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## **45-DAY PLACEMENTS: A DEEP DIVE**

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When a student engages in certain significant types of misconduct, the Individuals with Disabilities Education Act (“IDEA”) gives schools the options to temporarily place them in an interim alternative educational setting (“IAES”) for up to 45 school days. In this session, experienced school attorneys will explore the cases that have set the boundaries of schools under the IDEA and answer questions on how to utilize this authority.

#### **I. THE UNILATERAL 45-DAY PLACEMENT FOR “SPECIAL CIRCUMSTANCES.”**

##### **A. Special Circumstances: Justifications for a Unilateral 45-Day Placement.**

1. A school district may unilaterally place a student with a disability in an IAES for up to 45 school days if the student does any of the following:

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NOTE: The purpose of this presentation, and the accompanying materials, is to inform you of interesting and important legal developments. While current as of the date of presentation, the information given today may be superseded by court decisions and legislative amendments. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts discussed in the presentation or addressed in this outline, you should consult your legal counsel.

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- a. Carries or possesses a weapon at school, on school premises, or to or at a school function;
- b. Knowingly possess or uses illegal drugs while at school, on school premises, or at a school function;
- c. Sells or solicits the sale of a controlled substance while at school, on school premises, or at a school function; or
- d. Inflicts “serious bodily injury” upon another person while at school, on school premises, or at a school function.

20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g), (i).

2. **Weapons.** A “weapon” 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 such term does not include a pocket knife with a blade of less than 2½ inches in length.” 20 U.S.C. § 1415(k)(7)(C); 18 U.S.C. § 930(g)(2) (2004).

- a. Common objects are not necessarily weapons, even if they are used to inflict some injury. *See Sch. Dist. #831*, 32 IDELR 163 (Minn. SEA 1999) (pencil used in a stabbing incident did not qualify as a weapon under the IDEA); *In re: Student with a Disability*, 124 LRP 24278 (NV SEA 2024) (blunt pencil was not a “weapon”); *Anaheim Union High Sch. Dist.*, 32 IDELR 129 (CA SEA 2000) (paper clip used to cut another student on the bus did not qualify as a weapon under the IDEA); *Anchorage Sch. Dist.*, 45 IDELR 23 (AK SEA 2005) (where student lunged at teacher with scissors, scissors was found to be a “weapon” for purposes of disciplinary removal); *but see California Montessori Project*, 56 IDELR 308 (CA SEA 2011) (determining that rounded-tip scissors were not a “weapon” for purposes of an IDEA disciplinary removal because the scissors were not inherently dangerous); *Scituate Pub. Schs.*, 47 IDELR 113 (MA SEA 2007) (Principal’s necktie is not a “weapon” despite being used to choke principal for a short period of time that resulted in long-lasting red marks); *Kristina C. v. Klein Indep. Sch. Dist.*, Civil Action H-23-2271 (S.D. Tex. Feb 04, 2024) (clay cutter was not a weapon); *Knox County Schools*, 124 LRP 6505 (TN SEA 2024) (12-inch wrench not readily capable of inflicting serious bodily injury and, therefore, not a “weapon” for IDEA purposes when not actively used to inflict serious bodily injury); *GD v. Utica Community Schools*, (E.D. Mich. 2023)

(concluding that broken plastic phone receivers and broken thermostats are not “weapons” because they are not inherently dangerous and, when thrown by a kindergarten student, not readily capable of inflicting serious bodily injury).

- b. In other words, as one hearing officer phrased it, the “object's latent capability, coupled with its manner of use, is determinative of whether an object can be characterized as a dangerous weapon.” *Knox County Schools*, 124 LRP 6505 (TN SEA 2024); *see also Ind. Sch. Dist. No. 279*, 30 IDELR 645 (Minn. SEA 1999) (golf club or baseball bat could be used so as to make it readily capable of causing harm); *Pottstown School Dist.*, 118 LRP 27959 (Penn. SEA 2018) (holding that an object was a “weapon” when wielded in a manner so as to make it readily capable of causing harm); *Anchorage School Dist.*, 45 IDELR 23 (AK SEA 2005) (rejecting the school's argument that scissors are weapons per se, but holding that the student's use of the scissors rendered the scissors a dangerous weapon).
- c. Guns are inherently dangerous and, therefore, count as “weapons.” *See, e.g., Knox County Schools*, 124 LRP 6505 (TN SEA 2024) (quoting *McLaughlin v. U.S.*, 476 U.S. 16, 17 (1986)). Lookalike weapons, however, are not (unless used to inflict serious bodily injury).

