Are you keeping up with special education discipline?

PART TWO

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In our Spring 2008 issue of the School Law Advisory, we wrote about the important change in special education discipline rules relating to when schools are required to undertake the Manifestation Determination, which is the key step in determining whether school officials can impose regular disciplinary consequences such as long term suspensions or expulsions. In this issue, we turn to another important change – the circumstances in which schools can impose 45-day disciplinary removals for student misbehavior. This is one of the more important provisions of the state and federal discipline rules, and has changed in the past few years in ways that should be favorable for schools. There remain, however, some areas of uncertainty regarding the breadth of these new provisions.

The 45-day removal exception

As a general rule, school officials can impose regular disciplinary consequences on special education students. If the discipline includes suspension, special duties start to arise when a special education student’s number of suspensions exceed 10 school days in the school year. At that point, the local school must begin providing educational services during additional removal days that year. If the number of disciplinary removal days reaches the level of a “change of placement,” the school must convene an IEP Team and undertake a manifestation determination. This is usually key to further discipline that can occur. If the misconduct is a manifestation, the IEP Team usually decides what occurs next. If it is not, the school can impose regular discipline, up to and including expulsion, although services must still be provided during the removal.

Yet both the federal and Maine special education rules include a special exception that permits schools to impose a 45-day removal from school for certain types of misconduct, regardless of whether the misconduct is a manifestation of the disability. Given the length of such removals, the IEP Team will still have to meet, and will still have to do a manifestation determination. The child will also still have to be served during that 45-day removal. But the school is permitted to order that child out of school for that lengthy period of time, even in those circumstances where the Team concludes that the misbehavior is a manifestation of the disability – as long as the school would impose a similarly lengthy removal on a non-
disabled student who committed this offense. This 45-day removal is a very important exception to the usual rules, and gives schools an extensive breathing period during which they can decide what to do next with the child.

**Changes in the 45-day removal exception**

Most school officials have heard of this 45-day removal exception, because it has been in place for almost a decade. Yet the exception has been expanded in the most recent amendments to state and federal special education rules. Most obviously, it has been expanded to permit removals of 45 school days, rather than 45 calendar days. This grants school officials many more actual days that they can keep out of school a misbehaving child who falls within this exception.

Beyond the expanded length of time, this exception has been expanded to include an additional category of misbehavior. The law has long applied to weapons and drug violations. It has now been expanded to include circumstances in which a student inflicts “serious bodily injury.”

As always, the 45-school day removal applies to a student who carries a weapon to school or a school function, or who knowingly possesses or uses illegal drugs or sells or solicits controlled substances while at school or a school function. The term “weapon” in this situation has the same meaning as does the term “dangerous weapon” under 18 U.S.C. § 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 less than 2 1/2 inches in length.3

The terms “illegal drugs” and “controlled substances” have very technical definitions, but do not include a substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other provision of federal law. The 45-day removal exception also does not apply to possession or use of alcohol.

The new category covered by this exception is for those circumstances when a student actually inflicts “serious bodily injury” on another person “while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.”4 The law defines “serious bodily injury” as having the same meaning as 18 U.S.C. § 1365(h)(3), which states:

> The term “serious bodily injury” means bodily injury which involves –

A. a substantial risk of death;

B. extreme physical pain;

C. protracted and obvious disfigurement; or

D. protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

It is undoubtedly true that this definition is fairly narrow. It certainly does not apply to threats, but only to the actual infliction of serious bodily injury. Nor do we think it will apply to routine pushing or shoving or the more commonly seen fisticuffs on the school playground. There are really no cases interpreting the term in the special education context. But the term has occasionally been interpreted under Title 18 of the U.S. Code. For example, the Eighth Circuit in *United States v. Two Eagle*, 318 F.3d 785, 791 (8th Cir. 2003), explained that serious bodily injury means “something more than slight bodily injury, but not necessarily life threatening injury. It does not require a high probability of death.” The court fortunately found that standard met when a person shot two individuals with a rifle, although both
recovered. Perhaps more important for schools, the 8th Circuit also found the standard met under Title 18 in *United States v. Moore*, 846 F.2d 1163, 1166 (8th Cir. 1988), when a person used his teeth to bite an individual to such an extent that the victim had his little finger nearly severed from his hand and suffered permanent impairment of movement and sensation in that finger. An expert in that case had testified that the human bite is a "very dangerous form of aggression," and "one of the most dangerous of all forms of bites." *Id.* at 1165-66. The Court there noted that "serious bodily injury" could also include "serious infection" resulting from a bite. In *United States v. Hollow*, 747 F.2d 481, 482 (8th Cir. 1984), the Court appeared to conclude that inflicting a "two-inch jagged, v-shaped cut" to the victim's left cheek, which in turn required nine stitches to close, would constitute serious bodily injury.

**Reconsidering the weapons exception**

Undoubtedly the serious bodily injury exception is narrow. But schools should reconsider the breadth of the definition of "weapon" when considering whether a 45-day removal will apply. Remember that the weapons definition includes "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." It permits the 45-day removal for possession of such an instrument, as long as it is used for, or "readily capable of" causing serious bodily injury. The term includes animate, as well as inanimate objects.

This term is likely much broader than school officials usually think. The "serious bodily injury" exception applies only when serious bodily injury is actually inflicted. The weapons exception applies, however, when a student simply possesses an object that is used for or readily capable of causing serious bodily injury. One can imagine many circumstances where a student picks up a chair or other routine school item and threatens to hit or throw it at someone. Depending on the object and the circumstance, this might very well constitute a weapons violation, as long as the circumstances make it reasonable to conclude that serious bodily injury could have resulted. As one court stated, "what constitutes a dangerous weapon depends not on the nature of the object itself but on its capacity, given the manner of its use, to '…endanger life of inflict great bodily harm.'"5

Courts and hearing officers in various contexts have concluded that this weapons definition is met by chairs, walking sticks, broken beer bottles, mop handles, automobiles, and Airsoft pellet guns. It seems also likely to include pencils, pens, and scissors if they are used in a way that makes it reasonable to conclude that the student could have used it to inflict serious bodily injury. For example, the student who takes a pencil up to another student and in anger threatens to stab her in the face with it would seem to be in possession of a weapon and subject to the 45-school day removal. This is true even though no injury actually resulted. Even a part of a body, such as one's teeth, could be a "weapon" depending on how it is used.6 Kicking a student around his head and throat with a booted foot when the student is lying helpless on the ground would seem to constitute possession of a weapon – the booted foot – since it is being used in a manner readily capable of causing serious bodily injury. This is true even if no serious bodily injury results.

In short, the weapons exception seems much broader than it has traditionally been considered to be, especially in light of the definition of serious bodily injury. And although the serious bodily injury exception requires actual serious bodily injury, the weapons exception permits the 45-day removal as long as the circumstances at issue would seem to have made it reasonably likely that serious bodily injury could result. The specific circumstances of the offense will be critical for making that determination.

**Conclusion**

The 45-day removal exception to the special education discipline rules is very important for maintaining a safe school environment. Expanding that rule to 45 school days is helpful, as is the
addition of an exception for serious bodily injury. But most importantly, school officials should give careful thought to the weapons exception, which most likely covers a much broader arena of student misconduct than schools have been thinking about in the past. When in doubt, call your school attorney to review whether this exception applies.

Endnotes

1. See the Spring issue of the School Law Advisory for a full discussion of what constitutes a “change of placement” that would require scheduling such a meeting.


