

Legal Considerations in the Implementation of Behavior Interventions

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Presenter: Art Cernosia, Esq.

Email: acernosia@gmail.com

I. Introduction

This outline summarizes the legal requirements contained in federal statutes and regulations addressing behavioral issues as applied to students with disabilities.

II. Behavior Assessments

A. Evaluation Requirements Under the IDEA

1. In conducting the evaluation, a variety of assessment tools and strategies are used to gather relevant functional, developmental and academic information about the child. (IDEA Regulation--34 C.F.R. 300.304 (b)(1)). The evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the child's disability category. (34 C.F.R. 300.304(c)(6))

Furthermore, when appropriate, the district shall use "technically sound instruments" that assess behavioral factors. (34 C.F.R. 300.304(b)(3))

B. Functional Behavioral Assessments (FBA) Under the IDEA

1. The IDEA does not use the term functional behavioral assessment (FBA) except in the disciplinary section of the law.

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Even in the IDEA's disciplinary sections contained in the following paragraph, the term functional behavioral assessment is not defined.

The Comments to the IDEA's disciplinary regulations state that "it would be inappropriate to specify through regulation what constitutes a "current" or "valid" functional behavioral assessment as such decisions are best left to the LEA, the parent, and relevant members of the IEP Team (as determined by the LEA and the parent) who are responsible for making the manifestation determination. Federal Register, Volume 71, No. 156, Page 46721 (August 14, 2006)

2. The IDEA regulations, under the disciplinary section of the IDEA, provide that a child with a disability who is removed from the child's current placement pursuant to paragraphs (c), or (g) of this section receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur. (34 CFR 300.530(d))

[Note: Paragraph (c) referenced above states that for disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities.

Paragraph (g) referenced relates to placement in an Interim Alternative Educational Setting. Specifically, the referenced subsection provides that school personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child— (1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA; (2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or (3) Has inflicted serious bodily injury

upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.]

3. The IDEA regulations further address FBAs in situations where a disciplinary change of placement occurs and a manifestation determination is made.

If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must— (1) Either— (i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or (ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior. (34 CFR 300.530(f))

4. Although the term FBA is used only in the disciplinary sections of the IDEA, the United States Department of Education issued a guidance document that uses the term FBA outside the context of discipline.

In that guidance, the Department states that:

An FBA is generally understood to be an individualized evaluation of a child in accordance with 34 C.F.R. 300.301 through 300.311 to assist in determining whether the child is, or continues to be, a child with a disability. The FBA process is frequently used to determine the nature and extent of the special education and related services that the child needs, including the need for a BIP. As with other individualized evaluation procedures, and consistent with 34 C.F.R. 300.300(a) and (c), parental consent is required for an FBA to be conducted as part of the initial evaluation or a reevaluation. Questions and Answers on Discipline Procedures, Question E-4 52 Individuals With Disabilities Education Law Report (IDELR) 231 (United States Department of Education, Office of Special Education and Rehabilitative Services

(2009))

However, in the Comments to the IDEA Regulations the Department stated that “while conducting a functional behavioral assessment typically precedes developing positive behavioral intervention strategies we do not believe it is appropriate to include this language” in the regulations.

Federal Register, Vol.71, No. 156, Page 46683
(August 14, 2006)

5. If an FBA is used in the context of positive behavioral supports as a process for understanding problem behaviors within the entire school and to improve overall student behavior in the school, it would not be considered an evaluation requiring parental consent under the IDEA.

If the FBA is focused on an individual child’s needs it would be deemed an evaluation requiring that all evaluation procedures (prior written notice, parental consent, etc.) and procedural safeguards be followed. Letter to Christiansen 48 IDELR 161 (United States Department of Education, Office of Special Education Programs (2007)) See also Letter to Anonymous 54 IDELR 14 (United States Department of Education, Office of Special Education Programs (2012)). Consent must be obtained before conducting a behavioral observation as part of an FBA but not before reviewing existing data. Letter to Gallo 61 IDELR 173 (United States Department of Education, Office of Special Education Programs (2013)).

6. The Court held that the school district did not violate the IDEA when a functional behavioral assessment (FBA) was conducted without parent consent since it was not considered an evaluation under the IDEA. The school psychologist merely reviewed existing data to determine if additional assessments were necessary.