### **3. *Drugs.***

- a. A “controlled substance” is a “drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act.” 20 U.S.C. § 1415(k)(7)(A).
- b. An “illegal drug” is a “controlled substance; but does not include a controlled 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 authority under that Act or under any other provision of Federal law.” 20 U.S.C. § 1415(k)(7)(B).

### **4. *Serious Bodily Injury.***

- a. Bodily Injury. A “bodily injury” is a: “a cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary.”

- b. Serious bodily injury. A “serious bodily injury” is a “bodily injury” that involves “a substantial risk of death,” “extreme physical pain,” “protracted and obvious disfigurement,” or “protracted loss or impairment of function of a bodily member, organ or mental faculty.” 20 U.S.C. § 1415(k)(7)(D); 18 U.S.C. § 1365(h)(3).
- c. Only severe injuries qualify as “serious bodily injury” for purposes of the unilateral 45-day placement. For instance, one IDEA hearing officer determined that, although a student engaged in “behavior that was injurious, frightening and intimidating, a broken nose does not fit within the [IDEA’s] narrow definition of the infliction of ‘serious bodily injury.’” *Pocono Mountain Sch. Dist.*, 109 LRP 26432 (PA SEA 2008). Similarly, a principal who was punched in the head and suffered a migraine, was found not to have a serious bodily injury because the principal was able to drive herself home and the pain abated shortly thereafter. *Pittsburgh Pub. Sch. Dist.*, 116 LRP 48011 (PA SEA 2016). However, a teacher who experienced severe pain after being headbutted and kicked in the chest, was found to have serious bodily injury. One of the factors the hearing officer considered was that the teacher was prescribed pain medication for a chest contusion and was unable to return to work for a week. *Westminster Sch. Dist.*, 56 IDELR 85 (CA SEA 2011).
- d. Repeated blows to the head, resulting in a concussion, seizure, significant bruising, and memory loss constituted a serious bodily injury in at least one case. *Olu-Cole v. E.L. Haynes Pub. Charter Sch.*, 292 F.Supp.3d 413, 416-17, 421 (D.C.C. 2018), *rev’d & remanded on other grounds*, *Olu-Cole v. E.L. Haynes Pub. Charter Sch.*, 930 F.3d 519 (D.C. Cir. 2019). Likewise, hearing officers may consider both the part of the body targeted and the type of impairment suffered. *In Re: Student with a Disability*, 122 LRP 21820 (WI SEA 2022) (finding serious bodily injury where a student pulled a teacher’s hair, squeezed the front of her throat, and hit her in the back of the head); *see also Bensalem Twp. Sch. Dist.*, 122 LRP 25399 (PA SEA 2022) (allowing 45-day unilateral placement where the student stood on a chair, hit staff member's head with a closed fist, then continued to slap staff member's head), *Southfield Pub. Sch.*, 118 LRP 11554 (MI SEA 2018) (sustaining a 45-day unilateral placement where the student attempted to punch

staff member twice but was blocked, tripped into her causing both to fall, then kicked her in the stomach and knee).

- e. In addition to establishing that the injury constitutes a “serious bodily injury,” the school district must be able to show that the student “inflicted” the injury. At least one hearing officer has concluded that accidental conduct with a staff member who was trying to break up a fight did not satisfy this standard, despite the staff member suffering a broken leg and missing over two weeks of work. *Norwood Pub. Schs.*, 124 LRP 32443 (MA SEA 2024). But, intent to injure is not necessarily required. *Utica Community Schools*, 120 LRP 28499, at 46 (MI SEA 2020).
- f. Practice Point: Threats do not trigger a school’s authority to implement a 45-day unilateral placement, no matter how disturbing or explicit. *See, e.g.*, *Franklin Township School Corporation*, 125 LRP 4358 (Ind. SEA 2024).

