer (1) an explanation for why the witness should remain anonymous and (2) information regarding the anonymous student's reliability (e.g., reputation for truthfulness, lack of bias).
5. Select documents to be used as exhibits and make extra copies for the hearing officer and the student.
6. Prepare an outline. List the charges and, under each, note the district rules violated and the witnesses and other evidence that support the charge (including any admissions by the student). Make sure that there is substantial evidence to support each charge. Next, list the defenses and arguments likely to be raised by the student and, under each, note the school's rebuttal evidence and arguments. Finally, include information relevant to the severity of punishment, such as mitigating circumstances, prior disciplinary infractions, and academic history.
7. Prepare a brief opening statement, explaining the charges made, the district policies and school rules violated, and the recommended discipline.
8. Determine an effective order in which witnesses and other evidence will be presented.
9. Outline the questions to ask of each witness, including witnesses that the student is expected to call.
10. Prepare a brief closing statement, explaining how the evidence supports the recommended expulsion.

84) How should the district representative present the school's case at the expulsion hearing?

The hearing procedure will be determined by the hearing body. In general, the district representative presenting the case for expulsion should be prepared to do the following:

1. Describe the charges;
2. Identify and provide copies of the district policies and school rules violated;
3. Present school records and other documents supporting the charges (with copies for the hearing body and parent);
4. Call and question witnesses who support the charges (it is often possible and most efficient, introduce most or all of the district's evidence through one district witness who summarizes the school's investigation of the violation and discusses the student's academic and disciplinary record);
5. Cross-examine each adult witness called by the student to elicit helpful information or to discredit the witness by showing bias (e.g., the witness is a close friend of the student) or lack of personal knowledge (e.g., the witness did not actually see the incident);
6. Present information regarding the student's disciplinary and academic history;
7. Explain the rationale for the recommended disciplinary consequence; and
8. If appropriate, discuss alternative education options and the likely impact of expulsion on the student's grades and credits.

85) What is the procedure at the expulsion hearing?

If a hearing body conducts the initial hearing, board policy may allow the hearing body considerable discretion in establishing procedures. The following is a suggested procedure for a typical hearing.

Opening section

At the beginning of the hearing, the hearing body should:

1. State the purpose of the hearing;
2. Introduce the participants;
3. Explain the hearing body's authority and role;
4. State whether the hearing is closed or public and explain the confidentiality ramifications of the parent or student's choice;
5. Explain the procedures and ground rules for the hearing, including the fact that formal rules of evidence will not be followed (*i.e.*, hearsay may be allowed, and the hearing will proceed on a fundamental fairness standard);
6. State how and when the parent and student will be notified of the decision and what appeal rights they will have under district policy if they are dissatisfied with the decision;
7. Indicate whether the hearing body will record the hearing;
8. Identify any written communications or other information that the hearing body has reviewed regarding the matter;
9. Ask the participants whether they have any questions regarding the process; and
10. Invite the participants (the district representative first) to make brief opening statements.

Evidentiary section

In the evidentiary portion of the hearing, the hearing body allows each side to present evidence through witnesses and exhibits. Neither strict rules of evidence nor the Administrative Procedures Act apply to student discipline hearings.¹⁷⁵ For example, the hearing body may receive evidence that is based on hearsay (a statement made by someone who is not a witness at the hearing), even though that evidence would not be permitted in a court proceeding. The hearing body, however, is in control of the hearing and may disallow evidence that is irrelevant, overly repetitive, or otherwise not helpful in deciding the case. The hearing body may ask questions of any witness at any time.

In conducting the evidentiary portion of the hearing, the hearing body should:

1. Ask the district representative to present the district's evidence first;
2. After each district witness has testified, allow the student or his or her representative to ask questions of the witness;
3. After the witness has been cross-examined, allow the district representative to ask follow-up questions;

¹⁷⁵ *Smith v. Meridian Jt. Sch. Dist.*, 128 Idaho 714, 918 P.2d 583 (1996) (An Idaho school district is not an "agency" for purposes of an Administrative Procedure Act review).

4. When the district representative has finished presenting the school's case, ask the student or his or her representative to present the student's evidence;
5. If the student or his or her representative call witnesses, including the student, allow the district representative to ask questions of each adult witness;
6. Allow the student or his or her representative to ask follow-up questions; and
7. Resolve any objections to evidence presented by either party.

Closing section

After all evidence has been presented, the hearing body should invite representatives of each side, the district representative first, to make closing remarks regarding the charges, evidence, and proposed discipline. Before adjourning the hearing, the hearing body should again state how and when a decision will be issued and review the student's appeal rights under district policy.

86) May the student be compelled to testify?

No. The student must be given an opportunity to present his or her version of what happened but cannot be required to testify.

87) Does the student have a right to confront his or her accusers?

The student or the student's representative has a right to ask questions of any adult witnesses called by the district at the hearing.¹⁷⁶ Frequently, however, the district's case is based at least in part on information obtained from staff, students, and others who are not called as witnesses. The student does not have a right to confront and ask questions of individuals who provide information but do not testify at the hearing. The courts have recognized that the district has a legitimate interest in protecting the safety of student witnesses and that requiring live testimony from all individuals who have relevant information would overly formalize expulsion hearings.¹⁷⁷ Thus, the written or oral statements of witnesses not called to testify in person (and in some cases not even identified by name) may be received into evidence through the testimony of another witness, such as an administrator. That witness should provide sufficient detail regarding the statement of the witness not called to testify in person to allow the student a reasonable opportunity to respond to the evidence.

The student's rights are adequately protected when the student has an opportunity to confront and ask questions of the district representative who presents the facts developed from interviews conducted as part of the investigation.¹⁷⁸ The district representative may testify regarding the credibility of those who provided the information and may be questioned on efforts made to establish the reliability of the reports.

¹⁷⁶ Idaho Code § 33-205.

¹⁷⁷ *Newsome v. Batavia Local Sch. Dist.*, 842 F2d 920, 924-25 (6th Cir 1988); *Boykins v. Fairfield Bd. of Educ.*, 492 F2d 697, 701-02 (5th Cir 1974); *Graham v. Knutzen*, 351 F Supp 642, 666 (D Neb 1972).

¹⁷⁸ See, e.g., *Newsome*, 842 F2d 920.

For instance, in an expulsion for drug sales on school grounds, the students to whom the accused student tried to sell drugs may wish to remain anonymous. At the hearing, the school administrator could summarize the statements of these anonymous witnesses and speak generally to their credibility.

88) Who has the burden of proof at the hearing?

The school has the burden of proving that the student committed a violation. The student has the burden of proof as to any affirmative defense (meaning a defense other than a denial of the charges), such as a claim of self-defense in an expulsion for assaulting another student.

In both cases, the burden of proof is by a preponderance of the evidence. This means that the decision-maker must determine that it was more likely than not that the student committed the offenses of which he or she is accused.

89) What should the hearing body's decision include?

The form of the decision should be dated and signed and should include at least the following information:

- The date, time, and place of the hearing;
- The participants in the hearing;
- The alleged misconduct;
- The district rules and policies involved;
- The witnesses who testified for each side;
- The documentary evidence presented and considered;
- Findings of fact (in other words, what facts the hearings body is relying on in making the decision);
- Conclusions regarding district policies and school rules violated;
- A determination that the student is a habitual truant,¹⁷⁹ is incorrigible¹⁸⁰; or whose conduct is continuously disruptive of school discipline or instructional effectiveness; or whose presence posed a threat to the health or safety of the students; or has brought a weapon to school; or has been expelled from another school district;¹⁸¹
- The decision (or recommendation) regarding expulsion or other disciplinary sanction; and
- A statement of the student's appeal or review rights, including the applicable procedures and deadlines.

¹⁷⁹ Idaho Code §§33-205 and 33-206 require that the board of trustees determine, in a process that provides due process to the student and parent, that a student meets the school district criteria for “habitual truant.” Each school district board of trustees must define habitual truancy for the purposes of the statutes.

¹⁸⁰ “Incorrigible” is defined as “[i]ncapable of being reformed; delinquent.” BLACK’S LAW DICTIONARY 835 (9th ed. 2004).

¹⁸¹ Idaho Code § 33-205.

90) What procedures should be followed at the board level?

When the board conducts the expulsion hearing, it should follow procedures similar to those outlined for a hearing body in Question 85.

The student and parent should be given written notice of the board's decision. If the decision is to expel, the notice should clearly state the beginning and ending dates of the expulsion, or whether it is permanent, the alternative education options available to the student, if any, as well as any special terms or conditions of the expulsion.

91) What procedure should be followed if the student waives the right to a hearing?

Only the board has authority to order expulsion. Even if the student or parent waives the right to a hearing (or fails to attend the hearing after receiving notice), the board must be made aware of the facts supporting expulsion before ordering the expulsion.

After receiving the necessary information in the executive session, the board should prepare a written decision that includes the following:

- A summary of the charges and the evidence;
- Findings of fact and conclusions;
- A decision regarding disciplinary sanction; and
- Notice to the student and parent of the decision.

Copies of the decision should be sent to the student, the parent, and placed in the student's education file.

92) May a district proceed with an expulsion hearing if a student has withdrawn from school?

Yes. A school district has the right to expel a student following the provisions of due process, even if the student withdraws from school prior to the expulsion hearing. Although the student is no longer enrolled, the student was enrolled when engaging in the misconduct and may, therefore, be subject to disciplinary action.¹⁸²

93) May the district proceed with an expulsion hearing if criminal charges are pending?

A school district may proceed with expulsion proceedings or other disciplinary action when criminal charges are pending. Violation of school policy or rules is separate from the criminal violation.

If criminal charges are pending, the student may refuse to cooperate with the district's investigation and hearing to avoid creating evidence that could be used against the student in the juvenile or criminal case. Therefore, particularly when the student is in custody, the district

¹⁸² Idaho Code § 33-205.

may elect to defer disciplinary proceedings until the criminal matter is resolved. If the student is not in custody, however, the school must take the steps necessary to protect the school's safety (such as through expulsion) even if the criminal charges are still pending. When determining how best to proceed, school personnel will need to ensure they do not take any actions that may impede a criminal investigation.

94) What due process procedures are required for denial of school enrollment?

An Idaho school district may deny enrollment to a student who has been expelled from another school district in Idaho, or any other state.¹⁸³ The district in which the student is attempting to enroll must give the student the same due process hearing rights as are given to a student initially being expelled. The sole issue at the hearing is to determine whether the student requesting enrollment is the same student that was expelled from another district.

95) What documentation should schools maintain regarding student discipline?

School officials should carefully and consistently document disciplinary action, including evidence of the misconduct involved, the investigation conducted, the procedures followed, and the discipline imposed. The record should be as specific and detailed as possible. For example, if a student swears at a teacher, the actual words spoken by the student need to be documented; not simply a statement that the student used vulgar language. Such documentation may be necessary to support the disciplinary action or defend claims of discrimination, unreasonable search and seizure, use of excessive force, or violation of Idaho law or constitutional due process.

School officials should be aware that parents will likely have access to their students' records and thus should be professional in all documentation, including e-mail, texts, and other written communication.

96) Are there requirements to transfer student disciplinary records to another school?

Yes. Requirements exist to transfer student disciplinary records to another school district where a student enrolls.

Transfer of student records by an Idaho school district

Whenever a student transfers from one school to another, regardless whether the school is in the same school district, or another school district within or outside of Idaho, the sending school is required to provide a certified copy of the transferred student's record within ten days, unless the record has been flagged by law enforcement.¹⁸⁴ When the school record contains information regarding violent or disruptive behavior or disciplinary action involving

¹⁸³ Idaho Code § 33-205.

¹⁸⁴ Idaho Code § 18-4511 requires a school to flag a student's record as a possible missing or runaway child upon notification by the Idaho state police. Local law enforcement must be notified of any request received concerning a flagged record and the flagged records are not forwarded to the requesting school.

the student, the information is required to be included in the transfer of records, must be transmitted in a sealed envelope, marked to indicate the confidential nature of the contents, and must be addressed to the principal or other administrative officer of the school.

Receipt of student records from an out-of-state school district

If a student transfers from out of state, the parent must, if requested by the district, furnish copies of the student’s school records, including records containing information concerning violent or disruptive behavior or disciplinary action. The behavior and disciplinary information are required to be in a sealed envelope marked “confidential” and addressed to the principal or other administrative officer.¹⁸⁵

If the parent fails to furnish the required records or fails to request that the student’s previous school provide the required records, the district may deny enrollment to the transferring student or suspend or expel the student if he or she has already enrolled.¹⁸⁶

97) Are there notification requirements when a student of compulsory school age is expelled?