FBA’s which are administered for the limited purpose of adapting teaching strategies to a child’s behavior, as opposed to determining eligibility or changes in placement, fall outside of the IDEA’s evaluation requirements.

The targeted purpose of this FBA was not to influence the

student's placement, but to guide interactions between instructors and the student in the course of teaching the curriculum. Therefore, in this case, the FBA was akin to a "screening . . . to determine appropriate instruction strategies for curriculum implementation," which is not the same as an evaluation. West-Linn Wilsonville School District v. Student 63 IDELR 251 (United States District Court, Oregon (2014))

7. The parent of a child with a disability has the right to request an IEE of the child, under 34 CFR 300.502, if the parent disagrees with an evaluation obtained by the public agency. However, the parent's right to an IEE at public expense is subject to certain conditions, including the LEA's option to request a due process hearing to show that its evaluation is appropriate. See 34 CFR 300.502(b)(2) through (b)(5).

The United States Department of Education has clarified that an FBA that was not identified as an initial evaluation, was not included as part of the required triennial reevaluation, or was not done in response to a disciplinary removal, would nonetheless be considered a reevaluation or part of a reevaluation under the IDEA because it was an individualized evaluation conducted in order to develop an appropriate IEP for the child. Therefore, a parent who disagrees with an FBA that is conducted in order to develop an appropriate IEP also is entitled to request an IEE. Subject to the conditions in 34 CFR Section 300.502(b)(2) through (b)(5), the IEE of the child will be at public expense. Questions and Answers on Discipline Procedures, Question E-5 52 IDELR 231 (United States Department of Education, Office of Special Education and Rehabilitative Services (2009))

8. The Court held that a Functional Behavioral Assessment (FBA) is an evaluation under the IDEA and therefore parents have the right to request an Independent FBA if they disagree with the school's assessment. The regulations implementing the IDEA nowhere define "educational evaluation," but they do stress the broad scope of evaluations in general, defining "evaluation" as "procedures used ... to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." Evaluations must take into account a holistic perspective of

the child's needs, and the evaluating agency accordingly is compelled to "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors." The Court ordered that the school provide the parents an independent FBA since the last FBA was conducted two years ago. Harris v. District of Columbia 50 IDELR 194, 561 F.Supp.2d 63 (United States District Court, District of Columbia (2008)).

9. The parents asserted that because the school district failed to perform an FBA as part of the reevaluation, their student's behaviors evolved and regressed to such an extent that they severely interfered with his ability to attend to and receive benefit from his educational programming, denying him a FAPE. The parents challenged the schools assertion that no FBA was required as part of the reevaluation leading to the development of the IEP.

The Court evaluated whether the failure to perform an FBA constituted a procedural violation of the IDEA.

The Court held that in conducting evaluations, the IDEA requires the district to "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information" to assist in determining the content of the child's IEP. But the IDEA instructs that the district shall "not use any single measure or assessment as the sole criterion" for determining an appropriate IEP. There is no requirement that a particular assessment tool be employed in evaluating a child. Thus, the Court found no procedural violation of the IDEA. J.W. v. Unified School District of Johnson County 58 IDELR 124 (United States District Court, Kansas (2012)).

10. The parents of a student with autism placed their student in a private school and sought reimbursement. The Court concluded that the IEP was inappropriate and the private placement was proper resulting in an order for reimbursing the parents.

The Court found that lack of parent counseling and training (required under state law for parents of students with autism) and a vague behavioral intervention plan (BIP) that was not based on a functional behavioral assessment (FBA) (FBAs

required under state law before the development of a BIP) rendered the IEP substantively inadequate. The Court's conclusion was rooted in testimony that the student's behavioral needs required a 1 to 1 teacher/ student ratio in the classroom which the Team failed to consider. The classroom ratio could not be separated from the school's failure to conduct an appropriate FBA or BIP. C.F. v. New York City Department of Education 62 IDELR 281 (United States Court of Appeals, 2nd Circuit (2014)).

11. The Court concluded that the IEP for a student with autism was not appropriate since it did not appropriately address the student's behavior. The Court first noted that, notwithstanding testimony that the student's behavior showed that it was "not unusual" for an autistic child, the proper inquiry in determining the necessity of an FBA is whether the behavior impedes learning, not whether the behavior is atypical.

Merely describing problematic behavior and listing several goals for improvement are not adequate substitutes for the FBA and BIP.