**B. Decisions regarding the “Special Circumstances” Justifying a Unilateral 45-Day Placement.**

**1. *Franklin Township Sch. Corp.*, 125 LRP 4358 (Ind. SEA 2024).**

- a. Facts. A student with a disability made his hand “into a gun shape, pointed it at another student, and made shooting sounds in that student's direction.” The student also made statements—not directed at a specific student or teacher—“regarding schools being shot up, how bombs are worse when killing people because you cannot see what happens, and how a knife is preferable to a gun because knives are more personal and can only be used to kill when in close proximity to another person.” The conduct was a manifestation of his disability. The school utilized a unilateral 45-day placement. The placement was not an agreement between the school and the student’s parent.
- b. Issues. Was the school allowed to unilaterally place the student in an IAES for up to 45 school days?
- c. Holding. “There are no weapons involved, drugs involved, or serious bodily injury involved” in the student's behaviors and thus, a “threat of weapons or serious bodily injury is not sufficient to justify the use of IAES for 45-days.”

- d. Other Option. If the school “believes that maintaining the student in the current educational placement (the student’s placement prior to a removal) is substantially likely to result in injury to the student or others, the [school] may request an expedited due process hearing to determine an appropriate placement for the student.”

2. ***Mainland Regional Bd. Educ., 115 LRP 29440 (Bingham II, N.J. ALJ 2014).***

- a. Facts. A student with a disability brought a “replica gun” to school in his backpack. The “replica gun” bore the appearance of a functional firearm but had no ‘inner workings’ and was not operational.” Ultimately, the school principal discovered that the student had the “replica gun” at school.
- b. Issues. Can the school unilaterally place the student in an IAES for up to 45 school days?
- c. Holding. “Because the replica weapon apparently was incapable of ‘causing death or serious bodily injury,’ it does not constitute a weapon” and thus, the school “does not have the authority to remove [the student] for up to forty-five days, as a special circumstance and regardless of the MDR, for possession of a weapon.”

**C. Use of a Unilateral 45-Day Placement.**

1. “School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.” 34 C.F.R. § 300.530(a).
2. Suspending, or otherwise removing, a student for disciplinary reasons on top of a unilateral 45-day placement could violate the IDEA’s stay put provision, regardless of whether the conduct is a manifestation of the student’s disability. *See, e.g., Bloomfield Township Bd. of Educ., 125 LRP 10417 (SEA NJ 2024).*

**D. Options Other than a Unilateral 45-Day Placement.** School personnel have various options to choose from when a student with a disability violates the code of student conduct. Depending on the circumstances, those options could include:

**1. *Non-Disciplinary Options.***

- a. Programming. If it is necessary for a student to receive a free appropriate public education (“FAPE”), the student’s individualized education program (“IEP”) team must provide the student behavioral supports. *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA’s Discipline Provision*, 81 IDELR 138 (OSERS 2022), at Question A-4 (hereinafter, “OSERS, *Discipline Q&A*”).
- b. Nonexclusionary Disciplinary Policies and Practices. These are “policies and practices that are alternatives to dismissing a pupil from school.” Minn. Stat. § 121A.41, subd. 12.

**2. *Exclusionary Discipline.***

- a. Dismissal. A dismissal is “the denial of the current educational program to any pupil, including exclusion, expulsion, and suspension. It does not include removal from class.” Minn. Stat. § 121A.41, subd. 2.
- b. Suspension. A suspension is “an action by the school administration, under rules promulgated by the school board, prohibiting a pupil from attending school.” Minn. Stat. § 121A.41, subd. 10. “This definition does not apply to dismissal from school for one school day or less, except as provided in federal law for a student with a disability.” *Id.*
- c. Expulsion. An expulsion is “a school board action to prohibit an enrolled pupil from further attendance for up to 12 months from the date the pupil is expelled.” Minn. Stat. § 121A.41, subd. 5.
- d. Exclusion. An exclusion is “an action taken by the school board to prevent enrollment or reenrollment of a pupil for a period that shall not extend beyond the school year.” Minn. Stat. § 121A.41, subd. 4.
- e. Pupil Withdrawal Agreement. A pupil withdrawal agreement is “a verbal or written agreement between a school administrator or district administrator and a pupil's parent to withdraw a student from the school district to avoid expulsion or exclusion dismissal proceedings. The duration of the withdrawal agreement cannot be

for more than a 12-month period.” Minn. Stat. § 121A.41, subd. 13.