If an expelled student falls within the compulsory school attendance age of seven to sixteen,¹⁸⁷ the student falls under the purview of the Juvenile Corrections Act.¹⁸⁸ The authorized representative of the board is required to give written notice of the student’s expulsion to the prosecuting attorney of the county in which the student resides.¹⁸⁹

98) Can a student appeal a disciplinary decision to state court?

Typically, no. The Idaho Supreme Court¹⁹⁰ ruled that there is no statute in Idaho that specifically provides for judicial review of a school board’s student discipline decision. The Idaho Supreme Court further held that “[i]t is into the hands of the school board, elected by the local citizenry, not the courts, that the legislature has placed the discretionary power to discipline and expel students.”¹⁹¹ However, if a parent alleges a constitutional violation of failure to provide procedural due process, a court review may be allowed.¹⁹²

99) When may school officials call the police?

The police may be called when there is a health or safety emergency or in accordance with district policy. Many school districts have policies requiring or permitting a report to law enforcement officials when student misconduct violates the law.

¹⁸⁵ Idaho Code § 33-209.

¹⁸⁶ *Id.*

¹⁸⁷ Idaho Code § 33-202.

¹⁸⁸ Idaho Code §§ 33-206 and 20-527.

¹⁸⁹ Idaho Code §§ 20-527 and 33-205.

¹⁹⁰ *Daw ex rel. Daw v. School Dist. 91 Bd. of Trustees*, 136 Idaho 806 (2002).

¹⁹¹ *Rogers v. Gooding Public Joint School District No. 231*, 135 Idaho 480, 483 (2000).

¹⁹² *Id.*

Discipline of Students with Disabilities

IDEA: General Questions

100) Do students with disabilities have additional rights?

Yes. Students with disabilities have additional rights, including due process rights that districts must strictly adhere to. Both the IDEA and Section 504 provide procedures that must be followed for students covered by these federal mandates.

101) How may students with disabilities under the IDEA be disciplined?

Under the IDEA and *Goss v. Lopez*,¹⁹³ disabled students are entitled to the same due process rights as nondisabled students. And the IDEA provides additional rights to students with disabilities. Referring to the original statutory language of the IDEA, Pub L No. 94-142, the U.S. Supreme Court in *Honig v. Doe*, stated: "Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school."¹⁹⁴ The IDEA and the federal regulations directly address disciplining students with disabilities.¹⁹⁵ A disabled student may not be disciplined more harshly than a nondisabled student under similar circumstances.¹⁹⁶

102) Do general disciplinary rules apply to students with disabilities?

Yes. If a student's Individualized Education Program ("IEP") specifies disciplinary measures, however, then those measures preempt the district's general disciplinary code.

103) Does the "general education curriculum" have any bearing on disciplining students with disabilities?

Yes. A student who is suspended for more than ten cumulative school days, expelled, or placed in an interim alternative educational setting ("IAES") must continue to receive educational services to enable the student to continue to participate in the general education curriculum, although in another setting, and progress toward achieving the goals in the student's IEP.¹⁹⁷

A student's right to "participate" in the "general education curriculum" does not require the district to replicate every aspect of instruction in the regular classroom. As the comments to the federal regulations clarify, "it would not generally be feasible for a child removed for disciplinary reasons to receive every aspect of the services that a child would receive if in his or

¹⁹³ 419 US 565.

¹⁹⁴ *Honig v. Doe*, 484 US 305, 323, 108 S Ct 592, 98 L Ed 2d 686 (1988).

¹⁹⁵ 20 USC § 1400 et seq.; 34 CFR part 300 et seq.

¹⁹⁶ 20 USC § 1415(k)(1).

¹⁹⁷ *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed Reg 46723 (Aug. 14, 2006); *Questions and Answers on Discipline Procedures*, 52 IDELR 231, (OSERS 2009) Q/A C-1.

her chemistry or auto mechanics classroom as these classes generally are taught using a hands-on component or specialized equipment or facilities."¹⁹⁸

Additionally, the comments to the federal regulations state that the IDEA "modifies" the concept of a FAPE, since only those services needed to enable the student to continue to participate in the general curriculum and to progress toward meeting the goals set out in that student's IEP must be provided. "An LEA is not required to provide children suspended for more than ten (10) school days in a school year for disciplinary reasons, exactly the same services in exactly the same settings as they were receiving prior to the imposition of discipline."¹⁹⁹

104) How does the IDEA define the word "day"?

The regulations implementing the IDEA refer to three different types of "days" when establishing timelines.²⁰⁰ Each type has its own definition:

School day

Any day, including a partial day, that students are in attendance at school for instructional purposes. "School day" has the same meaning for all students in school, including students with and without disabilities.

Business day

Monday through Friday, except for federal and state holidays.

Day

A calendar day unless designated as a business day or school day.

105) What disciplinary removal options are available under the IDEA?

Suspensions of up to ten cumulative days

For the first ten school days of suspension in a school year, the district may suspend the student in the same manner and to the same extent as a nondisabled student. The first ten days of suspension may occur in a single suspension or a series of short suspensions. The federal regulations clearly provide that "[a] public agency is only required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if it provides services to a child without disabilities who is similarly removed."²⁰¹

School districts are also cautioned, however, that IEP teams have an obligation to develop appropriate IEPs based on each student's individual needs. Behavioral supports may be

¹⁹⁸ 71 Fed Reg 46716 (Aug. 14, 2006).

¹⁹⁹ Id.

²⁰⁰ 34 CFR § 300.11.

²⁰¹ 34 CFR § 300.530(d)(3).

needed to address or improve patterns of behavior that impede learning before, during, or after short-term disciplinary removals.²⁰²

Additional suspensions (beyond ten cumulative days)

There is no fixed limit on the total number of days that a student may be suspended during a school year. But any disciplinary removals beyond a total of ten cumulative days during the school year will require the district to provide education services to the student beginning on the 11th day of suspension. Additional procedural requirements apply if the suspensions constitute a "change in educational placement." (See Question 107.)

Expulsion

A student with a disability may be expelled in the same manner as a nondisabled student if the misbehavior was not a manifestation of his or her disability (see Questions 72-99). But a student with a disability may not be disciplined more harshly than a nondisabled student under the same circumstances. The district must continue to provide a FAPE to a student with a disability who has been expelled.

IAES for weapons or drug violation or infliction of serious bodily injury

School personnel may remove a student to an IAES (selected by an IEP team) for up to 45 school days for a weapons, or drug violation or for the infliction of serious bodily injury at school or a school function. (See Questions 137-149.)

IAES for dangerousness

The district may ask a due process hearing officer (also referred to as an administrative law judge (ALJ) in some states) to order the removal of a dangerous student to an IAES for up to 45 school days. This removal may be extended under certain circumstances. (See Questions 150-155.)

Court-ordered removal

The district may seek a court order (commonly referred to as a *Honig* injunction) removing a dangerous student from his or her current educational placement. (See Questions 156-160.)

Removal agreed to between the parent and the district

If the parent and the district agree to a change in educational placement for disciplinary reasons, the rules concerning the amount of time that a student with a disability may be removed from his or her educational placement need not apply, although the district must continue to provide a FAPE.²⁰³

²⁰² *Dear Colleague Letter*, 68 IDELR 76 (OSERS/OSEP 2016).

²⁰³ *Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities*, 64 Fed Reg 12406, 12620 (Mar. 12, 1999); *Questions and Answers on Discipline Procedures*, 52 IDELR 231(OSERS 2009), Q/A A-1.

106) What special requirements apply when removals exceed ten cumulative school days in a school year?

All cases

Whenever the cumulative days of removal exceed ten in a given school year, the district must provide services, beginning on the 11th day of removal, that are necessary to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the student's IEP goals.²⁰⁴ (See Questions 176-180.)

When removal constitutes a "change in educational placement"

In addition, if the removal will constitute a "change in educational placement," the district must:

- (1) Conduct a manifestation determination (see Questions 161-169);
- (2) Give the parent notice of the action and his or her procedural safeguards;²⁰⁵ (see Question 188) and
- (3) Provide, as appropriate, a functional behavioral assessment and behavior intervention services and modifications that are designed to address the behavior violation so that it does not recur.²⁰⁶ (See Questions 171-175.)

107) When does a removal constitute a "change in educational placement"?

A disciplinary removal is considered a "change in placement"²⁰⁷ if:

- a. The student will be removed for more than ten consecutive school days (expulsion or removal to a 45-day Interim Alternative Education Setting); or
- b. The student will be removed for more than ten cumulative school days during the current school year and the removals constitute a "pattern" (see Questions 111-119).²⁰⁸

²⁰⁴ 34 CFR § 300.530(d).

²⁰⁵ 34 CFR § 300.530(h).

²⁰⁶ 34 CFR § 300.530(f).

²⁰⁷ A student's placement is not a physical location but is the program of educational services offered to the student. A change in placement occurs when there is a substantial change in the student's educational program. 71 Fed. Reg. 46,588 (2006).

²⁰⁸ 34 CFR § 300.536

IDEA: Services During Disciplinary Removal

108) Are educational services required by the IDEA if a student is suspended or expelled?

It depends on how many days the student has been removed:

Removals of ten cumulative school days or less in a school year

A district need not provide educational services to a disabled student who has been suspended for ten cumulative school days or less during a school year, so long as services would not be provided to a student without disabilities who had been similarly suspended.²⁰⁹

Removals of more than ten cumulative school days in a school year

Services must be provided after the tenth day of removal even if (1) the misbehavior is not a manifestation of the student's disability or (2) the suspension does not constitute a change in placement.²¹⁰

109) What educational services must be provided if a student is removed for more than ten cumulative school days?

The district must provide services that are necessary to enable the student to continue to participate in the general curriculum and progress toward meeting the student's IEP goals.²¹¹

110) Who decides what services must be provided to a student removed for more than ten cumulative school days?

The answer depends on whether the removal will constitute a "change in placement" (see Question 107):

Removals that do not involve a change in placement

School personnel, in consultation with at least one of the student's teachers, determine the extent to which services are necessary and the location for the services' delivery.²¹²

Removals that do involve a change in placement

The IEP team determines the extent to which educational services are necessary and the location for the services' delivery.²¹³

²⁰⁹ 34 CFR § 300.530(d)(3).

²¹⁰ 34 CFR § 300.530(b)(2).

²¹¹ 34 CFR § 300.530(d).

²¹² 34 CFR § 300.530(d)(4).

²¹³ 34 CFR § 300.530(d)(5).

IDEA: Serial Suspensions

111) When does a series of suspensions constitute a "pattern"?

School personnel must determine, on a case-by-case basis, whether a series of suspensions create a "pattern" (and thus constitutes a change in placement) because:

- a. The series of removals total more than ten school days in a school year;
- b. The behavior involved is substantially similar to the student's behavior in previous removals during the school year; and
- c. Other factors, such as the length of each removal, the total amount of time the student has been removed during the school year, and the proximity of the removals to one another, are at play.²¹⁴

112) Are bus suspensions considered when determining whether a series of suspensions constitute a "pattern"?

If a student's IEP has bus transportation as a related service, a bus suspension must be treated as a removal and must be considered in determining whether a student's current removal from instruction or from IEP-prescribed transportation services constitutes a change in placement due to a pattern and whether a manifestation determination is required.²¹⁵

113) What is an example of a series of suspensions that do not constitute a pattern?

Three suspensions totaling more than ten days in a school year were held not to constitute a pattern because the first two out-of-school suspensions (four and a half days in October and three days in December) were not substantially similar to the third suspension in late December for possessing a weapon on campus, which resulted in eight days of out-of-school suspension.²¹⁶

114) What is an example of a series of suspensions that constituted a pattern?

The suspensions of a student who was suspended both in school and out of school for 11 days were held to constitute a pattern. The removals were the result of three hit, push, and trip incidents and one near hit, push, and trip incident. The student was removed for more than ten school days, and the four incidents were in close proximity to each other.²¹⁷

115) Is there a limit to the number of cumulative short-term removals if no pattern exists?

No. However, educational services must be provided to the student whenever more than ten cumulative suspensions occur in a school year.²¹⁸ (See Questions 106 and 176-180.)

²¹⁴ 34 CFR § 300.536; *Questions and Answers on Discipline Procedures*, 52 IDELR 231 (OSERS 2009), Q/A F-3.

²¹⁵ *Letter to Sarzynski*, 59 IDELR 141 (OSEP 2012).

²¹⁶ *East Metro Integration Dist. #6067*, 110 LRP 34370 (SEA MN 2010).

²¹⁷ *Highlands Cty. Sch. Bd.*, 115 LRP 27365 (SEA FL 2015).

