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Disciplining students with disabilities

Student Issues
Monday, November 14, 2011
2:00 p.m.
C 114—115

John Britton, Esq., Britton, Smith, Peters & Kalail Co LPA

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2011 OHIO SCHOOL BOARDS ASSOCIATION CAPITAL CONFERENCE

DISCIPLINING STUDENTS WITH DISABILITIES

November 14, 2011

Room C 114-115
2:00 p.m

Presented by:

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I. DISCIPLINE OF IDENTIFIED SPECIAL NEEDS CHILDREN: An Overview of Stay Put, Manifestation Determinations, and 45 School Day Removals

A. Discipline of Disabled Students – A Brief Historical Perspective

IDEIA 2004 implemented many new and important changes in the discipline of special education students, most significantly in the areas of "stay-put," manifestation determinations and automatic 45 school-day removals for certain serious offenses. However, some regulations and procedures remained unclear and the U.S. Department of Education has since published several Q&A documents to assist districts in addressing these issues.

In addition, several socio-educational concerns, such as the use of restraints and school challenges in managing bullying, have been the subject of increased nation-wide awareness.

This presentation will serve as a basic review of legal procedures and pitfalls when disciplining students with disabilities and will also address some of the emerging issues in this area.

B. Student Discipline and "Stay Put"

[20 U.S.C. § 1415(k)(1)(A)-(D); (k)(3); 34 C.F.R. § 300.533; O.A.C. § 3301-51-05(K)(20)]

1. IDEIA 2004 authorizes school districts to remove students with disabilities from their educational setting for an aggregate of ten school days or less, without providing educational services. OAC 3301-51-05(K)(20)(b)(i). (AKA – 10 "FAPE free" days)

2. If a student violates a school rule resulting in a removal in excess of ten days, and the appropriately comprised team determines that the behavior was not a manifestation of the student's disability, the student can be removed for the same amount of time as a non-disabled student, **provided** that the school district continues to educate the student in an interim alternative educational setting.

    a. As before, while the administrator makes the determination regarding discipline, the interim alternative educational setting must be determined by the student's IEP team which includes the parent. The continued services must enable the student to continue to participate in the general curriculum and **progress** toward meeting the IEP goals. A functional behavior assessment and behavior interventions must be provided, as appropriate (see below), to address the behavior violation so it does not recur.

b. The team does not need parental consent to change the student's placement in these circumstances. However, if the parent does not agree with either the manifestation determination decision or the interim alternative educational setting selected by the team, the parent may request an **expedited** due process hearing.

c. **STAY PUT -- An exception to the general rule:**

If a parent requests due process, "stay-put" is the interim alternative educational setting. The student will remain in this setting until (1) the term of the discipline has expired; or (2) the hearing officer issues a decision. OAC § 3301-51-05(K)(23).

d. 10-Day Removal – While the IDEA 2004 only refers to ten days without further stating whether such days are consecutive or cumulative, the following language is included in § 300.530 (b)(1) of the regulations:

*School personnel . . . may remove a child with a disability who violates a student code of conduct from their current placement to an appropriate interim alternative educational setting, 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** under § 300.536).*

e. Change in Placement – Under Regulation § 300.536 and O.A.C. § 3301-51-05(K)(26), a change in placement will occur if:

(1) The removal is for more than ten consecutive school days; or

(2) The child has been subjected to a series of removals that constitute a pattern:

(a) Because the series of removals total more than ten school days in a school year;

(b) Because the child's behavior is **substantially similar** to the child's behavior in the incidents that resulted in the series of removals; and

(c) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

(3) Subject always to the possibility of a due process challenge, the "school district," not the IEP team, determines whether a series of removals is a pattern of removal and is, therefore, a change of placement. OAC 3301-51-05(K)(26)(b).

District representatives should carefully analyze whether a series of removals constitutes a pattern and is, therefore, a change of placement before meeting with the parent and document the analysis in issuing a determination to the parent.

(4) The determination by the school district whether a series of removals constitutes a pattern and is, therefore, a change of placement, is subject to due process review. OAC 3301-51-05(K)(26)(b).

For this reason, if the school determines that a series of removals is not a pattern of removal (i.e. not a change of placement), the district should issue prior written notice (PR-01) and notice of procedural safeguards ("Whose IDEA is This?").

(5) Once a series of removals (or a single removal) exceeds a total of ten school days in the same school year, the district must provide educational services. This is true *regardless* of whether the series of removals constitutes a pattern (i.e. a change of placement).

a. Who determines what and how educational services will be provided starting on day 11?

(1) If the series of removals is not a pattern and is not, therefore, a change of placement for disciplinary reasons, the administrator, in consultation with one of the child's teachers, determines what and how services will be provided. OAC 3301-51-05(K)(20)(d)(iv).

(2) If the series of removals is a pattern and is, therefore, a change of placement (or if the removal is for more than 10 days and is a change of placement for that reason), then the IEP team must convene and determine what and how services will be provided. OAC 3301-51-05(K)(20)(d)(v).

b. **Caveat:** A district must also provide educational services to a disabled child during the first 10 school days of a removal or removals **if** the district provides such services to non-disabled children. OAC 3301-51-005(K)(20)(d)(iii).

c. What educational services must be provided starting on day 11 of the removal(s)?

The district must provide services that enable the child to continue to **participate** in the general educational curriculum, although in another setting, and to **progress** towards meeting the goals set out in the child's IEP. OAC 3301-51-005(K)(20)(d)(i)(a).

3. Authority of Hearing Officer – In making a determination in a due process case involving a disciplinary removal, a hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer may:

a. Return a child with a disability to the placement from which the child was removed, if the hearing officer determines that the removal was a violation of § 300.530/O.A.C. § 3301-51-05(K)(20) (Authority of School Personnel) or that the child's behavior was a manifestation of the child's disability; or

b. Order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others [34 C.F.R. § 300.532(b)(2) O.A.C. § 3301-51-05(K)(22)].