The Court did state that the failure to conduct an FBA will not always rise to the level of a denial of a FAPE even when required by state law, but when an FBA is not conducted, the court must take particular care to ensure that the IEP adequately addresses the child's problem behaviors. R.K. v. New York City Department of Education 59 IDELR 241 (United States Court of Appeals, 2nd Circuit (2012)).

C. Behavioral Assessments

1. A 13 year old student with autism had a behavior component in her IEP based on an independent educational evaluation conducted at school district expense. The student received supports, including a one to one support aide, provided by the Center for Autism and Related Disorders (CARD). The next school year the parents made a request for a reevaluation of the student's behavior on numerous occasions based on the student's worsening behavior including aggressive behavior which posed a threat to her health and safety.

The school took the position that the student's behavior was continuously assessed by CARD's support services which

functioned as an informal assessment. The CARD assessment was based on the support aide's observation of the student as well as data she collected on the student's maladaptive behavior.

The Court held that the school failed to properly assess the student's behavior which denied the student a FAPE. The data collected through observations by the support aide does not meet the IDEA's requirement that a school "use a variety of assessment tools and strategies". In addition, the support aide was not qualified to conduct a behavioral assessment. The student's maladaptive behaviors resulted in her being removed from the classroom on several occasions which interfered with her ability to learn and access information. As a result, she was denied educational benefit. M.S. v. Lake Elsinore Unified School District 66 IDELR 17 (United States District Court, Central District, California (2015)).

III. IEP Behavioral Components/Behavioral Interventions

- A. If the IEP Team determines, based on the evaluation data, that behavior impedes the learning of the student or others, the Team shall consider the use of positive behavioral interventions and supports and other strategies to address that behavior. (34 C.F.R. 300.324(a)(2)(i))

The only statutory or regulatory sections of the IDEA using the term "behavioral intervention plan" are those addressing discipline. (See Section II. B. 2 and 3 above)

- B. The regular education teacher should assist, as a member of the Team, in the determination of appropriate positive behavioral interventions, supports and other strategies for the child. (34 C.F.R. 300.324(a)(3)(i))

- C. Restraint and Seclusion

- 1. The Office for Civil Rights issued a report stating that students with disabilities under the IDEA represent 12% of the student population, but 58% of those placed in seclusion or involuntary confinement, and 75% of those physically restrained at school to immobilize them or reduce their ability to move freely. Black students represent 19% of students with disabilities served by IDEA, but 36% of these students are

restrained at school through the use of a mechanical device or equipment designed to restrict their freedom of movement. Data Snapshot: School Discipline (United States Department of Education, Office for Civil Rights, (2014))

2. The United States Department of Education issued a policy letter clarifying that although the IDEA requires the Team to consider the use of positive behavior interventions and encourages the use of such interventions and supports, the IDEA “does not contain a flat prohibition on the use of aversive behavioral interventions. Whether to allow IEP Teams to consider the use of aversive behavioral interventions is a decision left to each State.” Letter to Trader (United States Department of Education, Office of Special Education and Rehabilitation Services (2006)).

3. Arizona Law ARS Sections 15-105 and 15-843(B))

ARS 15-105 states (emphasis added):

A. A school may permit the use of restraint or seclusion techniques on any pupil if both of the following apply:

1. The pupil's behavior presents an imminent danger of bodily harm to the pupil or others.

2. Less restrictive interventions appear insufficient to mitigate the imminent danger of bodily harm.

B. If a restraint or seclusion technique is used on a pupil:

1. School personnel shall maintain continuous visual observation and monitoring of the pupil while the restraint or seclusion technique is in use.

2. The restraint or seclusion technique shall end when the pupil's behavior no longer presents an imminent danger to the pupil or others.

3. The restraint or seclusion technique shall be used only by school personnel who are trained in the safe and effective use of restraint and seclusion techniques unless an emergency situation does not allow sufficient time to summon trained personnel.

4. The restraint technique employed may not impede the pupil's ability to breathe.

5. The restraint technique may not be out of proportion to the pupil's age or physical condition.

C. Schools may establish policies and procedures for the use of restraint or seclusion techniques in a school safety or crisis intervention plan if the plan is not specific to any individual pupil.