²¹⁸ 34 CFR § 300.530(b)(2).

116) Who determines whether short-term cumulative day removals are a change in placement?

The decision is made by the school district. The decision is final unless the parent challenges the decision through the IDEA due process proceedings and a hearing officer or court reaches a different conclusion.²¹⁹

117) Should a student's IEP team convene to discuss short-term cumulative day removals that are not a change in placement?

Possibly. Although suspensions for ten consecutive school days or less do not constitute a change in placement under the IDEA, authority to implement short-term disciplinary removals doesn't negate the obligation to address whether a student needs new or different behavioral interventions and supports in order to receive a FAPE in the least restrictive environment. Thus, an IEP team may need to meet to review the need for behavioral supports and possibly revise a student's IEP even though no change in placement has occurred.²²⁰

118) How has the Ninth Circuit Court of Appeals treated serial suspensions?

A ruling by the Ninth Circuit Court of Appeals before the IDEA Amendments of 1997 and 2004 indicates that serial suspensions exceeding ten cumulative school days in a school year do not necessarily constitute a change in placement.²²¹ The court ruled that a particular school district's disciplinary policy, which allowed 15 cumulative school days of suspension per semester for special education students (30 days per school year), did not violate the IDEA.

119) May a parent contest a district's decision regarding whether multiple suspensions create a pattern?

Yes. A parent may request a due process hearing to challenge the determination by school personnel.²²²

²¹⁹ 34 CFR § 300.536(b).

²²⁰ *Dear Colleague Letter*, 68 IDELR 76 (OSERS/OSEP 2016).

²²¹ *Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F3d 1489, 21 IDELR 723 (9th Cir 1994).

²²² 34 CFR § 300.536(b)(2).

IDEA: Counting Days of Disciplinary Removal

120) What counts as a disciplinary removal?

A disciplinary removal occurs when a child with a disability violates a code of student conduct and is removed from his or her current placement to an appropriate interim alternative educational setting, or to another setting, or is suspended or expelled.²²³ It does not include removals by other agencies²²⁴ (e.g., the police), removals for public health reasons (e.g., head lice, infectious disease) or, under some circumstances, in-school suspensions or bus suspensions.

121) Does "in-school suspension" count as a disciplinary removal?

In-school suspension is not considered a disciplinary removal if the student:

- a. Continues to have access to the general curriculum and to the special education and related services described in the student's IEP; and
- b. Continues to participate with nondisabled students to the extent that he or she would in his or her current educational placement.²²⁵

122) Does a bus suspension count as disciplinary removal from school?

A bus suspension does not count as a disciplinary removal unless:

- a. Transportation is included as a related service on the student's IEP; and
- b. The district makes no alternative transportation arrangements for the student.²²⁶

123) How is a partial school day of suspension counted?

Portions of a school day that a student has been suspended should be included in determining whether the student has been removed for more than ten cumulative school days or has been subjected to a change in placement.²²⁷ Depending on the circumstances, however, some procedures may not constitute a removal, such as the use of study carrels, time-outs, detentions, and the restriction of privileges.²²⁸

124) Do removals by one district count when the student transfers to another district?

The IDEA does not address this situation. Because Idaho law does not provide otherwise, any days of suspension in the former district would carry over to the new district unless the new district does not have actual knowledge of the previous suspensions.²²⁹

²²³ 34 CFR § 300.530.

²²⁴ 64 Fed Reg at 12626 (1999).

²²⁵ 34 CFR § 300.530(b)(1); 71 Fed Reg at 46715 (Aug. 14, 2006).

²²⁶ 71 Fed Reg at 46715 (Aug. 14, 2006); *Letter to Sarzynski*, 59 IDELR 141 (OSEP 2012)..

²²⁷ *Id.*

²²⁸ *Honig v. Doe*, 484 US 305, 559 IDELR 231 (1988).

²²⁹ *Letter to Zirkel*, 31 IDELR 138 (OSEP 1999).

125) If a student is placed on a shortened day by the IEP team due to behavior issues, does the reduction in the student's day count as disciplinary removal?

No. The shortened day is a placement change, requires prior written notice to the parents, and is subject to other procedural safeguards, but does not constitute a disciplinary removal. Other states have cautioned that such a reduction should be reserved for a student with the most severe behaviors, should be implemented only when less restrictive options have failed and should be accompanied by a clear and measurable plan for increasing the student's participation to a full school day as soon as possible.²³⁰

126) If a student is placed on a shortened day by a school administrator due to behavior concerns without going through the IEP process, does the reduction in the student's day count as a disciplinary removal?

Yes. Unless such a reduction (change in placement) is made through the IEP team process and approved as a revision to the IEP, it counts as a disciplinary removal (and may also result in a denial of a FAPE).²³¹

127) If a parent is asked to pick up his or her child from school early due to behavior and does so, does the reduction in the student's day count as a disciplinary removal?

Yes, unless the practice is consistent with the provisions of the student's IEP. If the IEP provides for ending the student's school day early under the circumstances involved, the portion of the day missed does not count as a disciplinary removal. Otherwise, it does.²³² Other states have criticized the practice of calling a parent in the middle of the school day to come to school to pick up a student due to behavior issues as "ineffective" and a possible violation of the student's access to a FAPE.²³³

128) If a teacher removes a student from an individual class period for behavioral infractions, does the missed class period count as a disciplinary removal?

It depends. If the teacher removes a student on only one occasion for a behavioral infraction, such removal will not count as a disciplinary removal. On the other hand, if the teacher removes a student on multiple occasions and a pattern of removal occurs, the missed class period would count as a disciplinary removal (see Questions 111-119).²³⁴

²³⁰ *In re Eagle Point Sch. Dist.* 9, No. 16-054-017, Final Order 6 (July 19, 2016); *In re Salem-Keizer Sch. Dist.* 24J, No. 16-054-003, Final Order 15 (Mar. 24, 2016); Executive Numbered Memo 009-2015-16—Reduced School Days 2 (Jan. 27, 2016).

²³¹ *In re La Grande Sch. Dist.*, No. 16-054-001, Final Order 9 (Mar. 18, 2016).

²³² *In re Colton Sch. Dist. No. 53*, No. 09-054-006, Final Order 14 (Apr. 20, 2009); *Dear Colleague Letter*, 116 LRP 33108 (OSEP 2016).

²³³ Oregon Executive Numbered Memo 009-2015-16—Reduced School Days at 2.

²³⁴ 34 CFR § 300.536.

Additionally, if the student's behavior impedes his or her learning or the learning of others, the IEP team must consider, and when necessary to provide FAPE, include in the student's IEP the use of positive behavioral interventions and strategies and other strategies, to address the student's behavior, regardless of the number of short-term removals that have occurred.²³⁵

129) If short removals are part of a student's behavioral intervention plan, are they counted as suspensions?

No. If the behavior plan is prepared in accordance with the student's IEP, the removals do not count as suspensions. But if the removals are implemented in a manner that denies the student the opportunity to progress in the educational program, the student may not be receiving a FAPE.²³⁶

130) Is "restarting the clock" still allowed?

In 1991, the Office for Special Education Programs ("OSEP") of the U.S. Department of Education issued a letter that created the so-called "restarting the clock" rule.²³⁷ This rule allowed the district to restart the ten-day removal "clock" when there was a significant change in placement during the school year.

In a letter issued in 1999, however, OSEP indicated that "restarting the clock" is no longer appropriate.²³⁸ In determining the total number of days of disciplinary removal in a school year, OSEP explained, the district should apply the "pattern of exclusion" test. (See Questions 111-119.)

²³⁵ *Dear Colleague Letter*, 116 LRP 33108 (OSEP 2016).

²³⁶ 64 Fed Reg at 12479 (Mar. 12, 1999).

²³⁷ *Letter to Rhys*, 18 IDELR 217 (OSEP 1991).

²³⁸ *Letter to Zirkel*, 31 IDELR 138 (OSEP 1999).

IDEA: Use of 45-Day Interim Alternative Educational Settings

131) What is an IAES?

An IAES is an alternative setting where students with disabilities can be placed for up to 45 school days for certain types of misconduct. It is one of the most powerful disciplinary tools available to school officials. A student may be sent to an IAES by school personnel for drug or weapons violations or the infliction of serious bodily injury or by a hearing officer in a due process proceeding for "injurious behavior" (behavior that is substantially likely to result in injury to the student or others).

132) What services must be provided in an IAES?

School personnel must ensure that an IAES includes services that will enable the student to:

- a. Continue to participate in the general curriculum, although in another setting; and
- b. Progress toward achieving the student's IEP goals.²³⁹

The district is not required to provide all services in a student's IEP when the student is removed to an IAES. The IEP team should make an individualized decision for each student regarding the type and intensity of services to be provided in the IAES.²⁴⁰

133) Under what circumstance may a student be sent to an IAES and for how long?

A student with a disability may be sent to an IAES by one of two means:

- a. School personnel may order a student to an IAES for up to 45 school days for a weapons or drug violation or for infliction of serious bodily injury.²⁴¹ A 45-day placement in an IAES cannot be extended or renewed in connection with the same offense.²⁴²
- b. In a due process proceeding, a hearing officer may order a student to an IAES for up to 45 school days for behavior that is substantially likely to result in injury to the student or others.²⁴³ Extensions of this type of IAES, in increments of up to 45 school days, may be obtained from the hearing officer by showing (in an additional hearing) that returning the student to his or her previous placement would be dangerous.²⁴⁴

A disabled student may not be placed in an IAES longer than a nondisabled student would be removed from school for the same infraction.²⁴⁵

²³⁹ 34 CFR § 300.530(d).

²⁴⁰ *Questions and Answers on Discipline Procedures*, 52 IDELR 231(OSERS 2009), Q/A C-3.

²⁴¹ 34 CFR § 300.530(g).

²⁴² *Letter to Bachman*, 29 IDELR 1092 (OSEP 1997).

²⁴³ 34 CFR § 300.532(b)(2)(ii).

²⁴⁴ 34 CFR § 300.532(b)(3).

²⁴⁵ *Letter to Bachman*, 29 IDELR 1092 (OSEP 1997).

134) What are the roles of school personnel, the IEP team, and a hearing officer regarding an IAES?

The roles of school personnel, the IEP team, and a hearing officer differ depending on the basis for removal to the IAES.

	Drug Violation, Weapons Violation, or Infliction of Serious Bodily Injury	Dangerousness ("Injurious Behavior")
Who decides whether a student will be placed in an IAES?	School personnel	Hearing officer
Who selects the location of the IAES?	IEP team	Hearing officer
Who recommends a specific placement to a hearing officer?	N/A	The IEP team. ²⁴⁶ (The hearing officer may modify or change the IAES proposed.)

135) Is the maximum length of an IAES measured in school days or calendar days?

Based on a significant change to the IDEA in 2004, the maximum length of an IAES is now measured in school days, not calendar days.²⁴⁷

136) May an IAES carry over to the following school year?

Yes. Nothing precludes the district from requiring the student to fulfill the remainder of an IAES placement when a new school year begins.²⁴⁸

²⁴⁶ 34 CFR § 300.531.

²⁴⁷ 34 CFR § 300.530(g).

²⁴⁸ 71 Fed Reg at 46722 (Aug. 14, 2006).

IDEA: IAES for Weapons or Drug Violations or Infliction of Serious Bodily Injury

137) When may school personnel impose an IAES?

School personnel may order a student with a disability to an IAES for the same amount of time that a student without a disability would be subject to removal—in no event more than 45 school days—if the student while at school, on school premises, or at a school function under the jurisdiction of the state education agency or any school district:

- a. Commits a weapons violation;
- b. Commits a drug violation; or
- c. Inflicts serious bodily injury on another person.²⁴⁹

For purposes of an IAES, the violations must satisfy the definitions of these terms in the IDEA regulations, not merely the definitions in district policy.

138) Who selects the location for this type of IAES?

The location is selected by the student's IEP team.²⁵⁰

139) What constitutes a "weapons violation" for purposes of an IAES?

A "weapons violation" is carrying a weapon to, or acquiring a weapon at, school or a school function.²⁵¹

140) What is a "weapon" for purposes of placement in an IAES?

A "weapon," for the purpose of placing a student in an IAES, is 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 it does not include a pocket knife with a blade of fewer than 2½ inches in length.²⁵²

Some examples of a "weapon" from recent cases include:

- A "shank" held to the throat of another student is a weapon, despite the "pocket knife" exception, because it is not a pocket knife.²⁵³
- A cigarette lighter with a retractable blade is a weapon, without regard to the length of the blade, because it is not a pocket knife.²⁵⁴
- A 12-inch knife used to threaten another student is a weapon.²⁵⁵

²⁴⁹ 34 CFR § 300.530(g).