**3. *Expedited Due Process Hearing Request Seeking an Appropriate IAES.***

- a. Request: A school district may request an expedited due process hearing if it “believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others.” 34 C.F.R. § 300.532(a).
- b. Outcome: The administrative law judge may “[o]rder a change of placement of the child with a disability to an appropriate [IAES] for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.” 34 C.F.R. § 300.532(b)(2)(ii).

**4. *Expedited Due Process Hearing Request Seeking to Keep the Student in the Appropriate IAES.***

- a. Request. The school district can file another expedited due process hearing request seeking to keep the student in an appropriate IAES if it “believes that returning the child to the original placement is substantially likely to result in injury to the child or to others.” 34 C.F.R. § 300.532(b)(3).
- b. Outcome. The administrative law judge can once again order the child with a disability to “an appropriate [IAES] for not more than 45 school days” if the hearing officer determines that “returning the child to the original placement is substantially likely to result in injury to the child or to others.” 34 C.F.R. § 300.532(b)(3); *see also id.* at (b)(2)(ii).
- c. Repeating the Process: This process can be “repeated.” 34 C.F.R. § 300.532(b)(3).

**5. *Injunction.*** When a student is a danger to self or others, school districts “have the right to seek injunctive relief from a court when they believe they have the need to do so.” 64 Fed. Reg. 12,621 (Mar. 12, 1999).



## II. MANIFESTATION DETERMINATION REVIEW.

### A. Manifestation Determination Review.

1. ***A Disciplinary Change in Placement.*** A disciplinary removal is a change of placement if:

- a. “The removal is for more than 10 consecutive school days,” or
- b. The student “has been subjected to a series of removals that constitute a pattern” because:
  - i. the “series of removals total more than 10 school days in a school year;”
  - ii. the student’s “behavior is substantially similar to the [student’s] behavior in previous incidents that resulted in the series of removals;” and
  - iii. “of such additional factors as the length of each removal, the total amount of time the [student] has been removed, and the proximity of the removals to one another.”

34 C.F.R. § 300.536(a).

- c. A public school’s determination upon whether a series of removals constitutes a change in placement “is subject to review through due process and judicial proceedings.” 34 C.F.R. § 300.536(b).
- d. The United States Department of Education (“U.S. DOE”) articulated that “[p]ortions of a school day that a child had been suspended may be considered as a removal in regard to determining whether there is a pattern of removals.” 71 Fed. Reg. 46,715 (2006).

2. ***Manifestation Determination Review after a Disciplinary Change in Placement Decision.*** A manifestation determination meeting must be held 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. *See* 34 C.F.R. § 300.530(e)(1). At the meeting, the parents and the school representatives, including relevant members of the IEP team, must:

- a. “[R]eview all relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents;” and
- b. Determine whether the behavior was a manifestation of the student’s disability. A behavior is a manifestation of the student’s disability if the team determines that either:
  - i. The “conduct in question was caused by, or had a direct and substantial relationship to, the [student’s] disability;” or
  - ii. the “conduct in question was the direct result of the [school’s] failure to implement the IEP.”

34 § C.F.R. 300. 530(e)(1)-(2).

3. ***Manifestation Determination Review after a Unilateral 45-Day Placement Decision.*** A manifestation determination must be held within 10 school days of the decision to unilaterally place a student in an IAES for a period of up to 45 school days in response to the student committing a violation of the school’s code of student conduct related to weapons, drugs, or serious bodily injury. *See OSERS, Discipline Q&A, at Question E-1.*

## **B. Impact of the Manifestation Determination Review.**

1. ***Not a Manifestation.*** If the conduct is not a manifestation of the student’s disability, “school personnel may apply the relevant disciplinary procedures to [students] with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities,” with some exceptions. *See 34 C.F.R. § 300.530(c).* In addition, for a unilateral IAES placement based on “special circumstances,” a school may unilaterally place the student in an appropriate IAES for up to 45 school days regardless of whether or not the behavior was a manifestation of the student’s disability. *OSERS, Discipline Q&A, at B-2, E-1.*
2. ***Manifestation.*** If conduct is determined to be a manifestation of a student’s disability, the IDEA “does set some limits” on the “specific disciplinary actions” the school district can take. *OSERS, Discipline Q&A, at Question B-2.*