C. **Manifestation Determinations, Functional Behavioral Assessments, and Behavioral Intervention Plans**
[20 U.S.C. § 1415(k)(1)(E)-(F); 34 C.F.R. § 300.530(e) and (f)]

1. If a school district decides to change a student's placement by removing him/her for more than ten (10) school days due to a violation of the student code of conduct, the district must conduct a manifestation determination to ascertain whether the student's behavior was caused by his/her disability. The manifestation determination review ("MDR") must be completed within ten school days of any decision to change the student's placement. OAC 3301-51-05(K)(20)(e)(i).

    a. This applies to a single removal lasting more than 10 days and to a series of removals, each lasting less than 11 days, that constitutes a pattern. For example, if the district suspends a child three times, each time for five days, and the removals constitute a pattern, then the district must convene the IEP team to complete an MDR.

    b. When a child has been recommended for expulsion, the IEP team can meet before the expulsion hearing, or the superintendent can hold the expulsion hearing and, if the child is expelled, the IEP team can meet no later than 10 days after the decision to expel.

2. The manifestation hearing must be conducted by the district, the parent, and relevant members of the IEP team; **relevant members are determined by the parent and district,** and the IEP team shall review all relevant information in student's file, including:

    a. IEP;

    b. Any teacher observations; and

    c. Relevant information provided by the parent.

3. Who Will Make the Manifestation Determination?

    The school district, parent, and **relevant members** of the IEP team (as determined by the parent and school district).

4. Behavior is a manifestation of the student's disability if either of the following conditions is met:

   a. **The conduct in question was caused by, or had a direct and substantial relationship to, the child's disability**; or

   b. **The conduct was the direct result of the local education agency's failure to implement the IEP.**

5. This language does no longer mandates a finding that the behavior was a manifestation of the child's disability if the IEP and/or behavior plan are determined to be lacking.

6. The above conditions are still the focal points of the manifestation meeting. However, it is important to consider all the information known about the child and not just the particular disability that makes him or her eligible for special education services. For example, if a student initially qualified for services under the specific learning disability label but also is diagnosed with bipolar disorder, a district should consider the bipolar condition as well when determining if the conduct in question was caused by the disability and not only focus on the SLD. *See e.g.* K.R. and J.R. o/b/o N.R., v. Vineland City Bd. of Educ.,2008 N.J. AGEN LEXIS 128 (2008).

7. If the manifestation determination team determines that the behavior was a manifestation of the child's disability, the team must:

   a. Conduct a functional behavioral assessment and create a behavior intervention plan if these steps have not already been taken;

   b. In the event that a behavior intervention plan already exists, review the plan (within ten days of the MDR) and, if necessary, modify it to address the behavior;

   c. **Return the child to the educational placement from which he/she was removed, unless any of the following is applicable:**

      (1) **The district and the parent agree to a change in placement as part of the modification of the behavior intervention plan;**

(2) **The child was disciplined for possessing drugs, weapons, or inflicting serious bodily injury upon another; or**

(3) **The district files for an expedited appeal and the hearing officer orders a different placement.**
20 U.S.C. § 1415(k)(1)(F); 34 C.F.R. § 300.530(f)(1).

8. **NOTE:** Irrespective of whether a child's behavior is a manifestation of his/her disability, the child shall receive, "as appropriate," a functional behavioral assessment, behavior intervention plan, and modifications designed to address the behavior resulting in the disciplinary removal so that the behavior does not recur. 20 U.S.C. § 1415(k)(1)(D); C.F.R. § 300.530(d). If an IEP team determines that the child's behavior impedes her learning or that of others, then the IEP team should conduct an FBA and prepare and implement a BIP. In addition, at least one IEP goal should address the child's behavior. The BIP becomes part of the child's IEP.

9. **Functional Behavioral Assessments** – however, are required to be done within ten (10) business days following a removal of a child for more than ten (10) school days in a school year under the Operating Standards at 3301-51-05(K)(6)(a). Under IDEIA 2004, an "FBA" is required only if the IEP team has made a determination that the conduct was a manifestation of the child's disability. Ohio's Operating Standards now align with the federal law and also require an FBA **only** when the student's conduct was a manifestation of the child's disability. OAC § 3301-51-05(K)(20)(d)(b), (f).

10. "FBA" is not defined by the law or the regulations. However, such assessments need not be complicated and will often rely upon existing data. In essence, a functional behavioral assessment is a systematic process for describing the child's problem behavior which identifies the environmental factors, the setting and the events that trigger or predict those behaviors, as well as providing guidance for the development of effective behavioral interventions and/or support plans. The expected outcomes of an FBA are:

a. A definition of the problem behavior(s);

b. Descriptions of the conditions under which the behaviors are or are not likely to be observed;

c. Clarification/identification of the "why?" of such behavior(s), i.e. the "function" of the behavior(s); and

d. Data to support these outcomes, based upon direct observation.

e. An FBA should include:

i. The specific behavior(s) of concern, including the intensity, frequency and duration;

ii. The setting where the behavior usually occurs, e.g., cafeteria, transition periods, bus, regular classroom, etc.;

iii. the circumstances antecedent to behavior;

iv. the consequences of the behavior;

v. conditions that may impact the behavior, e.g., medications, diet, schedule, etc.;

vi. the apparent purpose of the behavior;

vii. modification/interventions attempted to change the behavior;

viii. behaviors that would serve as functional alternatives to the target behavior.

11. As stated above, **if the behavior is determined NOT to be a manifestation of the disability, the district may proceed with disciplinary action the same as for all other students.** Again, services must be provided to allow for participation in the general curriculum and progress toward IEP goals. If the parents dispute the manifestation determination, they may seek an "expedited" appeal – during which time the stay put placement is the alternative setting.

Note: Under Ohio law, districts must notify the ODE within one business day following the receipt of a parental request for an expedited hearing, and the ODE must appoint a hearing officer within one business day of receiving such notice. The hearing must take place within 20 school days of the day the complaint requesting the hearing was filed, and the hearing officer must render a decision within ten days of the conclusion of the hearing. **No extensions of time may be granted**. (O.A.C. § 3301-51-05(22)(d)).

12. **Behavioral Intervention Plans**—A behavioral intervention plan ("BIP") considers the appropriate strategies, "including positive behavior interventions, strategies and supports," to address a student's behavior that "impedes the student's learning or that of others."

The IDEA does not define "BIPs," leaving such plans to the wide discretion of public agencies to fashion. One suggested definition of BIP is "a written, specific, purposeful and organized plan, which describes positive behavioral interventions, and other strategies that will be implemented to address goals for a student's social, emotional, and behavioral development within the context of the IEP process. In addition, for students whose behavior prompts disciplinary action by the school, the behavioral intervention plan addresses the behavior(s) of concern that led to conducting a functional behavioral assessment."