²⁵⁰ 34 CFR § 300.531.

²⁵¹ 34 CFR § 300.530(g)(1).

²⁵² 18 USC § 930(g)(2).

²⁵³ *Tehachapi Unified Sch. Dist.*, 41 IDELR 20 (SEA CA 2004).

²⁵⁴ *Chester Upland Sch. Dist.*, 35 IDELR 104 (SEA PA 2001).

²⁵⁵ *Sierra Sands Unified Sch. Dist.*, 32 IDELR 78 (SEA CA 1999).

- A paper clip used to cut another student's throat is not a weapon if there is no intent to cause death or serious injury.²⁵⁶
- A pencil is not a weapon if the stabbing of another student is unintentional.²⁵⁷
- A paintball gun is not a weapon if it is not used to cause death or serious injury.²⁵⁸
- A pair of small scissors with rounded tips is not a weapon if it is merely pointed at another student.²⁵⁹

141) What is a "drug violation" for purposes of placement in an IAES?

A drug violation includes the use, possession, sale, or solicitation of drugs at school or a school function.²⁶⁰

142) What is a "drug" for purposes of an IAES?

For purposes of placement in an IAES for a drug violation, the term "drug" means an illegal drug or controlled substance but does not include a substance that is legally possessed or used under the supervision of a licensed healthcare professional or otherwise legally possessed.²⁶¹

Prescription drugs

This definition of "drug" excludes prescription medication for which a student has a valid prescription and that the student merely possesses or uses as prescribed by a licensed healthcare professional. But because prescription medications generally fall within the definition of controlled substances, the sale or distribution of prescription medication constitutes a "drug violation" even if the student has a valid prescription for the drug.²⁶²

Over-the-counter drugs

The use, possession, or sale of over-the-counter drugs may result in discipline under district policy or school rules. Such misconduct, however, does not allow school personnel to order a student to an IAES for a drug violation.

Alcohol and tobacco

Alcohol and tobacco do not qualify as illegal drugs or controlled substances.²⁶³ Alcohol or tobacco use may result in discipline under district policy or school rules but does not allow school personnel to place a student in an IAES under the IDEA provision relating to illegal drug or controlled substance violations.

²⁵⁶ *Anaheim Union High Sch. Dist.*, 32 IDELR 129 (SEA CA 2000).

²⁵⁷ *Independent Sch. Dist. # 831*, 32 IDELR 163 (SEA MN 1999).

²⁵⁸ *Independent Sch. Dist. #279, Osseo Area Sch.*, 30 IDELR 645 (SEA MN 1999).

²⁵⁹ *California Montessori Project*, 111 LRP 33567 (SEA CA 2011).

²⁶⁰ 34 CFR § 300.530(g)(2).

²⁶¹ 34 CFR § 300.530(i)(2).

²⁶² 34 CFR § 300.530(i)(1).

²⁶³ *Id.*

143) What constitutes "serious bodily injury" for purposes of removal to an IAES?

For purposes of removal to an IAES on the grounds of "infliction of serious bodily injury," the term "serious bodily injury" is defined as an injury that involves:

- A 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 facility.²⁶⁴

To qualify for an IAES on this basis, the injury must be severe. Minor injuries are not sufficient.²⁶⁵

144) Can school personnel place a student in an IAES if the student intended to cause serious injury to another but failed?

No. A serious injury must actually be inflicted. But the district may have grounds to seek an order allowing an IAES from a hearing officer or a *Honig* injunction from a court. (See Questions 150-160.)

145) May a parent object to an IAES ordered by school personnel?

Yes. A parent may object to an IAES and may request a due process hearing on the issue. The student will remain in the IAES, however, until the time limit has expired or the hearing officer renders an opinion favoring the parent, whichever occurs first. The parent will be entitled to an expedited hearing.²⁶⁶ (See Question 184).

146) May a parent invoke the 10-day objection rule to prevent a student's placement in an IAES?

No. Idaho has an administrative rule that allows a parent or adult student who disagrees with an IEP or placement change by a district to file a written objection within ten days after receiving Written Notice of the proposed change. If a written objection is received, the change cannot be implemented for 15 days or, if the parent files for a due process hearing, the student will remain in the current educational placement pending the outcome of the hearing. However, the administrative rule specifically provides that the written objection cannot be used to prevent a school district from placing the student in an IAES.²⁶⁷

²⁶⁴ 34 CFR § 300.530(i)(3); 18 USC § 1365(h)(3).

²⁶⁵ *Bisbee Unified Sch. Dist. No. 2*, 110 LRP 7292 (SEA AZ 2010).

²⁶⁶ 34 CFR § 300.532(c); *Questions and Answers on Discipline Procedures*, 52 IDELR 231(OSERS 2009), Q/A F-4.

²⁶⁷ IDAPA 08.02.03.109.05.a.

147) Is a manifestation determination required for an IAES placement for weapons or drug violations or infliction of serious bodily injury?

Yes. Whenever school personnel orders a student to an IAES for a weapons or drug violation or for infliction of serious bodily injury, a manifestation determination must be conducted within ten school days of the decision to remove the student to the IAES.²⁶⁸ (See Questions 161-170.)

Although a manifestation determination review is required, an IAES may be implemented regardless of the review's outcome. The student may be removed to the IAES even if the behavior is determined to be related to the student's disability.²⁶⁹ (See Questions 171-175.)

148) What behavioral assessments and interventions are required when school personnel remove a student to an IAES for a weapons or drug violation or the infliction of serious bodily injury?

Whenever school personnel order a student to an IAES for a weapons or drug violation or the infliction of serious bodily injury, the district must provide through the IEP team process, as appropriate, a functional behavioral assessment and behavior intervention services and modifications that are designed to address the behavior violation so that it does not recur.²⁷⁰

149) What notice must be provided to parents in connection with an IAES placement for weapons or drug violations or infliction of serious bodily injury?

On the date on which the decision is made to remove the student to an IAES, the district must notify the parent of that decision and provide the parent with notice of the procedural safeguards.²⁷¹

²⁶⁸ 34 CFR § 300.530(e).

²⁶⁹ 34 CFR § 300.530(g).

²⁷⁰ 34 CFR § 300.530(d)(1)(ii).

²⁷¹ 34 CFR § 300.530(h).

IDEA: IAES for "Injurious Behavior"

150) When may a hearing officer order a student to an IAES?

A district may request an expedited due process hearing to obtain an order from a hearing officer removing a student to an IAES for up to 45 school days due to "injurious behavior."²⁷²

151) What must a district prove to the hearing officer to obtain this type of IAES?

The district must prove that the student has engaged in behavior that is substantially likely to result in injury to the child or others.²⁷³ Typically, a district will need to show physical acts, not just verbal threats. A hearing officer is likely to consider the nature, extent, and frequency of a student's conduct. The district should review a student's disciplinary history and other school records for past violent or dangerous conduct and provide such records to the hearing officer.²⁷⁴

152) Who selects the IAES, and what criteria must it meet?

The hearing officer makes the final decision regarding an appropriate IAES, but the district, should propose an IAES and be prepared to support its appropriateness at the hearing. Best practice is to have the student's IEP team select the proposed setting.²⁷⁵ The proposed IAES must enable the student to continue to participate in the general curriculum, although in a different setting, and progress toward achieving the student's IEP goals.²⁷⁶

153) May a district ask a hearing officer to extend an IAES placement for injurious behavior?

Yes. The procedures described above may be repeated to obtain an extension of the IAES if the district believes that returning the student to the original placement is substantially likely to result in injurious behavior. Each extension requires a new hearing and is limited to a maximum of 45 school days.²⁷⁷

154) Is a manifestation determination required for removal to an IAES by a hearing officer for injurious behavior?

No. Unlike a removal to an IAES by the school district, a removal by a hearing officer does not require a manifestation determination.²⁷⁸

²⁷² 34 CFR § 300.532(b).

²⁷³ OSEP Memorandum 97-7, 26 IDELR 981 (OSEP 1997); 43 Fed Reg at 12,621 (1999).

²⁷⁴ See, *Oakland Unified School District*, 117 IDELR 35681 (SEA CA 2017).

²⁷⁵ If the IEP team is unable to reach consensus, the school team would make a recommendation for an appropriate IAES.

²⁷⁶ 34 CFR § 300.530(d).

²⁷⁷ 34 CFR § 300.532(b)(3); 64 Fed Reg at 12,648 (1999) ("There is no statutory limit on the number of times this procedure may be invoked in any individual case, and none is added to this regulation. If, after a 45-day extension of an IAES under paragraph (c) of this section, an LEA maintains that the child is still dangerous and the issue has not been resolved through due process, the LEA may seek subsequent expedited due process hearings.")

²⁷⁸ 34 CFR § 300.532(e).

155) Are a functional behavioral assessment and a behavior intervention plan required for an IAES placement ordered by a hearing officer?

No. These obligations are triggered by a manifestation determination, which is not required for an IAES ordered by a hearing officer based on injurious behavior.²⁷⁹ Best practice, however, would call for completion of a functional behavioral assessment and development of a behavior intervention plan for a student whose behavior is substantially likely to result in injury to the student or others. Further, the student's IEP team must consider positive behavior interventions and supports and other strategies if the student's behavior impedes his or her learning or the learning of others.²⁸⁰

²⁷⁹ 34 CFR § 300.532(f).

²⁸⁰ 34 CFR § 300.324(a)(2)(i).

IDEA: *Honig* Injunction

156) For removing dangerous students, is there an alternative to requesting an IAES from a hearing officer?

Yes. If the district believes that a student is too dangerous to remain in his or her current placement, the district may seek a court order (commonly called a *Honig* injunction²⁸¹) changing the student's placement or barring the student from attending school. The district may seek a *Honig* injunction in lieu of requesting an IAES from a hearing officer.²⁸²

157) What is the procedure for obtaining a *Honig* injunction?

The first step in obtaining a *Honig* injunction for the district is to file an action for injunctive relief in federal or state court. After the action is filed, the district may immediately apply for a temporary restraining order ("TRO") which, if granted, will remove the student from his or her current placement pending further hearings. Notice to the student or the student's parent need not be given before asking a court for a TRO if:

- a. It clearly appears from specific facts shown that the district will sustain immediate and irreparable injury, loss, or damage before the student can be heard in opposition; and
- b. The district's attorney informs the court of the efforts, if any, that have been made to give notice to the student and the reasons supporting the district's claim that notice should not be required.²⁸³

If a TRO is granted without notice, the court will schedule a hearing on the motion for a preliminary injunction for the earliest possible time.²⁸⁴

When requesting a TRO, the district will need to establish the following:

- (1) That the district will suffer irreparable injury unless the injunction is issued.
- (2) That the threatened injury to the district outweighs whatever damage the proposed injunction may cause the student.
- (3) That the injunction, if issued, would not be adverse to the public interest.
- (4) That there is a substantial likelihood that the district will eventually prevail on the merits.²⁸⁵

The next step is a hearing on the district's motion for a preliminary injunction.²⁸⁶ At this stage, the district will ask the court to issue the *Honig* injunction under terms and for a period that the

²⁸¹ The term "Honig injunction" is based on the U.S. Supreme Court case of *Honig v. Doe*, 484 US 305, 108 S Ct 592, 98 L Ed 2d 686 (1988), in which the Court affirmed a school district's right to seek injunctive relief to remove a dangerous student from his current educational setting.

²⁸² *OSEP Memorandum 97-7*, 26 IDELR 981 (OSEP 1997); 43 Fed Reg at 12,621 (1999).

²⁸³ Fed R Civ P 65(b).

²⁸⁴ Fed R Civ P 65(b).

²⁸⁵ *Alford v. Sch. Bd. of Collier Cty.*, 24 IDELR 239 (MD Fla 1996).

²⁸⁶ Fed R Civ P 65(b).

court determines to be appropriate. Both parties will have an opportunity to appear and be heard.

158) What will the district have to prove to the court when seeking a *Honig* injunction?

In addition to the statutory requirements for an injunction, the district must show the following:

- a. That maintaining the student in the current placement is substantially likely to result in injury to the student or others.
- b. That the district has done all that it reasonably can to reduce the risk of the student's causing injury.²⁸⁷

Courts generally have not required that the district conduct a functional behavioral assessment or develop a behavioral intervention plan in order to obtain an injunction. Even so, a functional behavioral assessment and a behavioral intervention plan may be helpful in showing the court the reasonable efforts that the school has made to reduce the risk of harm.

The decision to issue an injunction is within the court's discretion.

159) What documentation will be necessary for a *Honig* injunction?