- a. If the conduct is a manifestation of the student's disability, school personnel "may remove a [student] with a disability who violates a code of student conduct from his or her current placement to an appropriate [IAES], another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement)." 34 C.F.R. § 300.530(b)(1).
- b. If the conduct is a manifestation of the student's disability, the school district *may not* take disciplinary action that changes the placement of the student with the exception of unilateral IAES placements for not more than 45 school days related to weapons, drugs, or serious bodily injury. OSERS, *Discipline Q&A*, at B-2, E-1. As noted above, for a unilateral IAES placement based on "special circumstances," a school may unilaterally place the student in an appropriate IAES for up to 45 school days regardless of whether or not the behavior was a manifestation of the student's disability. *Id.* For all changes of placements other than a unilateral IAES placement related to weapons, drugs, or serious bodily injury, the school district must return the student to his or her last agreed upon placement, unless the school and parent agree to a change of placement. 34 C.F.R. § 300.530(f)(2).

**3. *Functional Behavioral Assessment ("FBA") and Behavior Intervention Plan ("BIP").***

- a. If the student's behavior is found to be a manifestation of the student's disability, the school must either: (a) conduct an FBA, unless it has conducted an FBA before the behavior that resulted in the change of placement occurred, and implement a BIP; or, (b) if a BIP already has been developed, review the BIP, and modify it, as necessary, to address the behavior. 34 C.F.R. § 300.530(f)(1).
- b. When a student is subjected to a disciplinary change in placement that would exceed 10 consecutive school days for behavior found not to be a manifestation of their disability or placed in an IAES for a period of up to 45 days in response to the student committing a violation of the school's code of student conduct related to weapons, drugs, or serious bodily injury, the student must receive, as appropriate, an FBA, and behavioral intervention services and

modifications, that are designed to address the behavior violation so that it does not recur. 34 C.F.R. § 300.530(d)(1)(ii).

C. ***Mainland Regional Bd. Educ., 115 LRP 29440 (Bingham II, N.J. ALJ 2014).***

1. ***Facts.*** The student had an ADHD diagnosis and was prescribed—as well as consistently took—daily medication. There was not credible evidence that he failed to take his medication prior to bringing the “replica gun” to school. The student “apparently packed the weapon either the night before or the morning of the incident, took it onto school property, displayed it to and discussed it with another student, then maintained concealed possession on school grounds, and did not turn it over to school personnel.” The student told the principal he brought the “replica gun” to school to return it to another student.

A manifestation determination review was held. The student’s parent, a parent advocate, and school personnel attended the manifestation determination review. It is undisputed that the required information was reviewed. At the manifestation determination review, “no staff member, home instructor or teacher had reported impulsive-type behavior.” The student was also obtaining “satisfactory” grades and had not had a behavioral incident that school year prior to bringing the “replica gun” to school. Ultimately, the school determined that the student’s “behavior was not a result of either his disability or a failure to implement the IEP.” The parent and the advocate did not agree with the decision. They believed that the student brought the “replica gun” to school because of his “ADHD impulsivity disorder.”

After the manifestation determination review, the student received a private psychiatric evaluation. The doctor determined that the student had diagnoses including “ADHD, inattentive type” and “impulse control disorder, not otherwise specified.” The doctor recommended that the student receive “behavior modification and cognitive behavioral therapy for impulse control” and “continued medication, perhaps at a higher therapeutic dose.”

2. ***Issue.*** Was the student bringing the “replica gun” to school a manifestation of his disability?
3. ***Holding.*** The school sufficiently demonstrated that the student’s conduct was not a manifestation of his disability. The student had “primarily done well academically, and had no recent behavioral issues suggesting the necessity for a behavior intervention plan prior to the subject incident.” In

addition, the student's statement to the principal show he had a "deliberate intent" to return the "replica gun" to another student at the school. "Based upon [the student]'s stated intent and collective actions, as well as the staff reports, the logical, probable and reasonable conclusion is that [the student]'s behavior was not an impulsive act, but rather the result of a calculated decision." As such, the student was "exposed" to a potential long-term dismissal.