13. Because the IDEA and federal regulations do not define "BIP," a BIP should include whatever behavior management tools, including both positive and negative reinforcers, are appropriate for the purpose of allowing the student to meet his behavioral goals and objectives. The lack of specificity is consistent with the IDEA philosophy of allowing IEP teams to decide the unique needs of, and responsive services for, each student with a disability.

Because of this lack of specificity, problems may arise in writing a student's BIP. The following are issues to consider:

a. Are BIPs in the district being implemented consistently?

b Who should write the BIP, the IEP team or an objective, outside party?

c. How and when will the school modify the BIP should the need arise?

d. How does the student's BIP fit into his or her IEP?

A district may elect to make a student's BIP part of the IEP but is not required to do so under federal law. In most cases, however, best practice includes developing, reviewing, implementing, and documenting a BIP as part of the IEP process.

e. Who should be informed about the details of the student's BIP?

If, for example, the student receives tokens for his or her good behavior while on school grounds, certain school employees should know about the tokens and award them when earned.

f. Does the BIP unduly limit the disciplinary options of the school district?

g. Will the student be "removed" to a "timeout" under the BIP, and, if so, how will this timeout be handled so as not to contribute to further "removals?" Timeout periods must be monitored so as not to result in a cumulative ten day removal.

h. It is critical to objectively look at the results of the FBA and determine what is causing the undesired behaviors and how altering the consequences and interventions can effect a change.

i. Why are the existing consequences not working?

ii. Is a minor modification needed or should the entire system be revised?

iii. What else can be tried?

14. As stated above, if the behavior is determined NOT to be a manifestation of the disability, the district may proceed with disciplinary action the same as for all other students. Again, services must be provided to allow for participation in the general curriculum and progress toward IEP goals.

The determination by the IEP team that the child's conduct was not a manifestation of the child's disability is subject to a due process hearing. If the parent requests a due process hearing for this issue, the hearing will be expedited (resolution session within 7 days (not 15) ; resolution period of 15 days (not 30); hearing within 20 days; decision within 10 days from hearing; no extensions of time). OAC 3301-51-05(K)(22)(c).

a. The child remains in the disciplinary placement pending the due process decision. OAC 3301-51-05(K)(23).

b. Remember – the district must notify ODE of its receipt of a request for an expedited due process hearing before the end of the next business day.

If the parents dispute the manifestation determination, they may seek an "expedited" appeal – during which time the stay put placement is the alternative setting.

D. **"Special Circumstances:" Drugs, Weapons, and Serious Bodily Injury**
[20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g)]

The 45-day Interim Alternative Educational Setting ("IAES") is an option when school districts are faced with some types of serious misbehavior.

1. The 45- **school** day interim alternative educational setting ("45 day alternative setting") is a separate tool allowing a unilateral change in placement for disciplinary reasons without parental consent. The 45-day alternative setting should be considered separate and apart from expulsion. Even if the child's misconduct is such that an IAES is available, it is necessary and important to complete the MDR. For example, if the student's conduct is not deemed to be a manifestation of the child's disability, the District may expel the child as it would any other (i.e., it may not need to resort to the limits of the 45 day period).

2. The 45 day alternative setting is for **school days**, not calendar days.

3. Since an IAES represents a change of placement (here, for disciplinary reasons), the district must provide prior written notice and notice of procedural safeguards.

4. The 45 day alternative setting is available for only three types of misconduct:

   a. The child carried a weapon to, or possessed a weapon at, school, on school premises, or a school function;

      (1) A "weapon" means a "dangerous weapon" as defined at 18 U.S.C. § 930(g)(2): 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.

(2) The child knowingly possessed or used illegal drugs, or sold or solicited the sale of a controlled substance, while at school, on school premises, or at a school function;

(3) The child inflicted serious bodily injury upon another person while at school, on school premises, or at a school function.

(a) "Serious bodily injury" means a bodily injury that involves (i) a substantial risk of death, (ii) extreme physical pain, (iii) protracted and obvious disfigurement, or (iv) protracted loss or impairment of the function of a bodily member, organ or mental faculty. 18 U.S.C. § 1365(h)(3)

5. If a child engages in one of the types of conduct for which the Superintendent may order a 45 day alternative setting, but the child cannot be expelled because the MDR team has determined that the conduct was a manifestation of the child's disability, then the Superintendent can unilaterally order the child to a 45 day alternative setting. In this case, the IEP team must convene to determine what that setting will be and how educational services will be delivered starting on day 11. OAC 3301-51-05(K)(21).

6. The Superintendent's use of the 45 day alternative setting and the IEP team's determination of the appropriate setting are subject to due process, which will be expedited. OAC 3301-51-05(K)(22)(a) and (c)(i). The child remains in the 45 day alternative setting pending the due process decision. OAC 3301-51-05(K)(23).

7. Referral to and action by law enforcement and judicial authorities.

a. A district may report delinquent conduct by a child with a disability to law enforcement. OAC 3301-51-05(K)(25) and 3301-51-04(R)(1).

b. If the district makes such a report to law enforcement, the district is required to transmit copies of the child's special education and disciplinary records to law enforcement. OAC 3301-51-04(R)(2).

E. **Appeals**
[20 U.S.C. § 1415(k)(3)-(4); 34 C.F.R. § 300.532]

1. Parents and school districts retain the right to request a hearing regarding student discipline. An expedited hearing must occur ***within 20 school days*** of the date the hearing is requested and the decision must be issued ***within 10 school days*** after the hearing. The statute does not address how regular due process procedural requirements apply to expedited due process proceedings. In accordance with 34 C.F.R. § 300.532(c)(3) and O.A.C. § 3301-51-05(22)(d):

    a. The resolution session must occur within 7 days of the date the hearing is requested; and

    b. The hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of the receipt of the hearing request.

2. As previously discussed, the "stay put" placement of the child during the pendency of the hearing is the interim alternative educational setting determined by the IEP team.