To receive a *Honig* injunction, a district and its attorney need the following two critical items:

- a. In-depth documentation establishing the student's dangerousness—not only documentation of the action causing the request for the injunction, but also documentation of the student's previous actions; and
- b. Documentation of the actions taken by the school to prevent the problem behavior, such as implementing a functional behavioral assessment, behavioral intervention plans, safety plans, and positive behavioral interventions and supports and other strategies.

160) What educational services must be provided if a *Honig* injunction is granted?

If a *Honig* injunction is granted, the student must receive a FAPE, including services necessary to enable the student to participate in the general curriculum and progress toward meeting the student's IEP goals. Courts have given schools broad discretion in selecting the setting in which the services will be provided.

²⁸⁷ *Honig*, 484 US 305; *Light v. Parkway C-2 Sch. Dist.*, 41 F3d 1223 (8th Cir 1994).

IDEA: Manifestation Determination

161) What is a "manifestation determination"?

A "manifestation determination" is a team review of relevant information and "determination" of whether or not the conduct in question is a "manifestation" of the student's disability.²⁸⁸

162) Who makes the "manifestation determination"?

The federal regulations require that a team consisting of a district representative, the parent, and other relevant members of the student's IEP team "as determined by the parent and the district" conduct the manifestation determination.²⁸⁹

Because the team may need to make other decisions following the manifestation determination (e.g., decide what services should be provided during a long-term removal), the most efficient practice is to have the manifestation determination conducted by a full IEP team.

163) What happens if the team cannot reach consensus on the manifestation determination?

If the members of the IEP team cannot reach consensus²⁹⁰ on whether the student's behavior was or was not a manifestation of the disability, the district is ultimately responsible for ensuring a FAPE and must make the determination and provide the parent with prior written notice of the decision.²⁹¹

The Idaho Special Education Manual (2017) outlines the process for an IEP team to follow in the event there is a lack of consensus among IEP team members:

If there is a lack of consensus between the parent/adult student, district personnel, and other IEP team members regarding an IEP decision, then school personnel on the IEP team should seek consensus within the school team and make the decision providing written notice to the parent/adult student. If there is a lack of consensus among school personnel, then the district representative on the IEP team shall make the decision and provide written notice to the parent/adult student.²⁹²

²⁸⁸ 34 CFR § 300.530(e).

²⁸⁹ 34 CFR § 300.530(e).

²⁹⁰ The Idaho Special Education Manual (2017), p. 80 defines "consensus as "consent of all IEP team members to support the decision of the team, which requires that all members of the team have had an opportunity for meaningful participation."

²⁹¹ *Letter to Richards*, 55 IDELR 107 (OSEP 2010); *Questions and Answers on Discipline Procedures*, 52 IDELR 231 (OSERS 2009), Q/A F-1.

²⁹² Idaho Special Education Manual (2017), p. 80.

164) When must a manifestation determination be conducted?

A manifestation determination must be conducted within ten school days of any decision to change the placement of a student with a disability because of a violation of a code of student conduct.²⁹³ (See Question 107.)

165) May a school district elect to conduct a manifestation determination even when no decision for a change in placement has occurred?

Yes. Schools may perform a manifestation determination anytime a child exhibits maladaptive behavior but are not required to perform one unless a proposed removal would constitute a disciplinary change in placement.²⁹⁴

166) How is a manifestation determination conducted?

The team must review all relevant information relating to the student's file. Relevant information includes (a) the student's IEP, (b) any teacher observations, and (c) any relevant information provided by the parent.²⁹⁵ This list of relevant information is not intended to be exhaustive. Other relevant information should be considered.²⁹⁶

After considering the relevant information, the team must consider the following statements. If either statement is answered "yes," the team must determine that the conduct was a manifestation of the student's disability.²⁹⁷

Manifestation Determination Questions	Yes	No
a. The conduct in question was caused by, or had a direct and substantial relationship to, the student's disability. ²⁹⁸		
b. The conduct in question was the direct result of the district's failure to implement the student's IEP. ²⁹⁹		

Congress has emphasized that the manifestation determination is to be conducted "carefully and thoroughly with consideration of any rare or extraordinary circumstances presented." Further, "if a change in placement is proposed, the manifestation determination will analyze the child's behavior as demonstrated across settings and across time when determining whether the conduct in question is a direct result of the disability."³⁰⁰

The manifestation determination must be made on a case-by-case basis to determine whether the student's conduct was a manifestation of his or her disability, and to determine that "the

²⁹³ 34 CFR § 300.530(e)(1).

²⁹⁴ *Avila v. Spokane Sch. Dist. #81*, 64 IDELR 171 (ED Wash 2014), aff'd, 69 IDELR 204 (9th Cir 2017) (unpublished).

²⁹⁵ 34 CFR § 300.530(e)(1).

²⁹⁶ 71 Fed Reg at 46719 (Aug. 14, 2006).

²⁹⁷ 34 CFR § 300.530(e)(2).

²⁹⁸ 34 CFR § 300.530(e)(1)(i).

²⁹⁹ 34 CFR § 300.530(e)(1)(ii).

³⁰⁰ 71 Fed Reg at 46720 (Aug. 14, 2006) (quoting HR Rep No. 108-779 (2004), at 224-25 (237)-(245)).

conduct in question was caused by, or had a direct and substantial relationship to, the child's disability, and was not an attenuated association, such as low self-esteem, to the child's disability."³⁰¹

The U.S. Department of Education endorsed language indicating that a manifestation determination team should "analyze the child's behavior as demonstrated across settings and across time when determining whether the conduct in question is a direct result of the disability."³⁰²

A common issue in manifestation determination, when impulsivity is a feature of the student's disability, is whether the behavior in question was impulsive. Recent cases have concluded that behavior was not impulsive, and therefore not a manifestation of the student's disability, if evidence establishes that the student was able to control his behavior when he wanted to,³⁰³ engaged in advance planning of the behavior,³⁰⁴ or took a series of thoughtful and carefully planned steps over a long period of time before engaging in the behavior.³⁰⁵ In a recent Oregon case, behavior was found to not be a manifestation of the disability, even though impulsivity "played some part," because there were other more important factors.³⁰⁶

The IDEA no longer requires that the appropriateness of the student's IEP and placement be considered when making a manifestation determination.

If the basis for the team's determination is that the district did not implement the student's IEP, the district must take immediate steps to remedy those deficiencies.³⁰⁷

167) What disciplinary actions may be taken if the student's misconduct was a manifestation of his or her disability?

If either question in Question 166 is answered "yes," the team must find that the behavior was a manifestation of the student's disability, in which case school personnel are limited to disciplinary actions that do not constitute a change in placement. Yet a student may be placed in an IAES by school personnel for drug violations, weapons violations, or infliction of serious bodily injury, regardless of whether the misconduct was a manifestation of the student's disability.³⁰⁸

³⁰¹ 71 Fed Reg at 46720 (Aug. 14, 2006) (quoting HR Rep No. 108-779, at 225 ((237)-(245))).

³⁰² Id.

³⁰³ *Moses Lake Sch. Dist., Special Education Cause No. 2012-SE-0019X* (SEA WA 4/17/12).

³⁰⁴ *Dep't of Educ., State of Haw.*, 56 IDELR 115 (SEA HI 2010).

³⁰⁵ *Pooway Unified Sch. Dist.*, 55 IDELR 153 (SEA CA 2010).

³⁰⁶ *In re Student & Lake Oswego Sch. Dist.*, No. DP 09-127E, at 13 (LEA OR 1/26/10).

³⁰⁷ 34 CFR § 300.530(e)(3).

³⁰⁸ 34 CFR § 300.530(g).

Further, if the reason a manifestation determination is found to exist is because the student's conduct in question was a direct result of the district's failure to implement the student's IEP, the identified deficiencies must be remedied immediately.³⁰⁹

168) What additional actions must be taken if the student's conduct is determined to be a manifestation of the student's disability?

If the team concludes that the misconduct was a manifestation of the student's disability, the team must:

- a. Conduct a functional behavioral assessment (unless one had previously been conducted before the behavior that resulted in the change in placement occurred) and implement a behavior intervention plan for the student; or
- b. If a behavior intervention plan has already been developed, review the plan and modify it as necessary to address the behavior.³¹⁰

Additionally, before the exclusion exceeds the "significant change in placement" threshold, the student must be returned to the placement from which he or she was removed, unless (1) the parent and the school district agree to a change in placement, (2) the district removes the student to a 45-day IAES for a weapons or drug violation or for infliction of serious bodily injury, (3) the district obtains an order from a hearing officer allowing a change in placement to an IAES for dangerous behavior or (4) the district obtained a *Honig* injunction from a court.

169) What disciplinary actions may be taken if the student's misconduct was not a manifestation of his or her disability?

If the team determines that the misconduct was not a manifestation of the student's disability, the district may discipline the student in the same manner and for the same duration as a nondisabled student.³¹¹

If the district decides to take such an action, notice to the parent is required. On the date on which the decision is made, the district must notify the parent of the decision and his or her procedural safeguards.³¹²

Services must also be provided during the removal. The student's IEP team must ensure that the student (a) continues to receive educational services to enable the student to participate in the general education curriculum, although in a different setting, and progress toward meeting his or her IEP goals and (b) receives, as appropriate, a functional behavioral assessment and behavior intervention services and modifications designed to address the behavior violation so that it does not recur.³¹³

³⁰⁹ 34 CFR § 300.530(f).

³¹⁰ 34 CFR § 300.530(f).

³¹¹ 34 CFR § 300.530(c).

³¹² 34 CFR § 300.530(h).

³¹³ 34 CFR § 300.530(d).

170) Does the IEP team have a role if the misconduct has been determined not to be a manifestation of the student's disability?

Yes. The IEP has various responsibilities to fulfill whenever a student's misconduct is determined not to be a manifestation of the student's disability, including the following:

- a. The IEP team must ensure that the student receives, "as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur."³¹⁴
- b. The IEP team determines services "to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP."³¹⁵
- c. The IEP team "determines the interim alternative educational setting for services."³¹⁶

³¹⁴ 34 CFR § 300.530(d)(1)(ii).

³¹⁵ 34 CFR § 300.530(d)(1)(i).

³¹⁶ 34 CFR § 300.531.

IDEA: Functional Behavioral Assessment ("FBA") and Behavior Intervention Plan ("BIP")

171) When are an FBA and a BIP required?

A functional behavioral assessment and a behavior intervention plan come into play in at least four situations:

- a. When a manifestation determination reveals that the student's conduct was a manifestation of the student's disability. In that case, an IEP team must either (1) conduct a functional behavioral assessment, unless the district conducted one before the behavior in question occurred, and implement a behavior intervention plan, or (2) if the student already has a behavior intervention plan, review the plan and modify it, as necessary, to address the behavior.³¹⁷
- b. When it is determined that behavior is not a manifestation of the student's disability, allowing the district to discipline the student in the same manner as a nondisabled student. In that case, the district must provide, as appropriate, a functional behavioral assessment and behavior interventions designed to address the behavior violation so that it does not recur.³¹⁸
- c. When a student's behavior impedes his or her learning or that of others. In that case, the IEP team must consider the use of positive behavior interventions and other strategies to address the behavior.³¹⁹
- d. Proactively in those instances in which the IEP team determines that an FBA and BIP would be appropriate for a student.³²⁰

172) Is parental consent required before conducting a functional behavioral assessment?

In most cases, yes. The OSEP has stated that parental consent is necessary whenever a functional behavioral assessment is intended to evaluate the educational and behavioral needs of a specific student as part of an initial evaluation or a reevaluation.³²¹ On the other hand, if a functional behavioral assessment is used as a methodology within a school to improve the behavior of all students, it would generally not be considered an evaluation requiring parental consent.³²²

³¹⁷ 34 CFR § 300.530(d).

³¹⁸ 34 CFR § 300.530(d)(ii).

³¹⁹ 34 CFR § 300.324(a)(2)(i).

³²⁰ *Questions and Answers on Discipline Procedures*, 52 IDELR 231(OSERS 2009), Q/A E-1.

³²¹ *Questions and Answers on Discipline Procedures*, 52 IDELR 231(OSERS 2009), Q/A E-4.

³²² *Letter to Christiansen*, 48 IDELR 161 (OSEP 2007).

173) Who is qualified to conduct a functional behavioral assessment?

The federal statute and regulations do not specify which individuals must or can conduct an FBA. There is no requirement that a board-certified behavioral analyst or any other specific individual conduct the FBA and Idaho law does not impose such a requirement.³²³

174) If a student's IEP already contains behavior strategies, must a separate behavior intervention plan be created?