### **III. THE IAES AND SERVICES DURING A UNILATERAL 45-DAY PLACEMENT.**

#### **A. IEP Team Decision.**

1. ***IEP Team Decision.*** The IEP team "determines the [IAES] for services . . . ." 34 C.F.R. § 300.531. IDEA's regulations outline who must be included on an IEP team. *See* 34 C.F.R. § 300.321.
2. ***Notification Requirements.***
  - a. "On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the [school district] must notify the parents of that decision, and provide the parents the procedural safeguards notice described in [IDEA's regulations]." 34 C.F.R. § 300.504(h).
  - b. A prior written notice ("PWN") must be given to the parents of a child with a disability before a school district proposes or refuses "to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child." 34 C.F.R. § 300.503(a). Pursuant to the Minnesota Rules, the school district must serve the PWN "on the parent within a reasonable time, and in no case less than 14 calendar days before the proposed effective date of change or evaluation. If the notice only includes a refusal of a request, it must be served on the parent within 14 calendar days of the date the request was made." Minn. R. 3525.3600.

#### **B. The IAES and the Services.**

1. ***The IAES.***
  - a. The placement selected must enable the student to "continue to participate in the general education curriculum, although in another

setting, and to progress toward meeting the goals set out in the [student's] IEP.” OSERS, *Discipline Q&A*, at Question D-3. The “determination will depend on the circumstances of each individual [student's] case.” *Id.* “Factors that could be considered when determining placement in an IAES include the specific programs and services available in the alternative setting, such as additional counseling services, behavioral and academic supports and other services, or programs that could address the behavior that led to the need for the [student's] placement in an IAES.” *Id.*

- b. The IAES “could be a different setting in the [student's] current school, a setting in a different school in the [school district], or in some other setting.” OSERS, *Discipline Q&A*, at Question D-3. Home instruction, including virtual home instruction, or hybrid instruction “could be additional options for an IEP Team to consider when determining the appropriate IAES for a child with a disability as long as the services allow the child to continue to participate in the general education curriculum and progress toward meeting the goals set out in the child's IEP.” OSERS, *Discipline Q&A*, at Question D-5. However, an IEP team “should be cautious about excluding a child with a disability from their regular educational program to provide virtual instruction for the sole purpose of responding to a child's behavior” because “[r]emoving a child from the regular education program without ensuring behavioral supports have been made available throughout a continuum of placements, including in a regular education setting, could result in an inappropriately restrictive placement and denial of FAPE.” *Id.* As such, “the IEP Team likely will need to consider other options beyond ‘home instruction’ when determining the appropriate IAES.” *Id.*

- 2. **Services.** While in the IAES, the student must “[c]ontinue to receive educational services [in order to receive a FAPE] so as 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 [student's] IEP.” 34 C.F.R. § 300.530(d)(1)(i). However, schools do not need to “replicate every aspect of the services that a child would receive if in his or her normal classroom” while the student is in the IAES. 71 Fed. Reg. 46,716 (Aug. 14, 2006).

#### **IV. THE PARENTS' RECOURSE IF THEY DISAGREE WITH THE UNILATERAL 45-DAY PLACEMENT.**

##### **A. The Parents' Recourse.**

- 1. Expedited Due Process Hearing.** If the parent disagrees with the unilateral placement in the IAES, the parent can appeal the decision by requesting an expedited due process hearing. 34 C.F.R. § 300.532(a).
- 2. Placement during Appeal.** When an appeal is made, the student must remain in the IAES pending the decision of the administrative law judge or until the expiration of the 45 school days, whichever occurs first, unless the parent and school district agree otherwise. 34 C.F.R. § 300.533.
- 3. Conciliation Conference.** "Parents must have an opportunity to meet with appropriate district staff in at least one conciliation conference if the parents object to any proposal or refusal of which the parents are notified [of via PWN]. If the parent refuses efforts by the district to conciliate the dispute with the district, the district is deemed to have satisfied its requirement to offer a conciliation conference." Minn. R. 3525.3700, subp. 1.

##### **B. Minn. Special Educ. Compl. 19-046C (Minn. SEA 2019).**

- 1. Facts.**
  - a. A student with a disability engaged in conduct that was a manifestation of his disability and met the standards to qualify as a "special circumstance" justifying a unilateral 45-day placement.
  - b. The District suspended the Student for "10 consecutive days for his behavioral incident" and the "Superintendent was provided the reasoning for the Student's longer suspension." Prior to the Student's sixth consecutive day of suspension, schoolwork was made available to pick up as well as made available to access remotely for the student to work on at home. The Student, however, did not complete the schoolwork.
  - c. A timely manifestation determination review was held. First, during the meeting, the "relevant members of the IEP team" determined that the conduct was a manifestation of the student's disability. The District notified the parent at the meeting that the IEP team has decided to use a unilateral 45-day placement for