F. **Protections for Children Not Yet Eligible for Special Education and Related Services** [20 U.S.C. § 1415(k)(5); 34 C.F.R. § 300.534]

1. *What happens when the parents of child who has not been identified as special needs – after disciplinary action is taken or threatened – claims that the student is, in fact, "disabled"?*

2. Under the IDEIA, a district shall be deemed to have knowledge a child is a child with a disability if, **before** the behavior that precipitated the disciplinary action occurred:

    a. The parent of the child has expressed concern in writing to supervisory or administrative personnel of the district, or to the teacher of the child that the parent believed the child was in need of special education and related services;

    b. The parent of the child has requested an evaluation under the IDEIA; or

c. The teacher of the child or personnel of the district has expressed **specific** concerns about a pattern of behavior demonstrated by the child **directly** to the director of special education or to other supervisory personnel of the district.

3. Exceptions: The district will not be deemed to have knowledge that a child is a child with a disability if the parent has not allowed an evaluation of the child, has refused services, or if the child was evaluated and was found not to be eligible under the IDEIA.

4. If the district receives a request for evaluation under the IDEIA after the behavior occurred, the district must conduct an expedited evaluation. While the expedited evaluation is in progress, the child remains in the disciplinary placement, which can include suspension or expulsion without any educational services. If the child is determined eligible, the district must provide special education and related services during the period of exclusion from school.

G. **Discipline Under Section 504 as Compared to the IDEA**
[29 U.S.C. § 794; 34 C.F.R. § 104]

1. Section 504 is a civil rights statute designed to protect the rights of individuals with disabilities in programs and activities that receive federal funds from the U.S. Department of Education.

2. Unlike the IDEA, Section 504 has no funding of its own. **Thus, rather than providing services, Section 504 requires that schools not discriminate against children with disabilities and provide children with reasonable accommodations.**

   Section 504 states that "[n]o otherwise qualified individual with a disability in the United States . . . shall **solely** by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."

3. In the past, to be protected under Section 504, a student must have been determined to have a physical or mental impairment that substantially limits one or more major life activities (functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working, have a record of such an impairment or be regarded as having such an impairment. However, the ADA Amendments Act of 2008 (effective Jan 1, 2009) sought to broaden the definition of disability and provided coverage to those who had been previously thought ineligible under Section 504:

a. The Act redefined major life activities and noted that "major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."

b. Major life activities also include "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." 42 USC 12102 (2)(A)-(B).

c. Further, the effects of mitigating measures are not to be taken into account when determining disability. The Act specifically notes that "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as: (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eye glasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; (II) use of assistive technology; (III) reasonable accommodations or auxiliary aids or services; or (IV) learned behavioral or adaptive neurological modifications." 42 USC 12102 (4)(E)(i).

In other words, a team's discussion of major life activities cannot be limited to learning. Even if a student's learning is not affected by the disability, he or she can still be covered if another major activity or bodily function is impacted. Examining a student's good grades is not enough to determine that he or she is not disabled. *See e.g. North Royalton Ohio Sch. Dist.*52 IDELR 203 (OCR 2009).

In addition, a team cannot consider mitigating measures in deciding whether the student is eligible for 504 protections. For example, it would be impermissible to decide that a student with ADHD does not have a disability covered by Section 504 simply because his medications lessen the severity of his symptoms. In determining which accommodations would be necessary, however, the team may consider the ameliorative effects of the medication.

Likewise, a student will not be eligible for 504 accommodations just because he has a record of having a condition or impairment. The team must determine that he is eligible for these accommodations because the impairment substantially limits a major life activity.

4. Like the IDEA, Section 504 affords students with disabilities special protections regarding discipline. There are, however, key distinctions between how the IDEA and Section 504 govern student discipline.

   a. Section 504 does not explicitly require districts to have a formal written Section 504 discipline policy, but it is highly recommended.

   b. Unlike the IDEA, Section 504 does not include an explicit stay-put provision pending the resolution of due process disputes between parents and schools.

   c. Unlike the IDEA, Section 504 has no explicit provision stating districts must provide FAPE to students with disabilities who are suspended or expelled. However, if state law mandates provision of continued services to properly expelled students, then such services must be offered to both disabled and nondisabled students alike. *OSEP Memorandum 95-16*, 22 IDELR 531 (OSEP 1995).

   d. Although the Section 504 regulations provide no direct guidance on whether a manifestation determination must be conducted before a disciplinary hearing under Section 504, this appears to be the case. OCR stated, pursuant to Section 504 and IDEA, a manifestation determination concerning "alleged misbehavior" must be conducted prior to proceeding with an expulsion hearing. *Washington (CA) Unified Sch. Dist.*, 29 IDELR 486 (OCR 1998). Moreover, because an expulsion is considered a "significant change in placement" under the Section 504 regulations at 34 C.F.R. § 104.35, "proper procedures" include a manifestation determination and a result finding the student's misconduct was not related to his disability.

   e. Under Section 504, children with disabilities may not be disciplined for behavior that is a manifestation of their disability if the disciplinary action constitutes a change in placement. *S-1 v. Turlington*, 552 IDELR 267 (5th Cir. 1981).

f. Generally, suspension and expulsion of students with disabilities have been treated the same way under both the IDEA and Section 504.

Section 504, however, allows districts to discipline all students with disabilities who are current drug users for use or possession of drugs in violation of the district's disciplinary code. 29 U.S.C. § 705 (20)(C)(iv). Because a student who is currently using illegal drugs is not considered a student with a disability under Section 504, the student can be disciplined under the district's regular code of student conduct, even with a drug addiction.

H. **Bullying:** As national concerns about the effects of bullying rise, more and more districts are facing legal action from parents whose children are verbally and physically harassed. If the victim or perpetrator is a child with a disability, disciplinary issues can become complicated very quickly. In order to limit liability, each district should:

1. Develop and implement a comprehensive anti-bullying and harassment policy in accordance with R.C. § 6777. Ensure that a school-wide preventive program is in place.

2. React quickly to each instance of bullying by informing parents, taking disciplinary action and developing safety plans where possible. *See Doe v. Big Walnut LocalSch. Dist. Bd. of Educ.*, 2011 U.S. Dist. LEXIS 81953 (S.D. Ohio July 27, 2011).

3. If either child has an IEP, convene the team to conduct an FBA and revise the behavior intervention plan. Additional services can include social skills and pragmatic language therapies, counseling, closer monitoring and schedule changes.

I. **Restraint and Seclusion:**

1. Ohio Legislation on Corporal Punishment and Classroom Control

a. R.C. § 3319.41
Corporal punishment policy.