An IEP team may include strategies to deal with a student's behavior—including positive behavioral interventions, strategies, and supports—in an IEP before these strategies are required by the IDEA. If circumstances ever require the creation or review of a behavioral intervention plan, the proactive strategies outlined in the student's IEP for addressing behavior that impedes learning for that student or others will constitute the behavioral intervention plan.³²⁴ The IEP team must then review and modify, as necessary, these strategies to address the student's behavior.³²⁵

175) May short removals be used as part of a student's behavioral intervention plan?

In appropriate circumstances, the IEP team may determine that a student's behavioral intervention plan should include the following as part of a comprehensive plan to address the student's behavior:

- a. Specific regular or alternative disciplinary measures (such as denial of certain privileges or short removals) that would result from particular infractions of school rules; and
- b. Positive behavior intervention strategies and supports.

If short removals are included in a student's behavior intervention plan, care must be taken to avoid disconnecting the student from education to the point that the removals constitute a denial of a FAPE.³²⁶

³²³ *Letter to Janssen*, 51 IDELR 253 (OSERS 2008).

³²⁴ 64 Fed Reg at 12620 (1999).

³²⁵ 34 CFR § 300.530(f)(1)(ii).

³²⁶ 64 Fed Reg at 12479 (1999).

IDEA: Continuation of Educational Services During Removals

176) Must educational services be provided to a student who is suspended or expelled beyond ten cumulative school days?

Yes. After a student with a disability has been removed for ten cumulative or consecutive school days in a school year, services must be provided during any subsequent days of removal during that school year.³²⁷

177) What services are required?

The student must continue to receive educational services that enable the student to continue to participate in the general educational curriculum, although in another setting, and to progress toward meeting his or her IEP goals.³²⁸

In addition, if the removal constitutes a "significant change in placement" (exceeds ten consecutive school days, creates a pattern of removal or is a placement in an IAES), the student must receive, as appropriate, a functional behavioral assessment and behavior intervention services and modifications that are designed to address the behavior violation so that it does not recur.³²⁹

Although a FAPE must be available to a student with a disability who has been suspended for more than ten days in a school year, the U.S. Department of Education has emphasized that it reads the IDEA as modifying the concept of a FAPE in circumstances in which a student is removed from his or her current placement for disciplinary reasons. "In other words, while children with disabilities removed for more than 10 school days in a school year for disciplinary reasons must continue to receive FAPE, we believe the Act modifies the concept of FAPE in these circumstances to encompass those services necessary to enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child's IEP."³³⁰

The nature and extent of services to be provided will depend on the circumstances, including the length of the removal, the extent of previous removals, and the student's needs and educational goals. "For example, a child who is removed for a short period of time and who is performing at grade level may not need the same kind and amount of services to meet this standard as a child who is removed from his or her regular placement for 45 days under § 300.530(g) or § 300.532 and not performing at grade level."³³¹

³²⁷ 34 CFR § 300.530(b)(2).

³²⁸ 34 CFR § 300.530(d)(1)(i).

³²⁹ 34 CFR § 300.530(d)(1)(ii).

³³⁰ 71 Fed Reg at 46716.

³³¹ *Id.*

178) To enable the student to "continue to participate in the general education curriculum," must the district provide all of the services the student was receiving prior to the disciplinary removal?

No. The U.S. Department of Education has commented that the opportunity to continue to "participate" in the general education curriculum does not require the district to replicate all the services that the student was receiving before the discipline was imposed.

"We caution that we do not interpret 'participate' to mean that a school or district must replicate every aspect of the services that a child would receive if in his or her normal classroom. For example, it would not generally be feasible for a child removed for disciplinary reasons to receive every aspect of the services that a child would receive if in his or her chemistry or auto mechanics classroom as these classes generally are taught using a hands-on component or specialized equipment or facilities."³³²

179) Who decides what services will be provided?

It depends on whether the removal constitutes a "significant change in placement." (See Question 107.)

Removal will not constitute a change in placement

School personnel, in consultation with at least one of the student's teachers, determine the extent to which educational services are needed to enable the student to continue to participate in the general education curriculum, although in another setting, and progress toward meeting the goals set out in the student's IEP.³³³

The federal regulations do not specify whether the teacher should be a special education or general education teacher. The determination of which teachers should be consulted should be based on the circumstances of each situation, the student's needs, and the expertise of the student's teachers.³³⁴

Removal will constitute a change in placement

If the removal will constitute a change in placement, the student's IEP team must determine the extent to which services are necessary to enable the student to participate in the general education curriculum and progress toward meeting the goals in his or her IEP.³³⁵

180) Must a parent be consulted when the district determines the educational services to be provided during disciplinary removals that are not a change in placement?

No. There is no federal or state requirement that a parent must be consulted.

³³² *Id.*

³³³ 34 CFR § 300.530(d)(4).

³³⁴ 71 Fed Reg at 46718 (Aug. 14, 2006).

³³⁵ 34 CFR § 300.530(d)(5).

IDEA: Parent Appeals

181) May a parent appeal special education disciplinary decisions?

Yes. A parent may request a due process hearing to challenge a disciplinary decision if he or she disagrees with:

- a. The IEP team's determination that the student's behavior was not a manifestation of the student's disability; or
- b. Any decision involving a change in placement for disciplinary reasons.³³⁶

The purpose of this appeal is not to challenge the merits of the disciplinary decision. Any controversy regarding whether the student is guilty of the alleged misconduct or whether the proposed disciplinary action is appropriate under district policy should be addressed through the district's usual disciplinary process.

182) If a parent appeals, who has the burden of proof?

In a due process proceeding, the moving party bears the burden of proof.³³⁷ Accordingly, the parent would have the burden of proof in an appeal of a disciplinary action under the IDEA.³³⁸

183) Who conducts the due process hearing?

The due process hearing is conducted by an impartial, state-appointed hearing officer, who must not be an employee of the state department of education or any school district and must not have any professional or personal interest that would conflict with his or her objectivity in the hearing.³³⁹

184) Does the parent have a right to an expedited due process hearing?

Yes. When appealing a disciplinary decision under the IDEA, the parent is entitled to an expedited due process hearing.³⁴⁰ The expedited nature of the due process hearing regarding a disciplinary change in placement is mandatory. A hearing officer may not extend the timeline for issuing a decision, even if the parties to the hearing mutually agree to a longer time period.³⁴¹

185) What are the procedures for an expedited hearing?

An expedited due process hearing must occur within 20 school days of the date on which the hearing is requested and result in a written determination within 10 school days after the hearing is concluded.³⁴²

³³⁶ 34 CFR § 300.532.

³³⁷ *Schaffer v. Weast*, 546 US 49, 126 S Ct 528, 163 L Ed 2d 387, 44 IDELR 150 (2005).

³³⁸ 71 Fed Reg at 46723 (Aug. 14, 2006).

³³⁹ 34 CFR § 300.511(c).

³⁴⁰ 34 CFR § 300.532(a).

³⁴¹ *Letter to Snyder*, 116 LRP 6063 (OSEP 2015); 34 CFR § 300.532(c).

³⁴² 34 CFR § 300.532(c)(2).

The parties must attend a resolution meeting unless both parties agree in writing to waive the resolution meeting. Unless waived, a resolution meeting must occur within seven calendar days from the date on which the hearing request is filed.³⁴³ A resolution meeting provides an opportunity for the parties to resolve their disagreement regarding a disciplinary placement or manifestation determination before the hearing.³⁴⁴ The parties may elect to use mediation instead of a resolution meeting.³⁴⁵

If the issues outlined in the due process hearing request are not resolved to the satisfaction of both parties within 15 days of the hearing request, the due process hearing may proceed.³⁴⁶

If the parent does not participate in the resolution meeting, and the parties have not agreed in writing to waive the meeting, the due process timelines will be delayed until the resolution meeting is held.³⁴⁷ The school district may ask the hearing officer to dismiss the due process complaint if it is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made and documented and timelines have run.³⁴⁸ On the other hand, if the school district fails to hold a resolution meeting within seven calendar days of receiving notice of the parent's due process complaint, or fails to participate in a resolution meeting, the parent may ask the hearing officer to intervene and begin the expedited due process hearing timeline.³⁴⁹

186) May a due process hearing decision be appealed to court?

Yes. Either party aggrieved by the hearing officer's decision may appeal the decision by filing a civil action in federal or state court.³⁵⁰ In Idaho, the action must be filed within 42 calendar days of the date of the hearing officer's decision.³⁵¹

187) Where is the student's placement during the due process hearing procedure?

When a parent requests a due process hearing because of disagreement with a manifestation determination or a disciplinary removal, the student will remain in the disciplinary setting pending the hearing officer's decision, or until the end of the removal, whichever occurs first, unless the parent and the district agree otherwise.³⁵²

³⁴³ 34 CFR § 300.532(c)(3)(i).

³⁴⁴ 71 Fed Reg at 46725 (Aug. 14, 2006).

³⁴⁵ 34 CFR § 300.510(a)(3)(ii).

³⁴⁶ 34 CFR § 300.532(c)(3)(ii).

³⁴⁷ 34 CFR § 300.510(b)(3).

³⁴⁸ 34 CFR § 300.510(b)(4); 34 CFR § 300.532(c)(3).

³⁴⁹ 34 CFR § 300.510(b)(5).

³⁵⁰ 34 CFR § 300.516.

³⁵¹ IDAPA 08.02.03.109.05.g.

³⁵² 34 CFR § 300.533.

IDEA: Notification Requirements

188) What parental notification requirements apply to disciplinary actions?

In addition to any notices required by state law or district policy for the discipline of nondisabled students, two notification requirements may apply when a student with a disability is disciplined:

- Notification of an IEP team meeting; and
- Notification of a decision to take disciplinary action that constitutes a change in placement (with notice of procedural safeguards).

Notification of an IEP team meeting

A parent must be notified of each IEP team meeting early enough to ensure that he or she will have an opportunity to attend.³⁵³ In the disciplinary arena, an IEP team meeting may be required for:

- (1) The planning of a functional behavioral assessment;
- (2) The development, review, or modification of a behavioral intervention plan;
- (3) A manifestation determination, which may result in a student's change in placement;
- (4) The selection of an IAES placement; or
- (5) A determination of services to be provided during a removal that constitutes a change in placement.

Notification of a decision to take disciplinary action that constitutes a change in placement

If disciplinary action is contemplated that would constitute a change in placement, the parent must be notified of the decision and provided with notice of his or her procedural safeguards no later than the date on which the decision to take the action is made.³⁵⁴

Disciplinary changes in placement include:

- (1) Expulsion;
- (2) Removal for more than ten consecutive school days;
- (3) A series of suspensions that exceed ten cumulative days in a school year and create a pattern of removal; and
- (4) Placement in a 45-day IAES.

³⁵³ 34 CFR § 300.322.

³⁵⁴ 34 CFR § 300.530(h).

IDEA: Protection for General Education Students

189) What if a general education student facing disciplinary action asserts that he or she qualifies for special education?

A general education student facing disciplinary action may assert the procedural safeguards afforded to special education students if the district had "knowledge" that the student was a student with a disability before the misbehavior that precipitated the disciplinary action.³⁵⁵

190) When is the district deemed to have "knowledge" that a student has a disability?

A district is deemed to have "knowledge" that a student not yet eligible for special education is a student with a disability under these circumstances:

- a. A parent has expressed concern in writing, to supervisory or administrative personnel or a teacher of the student, that the student needs special education and related services.³⁵⁶
- b. A parent has requested an evaluation of the student for eligibility under the IDEA.³⁵⁷
- c. The student's teacher or other district personnel have expressed specific concerns about a pattern of behavior demonstrated by the student directly to the director of special education or other supervisory personnel.³⁵⁸

Once a student has been properly referred for an evaluation, the district is deemed to have knowledge that the student is a student with a disability for purposes of the IDEA's disciplinary provisions.³⁵⁹

191) When is the district not deemed to have "knowledge" of a disability?

Even if one of these circumstances exists, the district will not be deemed to have knowledge that a particular student has a disability if:

- a. The parent has not allowed the district to evaluate the student or has refused special education services,³⁶⁰
- b. The child has been evaluated for special education and was determined to be not eligible,³⁶¹ or
- c. The parent or adult student has revoked consent for the continued provision of special education and related services.³⁶²

³⁵⁵ 34 CFR § 300.534.

³⁵⁶ 34 CFR § 300.534(b)(1).

³⁵⁷ 34 CFR § 300.534(b)(2).

³⁵⁸ 34 CFR § 300.534(b)(3).

³⁵⁹ *Questions and Answers on Discipline Procedures*, 52 IDELR 231(OSERS 2009), Q/A F-5.

³⁶⁰ 34 CFR § 300.534(c)(1)(i).