“special circumstances.” The general education teacher on the IEP team, however, left the meeting prior to the IEP team discussing the appropriate IAES. The parent did not agree in writing to the excusal and the general education teacher did not submit, in writing, input into the discussion prior to the meeting. The remaining members of the IEP team discussed an appropriate IAES. The parent “meaningfully participated in the IEP team's discussion regarding the Student’s [IAES].” The IEP team also determined that it was appropriate to wait to “change the content of the Student’s IEP as an IEP team after having the opportunity to tour [the IAES] and discuss how its programming could be tailored specifically to the Student’s needs following an intake meeting.”

- d. The District unilaterally used a 45-day placement to place the Student in the IAES and notified the parent using a PWN. The Student, however, “failed to avail himself of those educational services.” The District did not provide the procedural safeguards notice to the parent at the meeting or with the PWN. Because the Student was removed to the IAES prior to the 10th consecutive day of suspension, “the Student was not suspended for more than 10 consecutive days.”
- e. While the parent acknowledged that the District was justified in utilizing a unilateral 45-day placement based on “special circumstances,” the parent objected to the PWN and requested a conciliation conference. The parent also requested that the Student receive homebound services. The District did not provide the parent a PWN refusing her request for homebound services within 14 days of receiving the request. Nor did the District hold a conciliation conference within 10 days of the request for a conciliation conference.
- g. “The Student also received, as appropriate, an FBA and behavioral intervention services and modifications designed to address the behavioral incident so that it does not recur.”

2. ***Issues.*** Did the District comply with federal and State law?



3. *Holding.*

a. During the Suspension.

- i. “The District provided special education and related services in conformity with the Student’s IEP when the District commenced disciplinary procedures against the Student, in accordance with [IDEA’s FAPE obligation].”
- ii. “The Superintendent was provided the reasoning for the Student’s suspension which exceeded five days” and the “District provided alternative educational services to the Student when his suspension exceeded five consecutive school days, in accordance with [the Minnesota Pupil Fair Dismissal Act].”

b. The 45-day Unilateral Placement.

- i. “The District held a manifestation determination meeting regarding the Student’s behavioral incident within the timeline required by [IDEA’s regulations].
- ii. “The District was permitted to use the special circumstances under [IDEA’s regulations] to remove the Student to an [IEAS] for not more than 45 school days.”
- iii. “The IEP team determined the [IAES] for services for the Student, in accordance with [IDEA’s regulations].” But, “for the portion of the meeting relating to determining the setting of the [IAES], the ‘IEP team’ is required to be present.” “The District violated [IDEA’s regulations] when the [parent] did not consent to a partial excusal of an IEP team member from, and when the absent IEP team member failed to submit, in writing to the [parent] and the IEP team, input into the [IAES] discussion prior to, the meeting.”
- iv. “The Student was removed to an IAES where he would have received educational services to enable him to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting his IEP goals, in accordance with [IDEA’s regulations].” If the parent disagreed with the IAES that the IEP team selected,

the parent's "recourse was to appeal the decision by requesting a[n expedited due process] hearing."

c. Procedural Requirements.

- i. "The District provided notice to the Complainant of its decision to remove the Student to an [IAES] via the Prior Written Notice, in accordance with [IDEA's regulations and the Minnesota Rules]." "Because the District was notifying the [parent] of the Student's change of placement and not proposing to change the content of the Student's IEP yet, the requirement in [the Minnesota Rules] that districts provide a copy of proposed IEPs along with a prior written notice was not triggered with the District's Prior Written Notice."
- ii. "The District violated [IDEA's regulations] when it failed to provide a copy of the procedural safeguards notice to the [parent]."
- iii. "The District violated [IDEA's regulations and the Minnesota Rules] when it failed to provide to the Complainant prior written notice refusing her request for homebound services for the Student within 14 days of receiving her request."

d. Conciliation Conference. "Although the District was permitted to remove the Student to an interim alternative educational setting that the IEP team determined," "[t]he District violated [the Minnesota Rules] when it failed to hold a conciliation conference within 10 calendar days of receiving the [the parent's] objection to the Prior Written Notice proposing a change in the Student's educational placement."