(A) No person employed or engaged as a teacher, principal, administrator, non-licensed school employee, or bus driver in a public school may inflict or cause to be inflicted corporal punishment as a means of discipline upon a pupil attending such school.

(B) A person employed or otherwise engaged as a teacher, principal, or administrator by a nonpublic school, except as otherwise provided by the governing authority of the nonpublic school, may inflict or cause to be inflicted reasonable corporal punishment upon a pupil attending the school to which the person is assigned whenever such punishment is reasonably necessary in order to preserve discipline while the student is subject to school authority.

(C) Persons employed or engaged as teachers, principals, or administrators in a school, whether public or private, and nonlicensed school employees and school bus drivers may, within the scope of their employment, use and apply such amount of force and restraint as is reasonable and necessary to quell a disturbance threatening physical injury to others, to obtain possession of weapons or other dangerous objects upon the person or within the control of the pupil, for the purpose of self-defense, or for the protection of persons or property.

Amended by 128th General Assembly File No. 9, HB 1, § 101.01, eff. 10/16/2009

2. Executive Order 2009-13S (effective August 3, 2009)

a. Executive Order 2009-13S ("EO") - Includes provisions that impact restraint policies and procedures for 14 Ohio state agencies, including the Ohio Department of Education. Agencies were directed to adopt the policy immediately, but had the option to incorporate it into existing policies as long as they did not conflict with the executive order.

The EO divides "face-down" restraints into two types: "prone restraint" and "transitional hold." The EO prohibits the use of "prone restraint," places limitations on the use of "transitional hold," and also addresses the use of other types of physical restraint.

"Prone restraint," which is prohibited, means all items or measures used to limit or control movement or normal functioning of any portion, or all, of an individual's body while the individual is in a face-down position for an extended period of time, including physical or mechanical restraints.

"Transitional hold" means a brief physical positioning of an individual face-down for the purpose of quickly and effectively gaining physical control of that individual in order to prevent harm to self or others, or prior to transport to enable the individual to be transported safely. "Transitional hold" may include the use of handcuffs or other restraints incident to arrest or temporary detention by law enforcement consistent with departmental policy.

In addition to prohibiting the use of prone restraint, the EO places the following limitations on the use of transitional hold:

- Only staff with current training on the safe use of transitional hold, including how to recognize and respond to signs of distress in the individual, may use transitional hold;

- Transitional hold may be applied only in a manner that does not compromise breathing. The following techniques compromise breathing and cannot be used or applied: a.) pressure or weight bearing on the back; b.) soft devices such as pillows placed under an individual's face or upper body; c.) placing the individual's or staff's arms under the individual's head, face or upper body;

- Transitional hold may be applied only for the reasonable amount of time necessary to safely bring the person or situation under control and to ensure the safety of the individuals involved; and

- Transitional hold may be applied only with consistent and frequent monitoring during and after the intervention with every intent to assure that the person is safe and suffers no harm.

Physical restraint that does not involve placing the individual in a "face-down" position may be used only when there is risk of escape or harm to the individual or others. Physical restraint may be used only by trained staff and under the approval, guidance and restrictions as outlined under Department of Education policy. (i.e., the policy delineated in the EO).

The EO also established the Ohio Policy Committee on Restraint and Seclusion. This committee will include members from 14 Ohio departments and is charged with developing a single, statewide policy.

3. Avoiding Unnecessary Issues in the Restraint and Seclusion of Students

   a. Where restraint is both necessary and authorized by a student's BIP, ensure:

      • it is done by currently trained staff; and

      • there are no other alternatives to contain a threat to safety.

   b. Do not "default" to the involvement of the police, local authorities, or even the school resource officer as a standard "go-to" response. Where such intervention is necessary, make sure that the responding individuals are made aware of the student's disability when practicable.

II. REPRESENTATIVE CASE SUMMARIES: Emotional Disability (ED)/ OHI Students and Imposing Discipline for Disability-Related Behaviors

A. A district violated both 504 and IDEA when it disciplined a third grade student for ADHD related behaviors and also refused to provide him with a special education evaluation. The student performed well academically, but had difficulty in impulse control and social skills as well organizational deficits. The school maintained that an IEP would be inappropriate because of the student's academic success but agreed to implement a 504 plan. However, school officials continued to impose consequences, such as missing recess, for ADHD-related behaviors. The ALJ held that the student was eligible for special education services as a student with an OHI and that the school failed to implement the 504 plan as required. *2004 Fla. Div. Adm. Hear. LEXIS 1849* (Fla. Div. Adm. Hear. 2004)

B. A school violated IDEA when a seventh grader was sent to in-school suspension for five days. As stated on his IEP, the pupil had emotional difficulties stemming in part from a fear of being perceived as different from the others and a separate placement was found to be inappropriate by the hearing officer. In addition, the student was transferred to a self contained classroom immediately following a crisis incident, without a review of his IEP. Compensation was awarded to the student for the time period he remained in the self-contained room. *2002 Fla. Div.Adm. Hear. LEXIS 1381* (Fla. Div. Adm. Hear. 2002)

C. An Ohio federal court found that failure to identify an elementary school student as a child with a disability did not violate IDEA because effective interventions, including in-school counseling, were implemented even without the designation. However, the district did violate IDEA when it suspended the student without a manifestation determination, after it had recommended that the parent take her child to "an outside mental health agency" because concerns about mental health was sufficient reason for the district to have suspected that the child would be a special education student entitled to procedural safeguards. *Jackson v. Northwest Local Sch. Dist.*, 2010 U.S. Dist. LEXIS 90572 (S.D. Ohio, 2010).

D. After a student had been referred for an evaluation for academic and behavioral problems stemming from his ADHD, but before he was identified as a special education student, he vandalized the school bathrooms. The school filed a petition in juvenile court and refused to seek dismissal, even after the student was identified as disabled for IDEA purposes and placed on an IEP. The 6th Circuit Court of Appeals held that the filing of such a petition is enough to be considered a change in placement and disciplining this student for behavior that occurred as a result of his disability was a violation of IDEA. *Morgan v. Chris L. by Mike L.*, 1997 U.S. App. LEXIS 1041 (6th Cir. Tenn. Jan. 21, 1997).