³⁶¹ 34 CFR § 300.534(c)(2).

³⁶² 34 CFR § 300.534(c)(1)(ii).

In those instances in which a parent has refused to provide consent for an initial evaluation or has failed to respond to a request to provide consent, the school district may request a due process hearing but is not required to do so. If the school district elects not to file for a due process hearing, the district is not considered to be in violation of the requirement to provide the student with a FAPE.³⁶³ The district will not be deemed to have had knowledge of a disability.

In addition, the district will not be considered to have had knowledge of a disability if the student has been evaluated and it was determined that the student was not eligible. No time frame is provided in the federal regulations regarding when the previous evaluation occurred because "such restrictions are unnecessary and could have the unintended consequence of hindering the school's ability to appropriately discipline a child."³⁶⁴

The intent of Congress was to "ensure that schools can appropriately discipline students, while maintaining protections for students whom the school had valid reason to know had a disability" and the IDEA should not have the "unintended consequence of providing a shield against the ability of a school district to be able to appropriately discipline a student."³⁶⁵

192) If the district did not have "knowledge," what disciplinary actions may be taken?

If the district did not have knowledge that a student is a student with a disability before the behavior that precipitated the disciplinary action, the student may be disciplined in the same manner and to the same extent as other nondisabled students who engage in comparable behaviors.³⁶⁶

193) What actions are required if there is no "deemed knowledge" of a disability but the student requests an eligibility evaluation while the disciplinary action is pending?

If a special education evaluation is requested or the district initiates a special education evaluation while disciplinary action is pending or being imposed, the evaluation must be conducted in an expedited manner.³⁶⁷ Pending the results of the evaluation, the student remains in the educational placement determined by school authorities, which may include suspension or expulsion.³⁶⁸ There is no requirement that a disciplinary action be put on hold pending the outcome of an expedited evaluation or that the parent be involved in placement decisions for disciplinary reasons.³⁶⁹

³⁶³ 71 Fed Reg at 46728 (Aug. 14, 2006).

³⁶⁴ 71 Fed Reg at 46727 (Aug. 14, 2006).

³⁶⁵ *Id.* (quoting S Rep No. 108-185 at 46 (2003)).

³⁶⁶ 34 CFR § 300.534(d).

³⁶⁷ 34 CFR § 300.534(d)(2)(i).

³⁶⁸ 34 CFR § 300.534(d)(2)(ii).

³⁶⁹ 64 Fed Reg at 12629 (1999).

194) Is there a specific timeline for completing an expedited evaluation?

No specific timeline for an expedited evaluation is included in the federal or state regulations. But "expedited" means that an evaluation should be conducted within a shorter time than a regular evaluation. What may be required to conduct an expedited evaluation can vary greatly depending on the nature and extent of the student's suspected disability and the amount of information necessary to make an eligibility determination.³⁷⁰

195) What is required if the student is found eligible for special education under the IDEA?

If, after the evaluation has been completed, the student is determined to be eligible under the IDEA, the district must conduct an IEP meeting (within 30 days of determining eligibility) to develop an IEP and determine placement.³⁷¹

196) May the district continue disciplinary removal despite a determination of eligibility?

If the district wishes to continue the student's disciplinary removal beyond the date on which eligibility is determined, it must comply with all rules applicable to discipline of special education students (e.g., continuation of educational services, manifestation determination, and completion of a behavioral assessment and intervention plan).

³⁷⁰ 71 Fed Reg at 46728 (Aug. 14, 2006).

³⁷¹ 34 CFR § 300.534(d)(2)(iii).

IDEA: Law Enforcement and Record Issues

197) May a student with a disability be reported to law enforcement?

Yes. The IDEA does not prohibit the district from reporting a crime committed by a student with a disability to appropriate authorities.³⁷² Copies of the student's special education and disciplinary records must be given to the authorities to whom the crime is reported, but only to the extent that the transmission of educational records is permitted by the Family Educational Rights and Privacy Act ("FERPA").³⁷³

198) When may educational records be shared with law enforcement?

FERPA generally prohibits the disclosure of educational records without prior written parental or eligible student³⁷⁴ consent but includes several exceptions. The following exceptions may permit disclosure of special education and disciplinary records to law enforcement without prior written parental consent:

- a. The disclosure is made under a judicial order or lawfully issued subpoena. The district must make a reasonable effort to notify the parent or eligible student of the order or subpoena before compliance unless the court or other issuing agency has ordered that its existence or the content of the subpoena or the information furnished in response to the subpoena not be disclosed.³⁷⁵
- b. The disclosure is made in connection with a health or safety emergency, and knowledge of the information is necessary to protect the health and safety of the student or other individuals.³⁷⁶

199) Must a manifestation determination occur if a student is reported to law enforcement?

A manifestation determination need not be conducted solely because a student is referred to law enforcement—even if the referral may lead to the student's removal from school by the law enforcement agency. Removals by other agencies are not considered "disciplinary removals."³⁷⁷

³⁷² *Questions and Answers on Discipline Procedures*, 52 IDELR 231(OSERS 2009), Q/A B-1.

³⁷³ 34 CFR § 300.535; 34 CFR part 99.

³⁷⁴ An "eligible student" is defined as "a student who has reached 18 years of age or is attending an institution of postsecondary education." 34 CFR § 99.3.

³⁷⁵ 34 CFR § 99.31(a)(9).

³⁷⁶ 34 CFR § 99.31(a)(10).

³⁷⁷ 64 Fed Reg at 12626 (1999).

IDEA: Transportation Issues

200) How should a student be disciplined for bus violations?

If a student's IEP contains behavior strategies that include discipline procedures applicable to the bus, those procedures must be used for misconduct on the bus. If a student's IEP does not contain discipline procedures applicable to the bus, the student is subject to the same discipline procedures applicable to nondisabled students.³⁷⁸

201) May the district change the mode of transportation for disciplinary reasons?

The district may change the mode of transportation if the student is endangering self or others or for other disciplinary reasons.³⁷⁹ Whether an IEP team meeting is required will depend on the student's IEP.

IEP does not include transportation

If the IEP does not include transportation as a related service, the district may change the mode of transportation without convening an IEP team meeting. Further, a district has no obligation to provide alternative transportation to a student, unless the district provides alternative transportation to students without disabilities similarly suspended from bus service.³⁸⁰

IEP does not specify a particular mode of transportation

If the IEP includes transportation as a related service, but does not specify a particular mode of transportation, the district may change the mode of transportation without convening an IEP team meeting.

IEP specifies a particular mode of transportation

If the IEP specifies a particular mode of transportation as a related service, a change in that mode should be treated in the same manner as any other revision of a student's IEP. An IEP team meeting should be convened to consider the proposed change. In the alternative, the mode of transportation can be changed on the IEP without a meeting if the parent agrees in writing.³⁸¹ In either case, prior written notice of the proposed change must be given to the parent.

202) Does a bus suspension count as suspension from school?

A bus suspension counts as suspension from school if the following are true:

- a. Bus transportation is a related service on the student's IEP; and.

³⁷⁸ *Letter to Veir*, 20 IDELR 864, 867 (OCR 1993).

³⁷⁹ *Id.*

³⁸⁰ 34 CFR § 300.530(d)(3); *Questions and Answers on Serving Children with Disabilities Eligible for Transportation*, 53 IDELR 268 (OSERS 2009).

³⁸¹ 34 CFR § 300.324(a)(4).

- b. The district does not arrange alternative transportation.³⁸²

If the district makes alternative transportation available, but the student does not attend school, the student is truant.

203) Does a bus suspension count as a suspension from school even though the suspended student attended school?

If a student has bus transportation as a related service on the IEP “[g]enerally, a school district is not relieved of its obligation to provide special education and related services at no cost to the parent and consistent with the discipline procedures just because the child’s parent voluntarily chooses to provide transportation to his or her child during a period of suspension from that related services.”³⁸³

³⁸² 71 Fed Reg at 46715 (Aug. 14, 2006).

³⁸³ *Letter to Sarzynski*, 59 IDELR 141 (OSEP 2012).

Section 504: General Questions About Section 504 of the 1973 Rehabilitation Act ("Section 504")

204) What is Section 504?

Section 504³⁸⁴ is a nondiscrimination statute. Among other provisions, Section 504 requires districts to provide disabled students with regular education and/or special education and supplementary aids and services designed to meet the students' individual educational needs as adequately as the needs of nondisabled students are met.³⁸⁵

The Office for Civil Rights (OCR), is an office of the U.S. Department of Education and oversees compliance with Section 504. In addition, the parent of a student eligible under Section 504 may request a hearing from the school district following its policy concerning actions that the parent believes are in violation of Section 504.

205) Do students with disabilities under Section 504 have additional rights regarding discipline?

Yes. Three general principles set the boundaries:

- a. If a student's misconduct is related to his or her disability (a "manifestation" of the disability), a disciplinary removal that constitutes a "significant change in placement" is generally not allowed;
- b. If a student's Section 504 plan specifies disciplinary measures, those measures preempt conflicting provisions in the district's general disciplinary rules; and
- c. A disabled student may not be disciplined more harshly than a nondisabled student under the same circumstances.³⁸⁶

206) Do students with disabilities under Section 504 have the same rights as students with disabilities under the IDEA regarding discipline?

Yes, in most instances. The OCR has stated that the same protections available to students under the IDEA are also available to students under Section 504, with the exception of students who are disabled solely because of alcoholism or drug addiction.³⁸⁷

³⁸⁴ 29 USC § 794.

³⁸⁵ 34 CFR § 104.33(b).

³⁸⁶ What Do I Do When * * * The Answer Book on Section 504 at 8:1 (LRP Publications 2011).

³⁸⁷ OSEP Memorandum 95-16, 22 IDELR 531 (OSEP 1995).

Section 504: Suspension and Placement Changes

207) What suspensions are permitted under Section 504 without additional procedural requirements?

The district may suspend a student eligible under Section 504 without following special procedural requirements in two situations:

- a. The disciplinary removal does not constitute a "significant change in placement."³⁸⁸
- b. The student is a current user of alcohol or illegal drugs and the disciplinary removal is for a violation involving the possession or use of illegal drugs or alcohol.³⁸⁹

208) What constitutes a "significant change in placement" under Section 504?

OCR considers each of the following to be a significant change in placement:

- a. A suspension or expulsion of more than ten consecutive school days.³⁹⁰
- b. A series of short suspensions (ten days or less each) that total more than ten days of suspension during the current school year and create a pattern of exclusion.³⁹¹

209) When does a series of suspensions create a "pattern of exclusion"?

School personnel must determine whether a series of suspensions creates a "pattern of exclusion" on a case-by-case basis, considering such factors as:

- a. The length of each suspension;
- b. The proximity in time of the suspensions to one another; and
- c. The total amount of time that the student has been suspended from school.³⁹²

On occasion, OCR has also considered whether the "misconduct for which the student was suspended on the last occasion was substantially similar to the misconduct for which the student was suspended on the previous occasions" when looking at whether a pattern of exclusion had occurred due to disciplinary removals.³⁹³

210) Does in-school suspension count as suspension from school?

It depends. If the nature and amount of services provided in the in-school suspension program are comparable to those that the student normally receives, and the in-school suspension will not result in an interruption in services called for in the student's Section 504 plan, the in-school suspension does not count as a suspension.³⁹⁴

³⁸⁸ *OCR Staff Memorandum*, 16 EHLR 491 (OCR 1989).

³⁸⁹ 29 USC § 705(20)(C)(iv).

³⁹⁰ *OCR Staff Memorandum*, 16 EHLR 491 (OCR 1989).

³⁹¹ *Akron (OH) City Sch. Dist.*, 19 IDELR 542 (OCR 1992).

³⁹² *Cobb County (GA) Sch. Dist.*, 20 IDELR 1171 (OCR 1993).

³⁹³ *Portsmouth (VA) Pub. Schs.*, 48 IDELR 229 (OCR 2006).

³⁹⁴ *What Do I Do When * * ** The Answer Book on Section 504 at 8:17 (LRP Publications 2011).

Section 504: Manifestation Determination

211) Does a "manifestation determination" requirement apply to Section 504?

Yes. A "manifestation determination" (considered a form of reevaluation) must be conducted before a disciplinary exclusion that constitutes a "significant change in placement" is imposed on a student who is disabled under Section 504.³⁹⁵ The manifestation determination must be conducted whether or not the student is receiving services.³⁹⁶

212) Who must participate in a manifestation determination?