E. A New Jersey hearing officer found that a district violated IDEA when it suspended a student with a reading disability for bringing a pocket knife to school. The high school student had been diagnosed with ADHD but was eligible for special education services only as a student with a specific learning disability. However, the IEP was poorly written with regard to reading services and included only vague generalizations instead of measurable objectives. During the manifestation determination, the IEP team decided that the reading disability did not relate to the knife incident, but the team failed to consider ADHD as a component of the disability. Moreover, the knife was of a type that was specifically excluded from IDEA regulations and the period of suspension was considerably longer than permitted for any weapons violation. *2008 N.J. AGEN LEXIS 128* (N.J. AGEN 2008).

F. A district avoided a violation of IDEA when it suspended student as per his Behavior Intervention Plan. The 4th grade boy had an IEP for ADHD and ODD and a BIP which listed a number of interventions for social interaction difficulties and verbal aggression. The BIP did not mention physical aggression. The team added a sentence that stated "If behaviors go beyond what is written in Student's BIP, then administrators follow local and state guidelines." After a physical altercation on the playground, the student was suspended for two days. Because these two days did not constitute a change in placement and were consistent with the BIP directions to follow local guidelines, the AJL held that IDEA was not violated and FAPE was not denied. *Granville County Board of Education* 56 IDELR 309 (March 31, 2011).

G. An Alabama hearing officer found that a school district denied FAPE when it failed to implement and follow a student's behavior intervention plan. The 17 year-old had a history of reading disabilities and mental health issues. After he transferred into his new district, the school revised the BIP and included counseling, role-play, cool-down periods, and a system of behavioral consequences and rewards. However, the school failed to follow through and did not provide the counseling or role play. The consequences were enforced inconsistently and no data-collection or monitoring was done. Eventually the student threatened a teacher and the police were called. The hearing officer found that the school's failure to implement the BIP correctly led to the incident and that IDEA was violated. Compensatory services in reading and counseling were ordered. *Guntersville City Board of Education* 47 IDELR 84 (August 18, 2006).

H. A California ALJ found that an 8 year old boy should not have been placed in an interim alternative educational setting after pointing a pair of scissors at a classmate. The student was receiving special education services as a child with an emotional disability. The children were involved in an altercation during arts & crafts and the student pointed a pair of children's scissors at another boy. After the incident, the school categorized the scissors as a weapon for IDEA purposes and removed the child to a non-public setting. The ALJ noted that the scissors could not have caused serious harm because they were blunt tip and also because the student was not holding them in a way that could have punctured skin. The school was not entitled to remove the student. *California Montessori Project* 56 IDELR 308 April 29, 2011.

I. An ALJ from California found that a district incorrectly determined that a student's behavior was unrelated to her disability. The 17 year-old female received special education services under the TBI category. However, more recently she had experienced a sexual assault and was being treated for PTSD. When a student began sexually harassing her in school, she kicked him in the groin. This resulted in an arrest for her and the school thereafter began expulsion

proceedings. During the MD meeting, the school relied heavily on the district's neuropsychologist who had never met the student and did not consider information from the student's primary psychiatrist who was treating her for the PTSD. The ALJ found that this error result in an incorrect manifestation determination outcome and ordered the student back to her classroom. *Manteca Unified School District* 50 IDELR 298 June 27, 2008.

III. RECENT DISCIPLINE CASES INVOLVING SPECIAL NEEDS STUDENTS

District's Prompt Responses to Bullying Results in Dismissal of Constitutional Claims

Doe v. Big Walnut Local Sch. Dist. Bd. of Educ.,
2011 U.S. Dist. LEXIS 81953 (S.D. Ohio July 27, 2011)

The parents of a young man with a cognitive disability filed an action against the school district after bullying and taunting continued in his high school environment. Their son attended a Resource Room with a group of other children, some of whom had academic difficulties and others who had emotional challenges. Because of his disability, the young man had many interpersonal limitations and often made inappropriate remarks or acted in ways which resulted in negative interactions with his peers. He soon became a target of bullying and teasing. Physical altercations were not uncommon and he required several hospital stays and surgeries.

The district responded to these events by developing a series of safety plans for the student. These safety plans included alterations of his schedule in order to enable the young man to have as little contact with the bullies as possible. Further, the school implemented exercises and activities for the student to learn about the types of interactions he was experiencing and to learn appropriate responses. Moreover, the school also cooperated with police and disciplined all the students involved in the altercations. Despite these efforts, the bullying continued into high school.

The court found that the district's efforts were appropriate and that it did not turn a blind eye to the situation. Because the district responded promptly to bullying complaints, it could not be held liable under an "inaction" theory under § 1983. Further, the district had no constitutional responsibility to protect the young man from private actors, such as other students. Finally, because there was no constitutional violation, the district could not be held liable under any of the other theories proposed by plaintiffs.

School Boards Lack Authority to Overrule Educational Decisions of the IEP Team With Regard to Change in Placement Decisions

Doe v. Todd County Sch. Dist.
625 F.3d 459 (8th Cir. S.D. 2010)

After a high school student with a reading disability brought a knife to school, he was suspended and a manifestation determination review was held. The MDR team found that the student's misconduct was not a manifestation of his disability. Second, at that meeting the team adopted an IEP addendum changing the student's placement to an after-school program at an Alternative High School where he would receive two hours of regular education and special education services per day. The student's grandmother, as the parent member of the IEP team, was present and gave her written consent to this change in placement. She apparently agreed to this because she was under the impression that she had no other choice.

Several days later, however, the grandparent wrote to the district and requested a hearing before the school board as her grandson had already been suspended for ten days. However, the assistant principal informed her that her grandson was no longer suspended, rather, his placement was changed with her written consent. Therefore, no hearing would be held before the school board and instead, the student would be transitioned back into the high school in approximately one month. After this time period elapsed, the student was returned back to school, but was suspended for fighting shortly thereafter. The grandmother removed him from school and, without exhausting her IDEA remedies, filed suit alleging violations of the student's Due Process rights under §1983.

The district court held in favor of the student and found that the entire time period that the student attended the Alternative High School was a period of long term suspension and therefore, he was entitled to formal Due Process procedures, including a hearing before the school board and notice. However, the Eighth Circuit Court of Appeals reversed and found that because the grandmother, as part of the IEP team, signed her consent to the change in placement, she could not claim an educational deprivation from that team decision. Further, the court noted that because of the stay-put rule, even a hearing before a board of education could not have enabled the student to return to his regular high school, as the school board lacked authority to overrule educational decisions of the IEP team. An expedited administrative hearing, noted the Court, would have been a more appropriate means of seeking redress if the grandmother felt that her consent to the placement was wrongly obtained.

Fourth Amendment Not Violated When Parent Fails to Challenge IEP Authorizing Use of Restraints

C.N. v. Willmar Pub. Sch.
591 F.3d 624 (8th Cir. Minn. 2010)

The parent of an elementary school student filed a complaint with the state department of education challenging the adequacy of educational services provided to her child. Initially, the child was diagnosed with communication delays and hyperactivity and placed in a special education classroom. The team then developed an Individual Education Plan ("IEP") and Behavior Intervention Plan ("BIP") which authorized the use of restraints to address certain targeted behaviors. In her complaint, the parent alleged that the special education teacher used restraints improperly and excessively, and also mistreated her child by denying restroom use, forcing her to hold a particular posture for a specified time, and by demeaning and belittling her. Notably, however, the parent filed this complaint only after she moved and enrolled her child in a different public school district.

The Administrative Law Judge ("ALJ"), pursuant to applicable Minnesota law, dismissed the hearing because the child was no longer enrolled in that district. The parent appealed that ruling to the district court and asserted a variety of claims, including violations of the Individuals with Disabilities Education Act ("IDEA"), § 504 of the Rehabilitation Act of 1973, ("RA"), 42 U.S.C. § 1983 and violations of the 14th and 4th Amendments to the Constitution. The district court dismissed the parent's claims, and she appealed once more.

The Eighth Circuit Court of Appeals found that failing to request a due process hearing prior to leaving the district is fatal to an IDEA claim under Minnesota law, and upheld the dismissal of this claim. As a result, the parent's 504 claim failed as well under a failure to exhaust theory. The court emphasized that the pupil had been enrolled in the new district for ten months before the parent requested a due process hearing. Because there was no "live issue" with regard to the student in her current setting, the court dismissed these claims.

In addition, the court held that the student's Fourth Amendment rights against unlawful seizure were not violated when she was restrained, because the IEP authorized such restraints. Although the parent contended that she objected to the use of these methods, she did not request a hearing while her daughter attended school in that district. Therefore, the IEP set forth the standard for accepted practice and the restraint methods were not unreasonable, under Fourth Amendment jurisprudence.

Allegations of excessive force used during restraints were not enough to amount to a constitutional violation, explained the court, because physical abuse by a teacher must be "shocking to the conscience" before it violates a student's constitutional rights. Therefore, the court found that the parent's 14th amendment claims were not specific enough to plausibly entitle her to any relief and dismissed those as well. The court of appeals affirmed the decision of the district court dismissing all federal claims against the district and its employees.

Extreme Disciplinary Approaches Do Not Violate Student's 14th Amendment Rights

T. W. v. Sch. Bd. of Seminole Cty.
2010 U.S. App. LEXIS 13215 (11th Cir. Fla. June 29, 2010)

A fourteen year old student with autism attended 8th grade in a special education classroom with one teacher and two aides. The teacher had considerable years of experience in teaching special needs students, but also had a long record of parental complaints against her. The aides who worked with her reported that she used force against her students and engaged in profanity on a daily basis. She sometimes spanked students, hit them on the back of the head and once bent a student's thumb backward until the child screamed. On several occasions, she left students in clothing soiled by urine and feces.

The teacher used physical force against the student in question on five separate occasions. In the spring of 2004, the student and the teacher had an argument and the teacher proceeded to put the child on the floor with his face to the ground, straddled him so that her pelvic area was on top of his buttocks, and pulled his arms behind his back. She then informed him that she would release him when he followed her commands. In the fall of 2004, the student refused to comply with the teacher's directive and she attempted to restrain him again. He then began swinging his arms at her after which she forced the student to the floor and pulled his right leg up against the back of his left leg. The teacher held him in this position for two to three minutes. and released him after he calmed down. On another occasion, the teacher held him down in a similar fashion to prevent him from scratching an insect bite. Another time, the aides testified, the teacher tripped the student as he was leaving the cool down room, causing him to stumble. The aides testified that the teacher frequently told the child that he stinks and called him lazy, an asshole, a pig, and a jerk. She frequently teased and agitated him until he became angry.

The parent observed several bruises on her son's arm and when asked about them, the student reported that his teacher had hurt him. However, the mother did not seek medical treatment for these bruises and never confronted the teacher about them. His mother testified that her son began experiencing psychological consequences as a result of his experiences in this classroom. Specifically, he had trouble sleeping, became stressed, developed trust issues and panic attacks, started "urinating all over the place," cried to and from school, and refused to close doors. The psychologists retained by the parent opined that this teacher's treatment of the student aggravated his developmental disability and eventually caused him to drop out of school.

After the aides observed restraint of another child in that classroom which caused the student's eyes to swell and his lips to turn blue, they reported their concerns to the principal, who in turn, called the state's child abuse hotline. The teacher was arrested on November 10, 2004, and was eventually found guilty of one count of child abuse in a jury trial. After her arrest, an investigation found that the classroom computers contained images of the teacher engaged in sexual acts that were masochistic or sadistic in nature.

Following these events, the student's mother filed a complaint against the teacher and the school board, alleging that her child's due process rights under the 14th Amendment were violated and that the school board discriminated against her son in violation of Section 504 of the Rehabilitation Act. The district court granted summary judgment for the teacher and the board on all federal claims and the parent appealed.

The appellate court affirmed the district court's decision. The court found that on four out of five occasions, the restraint used by the teacher was for disciplinary purposes because she told the student that "she would release him when he followed her instructions" or "when he agreed to do his work." With regard to the fifth incident, where the teacher tripped the student as he was leaving the calm-down room, the court found that "it is inconceivable that tripping a student and causing the student to stumble, without more, violates the Constitution." The court found that although restraint may have been inappropriate, it could be construed as having some pedagogical purposes and therefore, did not violate the student's rights. Moreover the court found that although there was evidence that the teacher frequently teased the student and agitated him until he became angry, there was insufficient evidence to show that the teacher deliberately provoked him to disrupt class during the four incidents in which she restrained him. The court also found that the student did not experience anything more than transient pain as a result of the restraint. Considering the totality of the circumstances, the court found that the teacher's "conduct was not so arbitrary and egregious as to support a complaint of a violation of substantive due process." The court likewise dismissed the student's claims with regard to 504 discrimination and found that the board was also not liable under a theory of respondeat superior because no reasonable jury could conclude that the teacher intentionally discriminated against the child solely by reason of his disability.