The manifestation determination team must consist of a group of persons, including persons knowledgeable about the student, the meaning of the evaluation data, and the placement options available for the student.³⁹⁷ OCR has indicated that a manifestation determination team should include the parent.³⁹⁸ The manifestation determination may be made by the same group of people who developed the student's Section 504 plan and made the initial placement decision.³⁹⁹ The manifestation determination may not be made solely by the individuals responsible for the school's regular disciplinary procedures, such as the school principal. These individuals, however, may participate as members of the team.⁴⁰⁰

213) When must a manifestation determination be conducted?

A manifestation determination is required whenever:

- a. A student is suspended for more than ten consecutive days.⁴⁰¹
- b. A series of short-term suspensions have occurred during a school year in excess of ten cumulative school days that constitute a pattern of removals.⁴⁰²

214) How is a manifestation determination conducted?

A manifestation determination under Section 504 is the process for determining whether a student's misconduct is related to the student's disability and is a key step since it impacts the type of discipline that may be imposed on a student. OCR interprets Section 504 as requiring a manifestation determination review in connection with disciplinary actions that constitute a significant change in placement.⁴⁰³ A manifestation determination under Section 504 is conducted in substantially the same way as it is conducted under the IDEA. Following the IDEA criteria will fully meet Section 504 requirements. (See Questions 161-170.)

³⁹⁵ *OCR Staff Memorandum*, 16 EHLR 491 (1989).

³⁹⁶ *Letter to Veir*, 20 IDELR at 868 (OCR 1993). ("A child with a disability who does not require services is still entitled to the protections afforded by Section 504.")

³⁹⁷ 34 CFR § 104.35(c).

³⁹⁸ *Mobile Cty. (AL) Sch. Dist.*, EHLR 353: 378 (OCR 1988); *McKeesport (PA) Area Sch. Dist.*, EHLR 353: 266 (OCR 1989).

³⁹⁹ OCR, *Discipline of Students with Disabilities in Elementary and Secondary Schools* (Oct. 1996).

⁴⁰⁰ *Id.*

⁴⁰¹ *S. Bronx (NY) Classical Charter Sch.*, 112 LRP 41188 (OCR 2016).

⁴⁰² *Id.*

⁴⁰³ *OCR Staff Memorandum*, 16 EHLR 491 (1989); *Greenville (TX) Indep. Sch. Dist.*, 113 LRP 27897 (OCR 2013).

215) What information and behavior must be reviewed in a manifestation determination?

The team must have available to it information that competent professionals would require, such as psychological evaluation information related to the behavior.⁴⁰⁴ The information must be recent enough to afford an understanding of the student's disability.⁴⁰⁵ If reasonably current information about the student's disability is not available, the district should conduct or arrange for additional evaluations, as determined necessary, regarding the student's disability before conducting the manifestation determination.

A manifestation determination under Section 504 includes reviewing the student's misconduct, the student's disability, and the services being provided to the student. The purpose is to determine whether the behavior is related to the disability. Two critical questions must be asked during the manifestation determination:

- a. Whether the conduct in question was caused by or had a direct and substantial relationship to, the student's disability; and
- b. Whether the conduct in question was the direct result of the school district's failure to implement the student's Section 504 plan.⁴⁰⁶

216) What actions are allowed if the student's misconduct was not a manifestation of his or her disability?

If the answer to both of the questions above is "no," the student's misconduct was not a manifestation of the student's disability, and the student is subject to disciplinary removal, including expulsion, to the same extent and under the same conditions as a nondisabled student.

Unlike the IDEA, Section 504 has no explicit provision stating that school districts must provide a FAPE to students with disabilities who are suspended or expelled.⁴⁰⁷

217) What happens if the student's misconduct was a manifestation of his or her disability?

If the answer to either of the questions discussed in Question 215 is "yes," the misconduct is a manifestation of the student's disability and the student may not be subjected to a disciplinary removal that constitutes a significant change in placement.⁴⁰⁸

In addition, the team must conduct an evaluation that meets the requirements of Section 504⁴⁰⁹ to determine whether the student's current educational placement is appropriate.⁴¹⁰ If the

⁴⁰⁴ *OCR Staff Memorandum*, 16 EHLR 491 (1989).

⁴⁰⁵ OCR, *Discipline of Students with Disabilities in Elementary and Secondary Schools* (Oct. 1996).

⁴⁰⁶ 34 CFR § 300.530(e).

⁴⁰⁷ *Florence Cty. (SC) Sch. Dist. 192*, 16 IDELR 376 (OCR 1989).

⁴⁰⁸ *OSEP Memorandum 95-16*, 22 IDELR 531 (1995).

⁴⁰⁹ 34 CFR § 104.35.

⁴¹⁰ OCR, *Discipline of Students with Disabilities in Elementary and Secondary Schools* (Oct. 1996).

placement is not appropriate, measures must be taken to determine the appropriate placement for the student.

Section 504: Assessment and Behavior Plans

218) Is the school required to conduct a functional behavioral assessment in connection with a disciplinary removal?

Under Section 504, the decision to conduct a functional behavioral assessment is discretionary. When conducting an evaluation or reevaluation, the Section 504 team is required to draw on information from a variety of sources.⁴¹¹ The team may wish to review whether a functional behavioral assessment would be appropriate as part of the evaluation process when social, emotional, or behavioral needs are at issue.

219) Are individual behavior management plans required under Section 504?

It depends. If a student has behavior difficulties, the district may be required to develop an individual behavior management plan.⁴¹² OCR has stated:

"[W]hen a student who is disabled within the meaning of Section 504 manifests repeated or serious misconduct such that modifying the child's negative behavior becomes a significant component of what actually takes place in the child's educational program, [a district] is required to develop an individual behavior management plan."⁴¹³

There are no specific timelines for developing an individual behavior management plan under Section 504, nor are there any specific requirements to review the plan after disciplinary actions. Of course, if the plan is not working, or if it needs to be modified, appropriate changes must be made in a timely manner.

⁴¹¹ 34 CFR § 104.35(c).

⁴¹² *Morgan v. Chris L.*, 25 IDELR 227 (6th Cir 1997).

⁴¹³ *Elk Grove (CA) Unified Sch. Dist.*, 25 IDELR 759 (OCR 1997).

Section 504: Due Process Requirements

220) Do parents have additional due process rights under Section 504?

Yes. Whenever the placement of a student with a disability is changed for disciplinary reasons, the student and his or her parent are entitled to procedural safeguards required by Section 504.

The procedural safeguards include:

- a. Appropriate notice to the parent;
- b. An opportunity for the parent to examine records;
- c. An impartial hearing with the participation of the parent and an opportunity for representation by counsel; and
- d. A review procedure.⁴¹⁴

221) May a parent request an administrative hearing to challenge the results of a manifestation determination?

Yes. A parent may file a written request for an impartial administrative hearing with the school district if he or she disagrees with an action regarding the identification, evaluation, provision of a FAPE, or education placement of a student with a disability under Section 504. If the district imposes a disciplinary removal that constitutes a significant change in placement, based on the Section 504 team's determination that the student's behavior was not a manifestation of the student's disability, the parent may request a hearing to contest the results of the manifestation determination.⁴¹⁵

222) Is an "impartial hearing" under Section 504 the same as a "due process hearing" under the IDEA?

They may be similar depending on the district's hearing process. However, the following exceptions apply:

- a. The "stay-put" rule (allowing the student to remain in his or her current educational placement pending the results of the hearing) does not apply.⁴¹⁶
- b. There is no right to a written or electronic record of the hearing at no cost to the parent unless district policy provides for such a record.⁴¹⁷

⁴¹⁴ 34 CFR § 104.36.

⁴¹⁵ OCR, *Discipline of Students with Disabilities in Elementary and Secondary Schools* (Oct. 1996).

⁴¹⁶ OCR has stated that Section 504 has an implicit stay-put component. *Letter to Zirkel*, 22 IDELR 667 (OCR 1995).

⁴¹⁷ 34 CFR § 104.36.

Section 504: Drugs and Alcohol

223) Is addiction to illegal drugs or alcohol a disability under Section 504?

Drug and alcohol addictions may be disabilities covered by Section 504. Both are considered physical or mental impairments for purposes of Section 504, and therefore, a student addicted to illegal drugs or alcohol is disabled under Section 504 if the addiction substantially limits a major life activity.⁴¹⁸

224) Is marijuana considered to be an illegal drug?

Yes. Marijuana is a drug defined as a controlled substance included in the schedules of the Controlled Substances Act, for purposes of Section 504.⁴¹⁹

225) Is a current user of illegal drugs or alcohol protected under Section 504?

A student currently engaging in the illegal use of drugs is not protected under Section 504 when the school acts based on the student's current drug use.⁴²⁰ When the district takes any disciplinary action with respect to such a student, based on the student's current drug use, the special procedures required by Section 504 do not apply. Note that Section 504's definition of a student with a disability does not exclude users of alcohol. However, Section 504 allows schools to take disciplinary action against students with disabilities using drugs or alcohol to the same extent as students without disabilities.⁴²¹

226) Is a current illegal drug or alcohol user entitled to special disciplinary treatment under Section 504?

Under some circumstances, a student who is a current user of illegal drugs or alcohol may be disciplined in the same manner as a nondisabled student. Whether the current user is subject to regular discipline depends on the nature of the misconduct.

Misconduct directly involving the use or possession of illegal drugs or alcohol

A disabled student who is a current user of illegal drugs or alcohol may be disciplined for the use or possession of illegal drugs or alcohol in the same manner and to the same extent as a nondisabled student would be disciplined for such misconduct.⁴²² Thus, discipline may include suspension, expulsion, and all other disciplinary measures that a nondisabled student would be subject to. Under these circumstances, the student is not entitled to the procedural safeguards afforded under Section 504, which include, among other things, a manifestation determination.⁴²³

⁴¹⁸ 34 CFR 104, app A, subp A, § 4.

⁴¹⁹ 21 USC § 812.

⁴²⁰ 29 USC § 705(20)(C)(i); *Letter to Zirkel*, 22 IDELR 667 (OCR 1995); *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, 67 IDELR 189 (OCR 2015), Q. 16.

⁴²¹ *Protecting Students with Disabilities*, 67 IDELR 189 (OCR 2015), Q. 17.

⁴²² 29 USC § 705(20)(C)(iv).

⁴²³ *Id.*

Misconduct not involving the use or possession of illegal drugs or alcohol

If the misbehavior does not involve the use or possession of illegal drugs or alcohol, a current user of alcohol is entitled to all the safeguards afforded by Section 504. A current user of illegal drugs is also protected under those circumstances unless the disciplinary action is based on the student's current illegal drug use.⁴²⁴

227) What constitutes current use?

The term "current illegal use of drugs" means use that "occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem."⁴²⁵

228) What constitutes "illegal use of drugs"?

"Illegal use of drugs" means "the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act." The term does not include the use of a drug taken under the supervision of a licensed healthcare professional.⁴²⁶

229) What if the current user is also eligible under the IDEA?

The exceptions discussed above regarding current users of alcohol and illegal drugs are recognized for students eligible under Section 504 only. They do not apply to students who are also eligible under the IDEA.

⁴²⁴ 29 USC § 705(20)(C)(i).

⁴²⁵ 28 CFR § 35.104.

⁴²⁶ *Id.*

Section 504: Law Enforcement

230) May police be notified of illegal conduct committed by a Section 504 student?

District personnel may notify police of illegal conduct committed by a Section 504 student if the district follows a policy or practice applicable to both disabled and nondisabled students. Even if a student has a behavior management plan, school personnel may use reasonable means to protect the safety of students and staff. OCR has stated: "School officials have a clear and unconditional duty to protect the health and safety of its [sic] students and employees and OCR will not disturb that responsibility absent overwhelming and significant evidence of dereliction of duty or subterfuge."⁴²⁷

⁴²⁷ *Delaware Cty. (PA) I.U.*, 24 IDELR 471, 472 (OCR 1992).

Section 504: Transportation

231) May a student eligible under Section 504 be suspended from the bus?

OCR's position on bus discipline has been stated as follows:

"[A]ny incident of misconduct on the bus should be viewed in the same manner as any disciplinary incident in the school. A district cannot revoke transportation services just as a district could not suspend a student with disabilities in excess of ten days or, in some cases, impose cumulative suspensions exceeding ten days without taking a number of prior actions."⁴²⁸

Prior actions generally include having a Section 504 team meeting and conducting a manifestation determination to decide whether the student's misbehavior was related to his or her disability. If the behavior was not a manifestation of the student's disability, the student may be treated like any other student. If the behavior is a manifestation of the student's disability, the district may not terminate transportation services in excess of ten days, but the Section 504 team may consider alternative means of providing transportation.

⁴²⁸ *Letter to Veir*, 20 IDELR at 867 (OCR 1993).