Training Critical to Defense of ADA and Section 504 Discrimination Suit Regarding Restraint

J.D.P. v. Cherokee Co. Sch. Dist.
2010 U.S. Dist. Lexis 84687 (N.D. Ga. 2010)

In an action for compensatory damages under Section 504 and the ADA based upon the use of restraint with a student with autism, intellectual disabilities, a speech language disorder, ADHD, and ODD, the school district was ultimately to be compliant with both statutes, primarily due to the training provided to staff. Fearful that the student was going to injure himself or others when his regular one-on-one aide was absent, employees implemented a physical restraint process whereby they held the student's ankles and wrists. All of the employees had experience and training working with students with disabilities, including de-escalation and physical restraint techniques and, although all employees were not familiar with the student's BIP or 504 plan, the evidence did not demonstrate that their actions were unreasonable in light of their professional determination that the student's behavior put him and others at risk. While it helped that the student was not injured in any way by the restraint, the court recognized that there can be no liability unless the staff either failed to act on knowledge that the student's 504 and ADA

rights were likely to be violated or acted in bad faith or with gross misjudgment. [NOTE: In *D.D. v. Chilton County Bd. of Educ.*, 701 F.Supp.2d 1236 (M.D. Ala. 2010), securing a disabled 4-year-old student in a Rifton chair for less than 10 did not rise to the level of "shocking the conscience," and therefore did not violate the student's constitutional rights. As with the above case, the student sustained no physical injury from the restraint. The court also found that no procedural due process violation had occurred, as there was no right to notice and a hearing before being placed in the chair.]

Draft Anti-Bullying Policies That Comply with Federal Disability Laws

Dear Colleague Letter, Office for Civil Rights
110 LRP 62318 (Oct. 26, 2010)

The Office for Civil Rights issued a "Dear Colleague Letter" clarifying the relationship between bullying and discriminatory harassment. The letter also reminds school districts that by limiting its responses to a specific application of an anti-bullying or other disciplinary policy, it may fail to properly consider whether the student misconduct also resulted in discrimination in violation of students' federal civil rights. These rights can be found in Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin; Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex; and Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990, which prohibit discrimination on the basis of disability.

The letter reminds districts that a more comprehensive response than merely disciplining the perpetrator, or counseling the victim, might be necessary. In addition, steps should be taken to prevent recurrence and to eliminate any hostile environment caused by bullying. These duties are triggered regardless of whether a student has complained, asked the school to take action, or identified the harassment as a form of discrimination.

The letter stated that districts should keep two things in mind when responding to reported bullying: first, it should avoid shaping a response based on how the victim labeled the incident and instead determine whether the nature of the conduct implicates the student's federal civil rights; and second, the district "should look beyond simply disciplining the perpetrators." If a hostile environment exists, the district should take a systemic approach to address the unique effect that the misconduct had on school climate.

The letter offered numerous hypothetical bullying situations that triggered students' federal rights. One hypothetical situation in particular involved several classmates who threw objects at a student with a "specific learning disability," and repeatedly called him names like stupid, idiot, and retard, referencing his impairment. The student reported that he was being continually "taunted and teased." The letter noted that a district that viewed the incident as bullying and merely offered counseling services would have responded inadequately because it would have failed to take steps to address the hostile environment. The letter reported that such

steps should have involved disciplining the harassers, consulting with the district's Section 504 coordinator to ensure a thorough response, training staff to recognize disability discrimination, and monitoring the harassment so it did not resume.

If harassment has occurred, a district must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment, and prevent its recurrence. An effective and prompt investigation of the facts will aide in a district's duty to respond appropriately.

District's Concern for Student's Mental Health is Sufficient Reason to Suspect Child Would be a Special Education Student Entitled to Procedural Safeguards

Jackson v. Northwest Local Sch. Dist.
2010 U.S. Dist. LEXIS 90572 (S.D. Ohio, 2010)

An Ohio federal court found that failure to identify an elementary school student as a child with a disability did not violate IDEA because effective interventions, including in-school counseling, were implemented even without the designation. However, the District did violate IDEA when it suspended the student without a manifestation determination, after it had recommended that parent take her child to "an outside mental health agency," because concerns about mental health was a sufficient reason for the district to have suspected that the child would be a special education student entitled to procedural safeguards.

Student attended first grade in the Northwest Local School District, and was referred to an Intervention Assistance Team due to concerns about her academic progress and behavior raised by parent. Student was diagnosed with Attention Deficit Disorder and considered to be a child "at risk." Specific interventions were adopted and implemented during the spring of her first grade school year. Student responded appropriately to the interventions and did not require an Individualized Education Program ("IEP") at that time. The Intervention Assistance Team reviewed student's response to the interventions in 2006 and 2007 demonstrating there was no indication that additional or intensive intervention was necessary such that Student would require an IEP.

By October of the 2007-2008 school year, Student was exhibiting additional academic and behavioral problems that concerned the Intervention Assessment Team. The Team determined that Student should be referred to an outside mental health agency, among other strategies. In November 2007, student was suspended and ultimately expelled for threatening behavior. Thereafter, Student's Parent requested that the District conduct a Multi-Factored Evaluation for Student to determine whether she has a disability which falls under the IDEA and also requested a Manifestation Determination Review in relation to the November 6, 2007 suspension. A Multi-Factored Evaluation was then initiated by school officials. The Evaluation Team Report concluded that student qualified for special education services under the category of "emotional disturbance." An Individualized Education Program was then developed.

The court found the record supports that student was not a child with a disability in 2006 because the related services provided to her were sufficient to meet her needs at that time and the interventions in place were satisfactory in addressing Student's educational needs. The evidence failed to show that the District violated the IDEA when it failed to identify student as a child with a disability in 2006. However, in the fall of 2007, circumstances changed. Student's teachers became increasingly concerned about the impact of Student's behavioral issues on her academic performance. The District reconvened the Intervention Team, who reported that in addition to continuation of current interventions and the addition of other strategies to help student with social skills, student should be referred "to an outside mental health agency." The court found sufficient reason for the District to suspect that student might be a child with a disability and therefore entitled to an evaluation under the IDEA. Thus, the District's failure to evaluate student violated IDEA.