D. Schools shall establish reporting and documentation procedures to be followed when a restraint or seclusion technique has been used on a pupil. The procedures shall include the following requirements:

1. School personnel shall provide the pupil's parent or guardian with written or oral notice on the same day that the incident occurred, unless circumstances prevent same-day notification. If the notice is not provided on the same day of the incident, notice shall be given within twenty-four hours after the incident.

2. Within a reasonable time following the incident, school personnel shall provide the pupil's parent or guardian with written documentation that includes information about any persons, locations or activities that may have triggered the behavior, if known, and specific information about the behavior and its precursors, the type of restraint or seclusion technique used and the duration of its use.

3. Schools shall review strategies used to address a pupil's dangerous behavior if there has been repeated use of restraint or seclusion techniques for the pupil during a school year. The review shall include a review of the incidents in which restraint or seclusion technique were used and an analysis of how future incidents may be avoided, including whether the pupil requires a functional behavioral assessment.

E. If a school district or charter school summons law enforcement instead of using a restraint or seclusion technique on a pupil, the school shall comply with the reporting, documentation and review procedures established

under subsection D of this section. Notwithstanding this section, school resource officers are authorized to respond to situations that present the imminent danger of bodily harm according to protocols established by their law enforcement agency.

F. This section does not prohibit schools from adopting policies pursuant to section 15-843, subsection B, paragraph 3.

G. For the purposes of this section:

1. "Restraint" means any method or device that immobilizes or reduces the ability of a pupil to move the pupil's torso, arms, legs or head freely, including physical force or mechanical devices. Restraint does not include any of the following:

(a) Methods or devices implemented by trained school personnel or used by a pupil for the specific and approved therapeutic or safety purposes for which the method or device is designed and, if applicable, prescribed.

(b) The temporary touching or holding of the hand, wrist, arm, shoulder or back for the purpose of inducing a pupil to comply with a reasonable request or to go to a safe location.

(c) The brief holding of a pupil by one adult for the purpose of calming or comforting the pupil.

(d) Physical force used to take a weapon away from a pupil or to separate and remove a pupil from another person when the pupil is engaged in a physical assault on another person.

2. "School" means a school district, a charter school, a public or private special education school that provides services to pupils placed by a public school, the Arizona state schools for the deaf and the blind and a private school.

3. "Seclusion" means the involuntary confinement of a pupil alone in a room from which egress is prevented. Seclusion does not include the use of a voluntary behavior management technique, including a timeout location, as part of a pupil's

education plan, individual safety plan, behavioral plan or individualized education program that involves the pupil's separation from a larger group for purposes of calming.

ARS 15-843(B) states in relevant part:

The governing board of any school district, in consultation with the teachers and parents of the school district, shall prescribe rules.... and shall include at least the following:

1. Procedures for the reasonable use of physical force by certificated or classified personnel in self-defense, defense of others and defense of property.

2. Beginning in school year 2013-2014, disciplinary policies for the confinement of pupils left alone in an enclosed space. These policies shall include the following:

(a) A process for prior written parental notification that confinement may be used for disciplinary purposes that is included in the pupil's enrollment packet or admission form.

(b) A process for prior written parental consent before confinement is allowed for any pupil in the school district. The policies shall provide for an exemption to prior written parental consent if a school principal or teacher determines that the pupil poses imminent physical harm to self or others. The school principal or teacher shall make reasonable attempts to notify the pupil's parent or guardian in writing by the end of the same day that confinement was used.

See also The Use of Seclusion and Restraint: A Guidance Document on Best Practices (2014) Arizona Department of Education, Exceptional Student Services

IV. Judicial/Administrative Decisions

A. Requirement for a Behavioral Intervention Plan

1. For a child with a disability whose behavior impedes his or her learning or that of others, and for whom the IEP Team has decided that a behavior intervention plan (BIP) is appropriate, or for a child with a disability whose violation of the code of

student conduct is a manifestation of the child's disability, the IEP Team "must" include a BIP in the child's IEP to address the behavioral needs of the child. Questions and Answers on Discipline Procedures, Question E-2 52 IDELR 231 (United States Department of Education, Office of Special Education and Rehabilitative Services (2009)).

2. The Court held that there is no provision in the IDEA requiring a behavioral intervention plan to be included in the IEP. However, the IEP must include the various interventions, supports and strategies deemed necessary to address the student's behavior that impedes his/her learning or that of other children. Yates v. Washoe County School District, 51 IDELR 7 (United States District Court, Nevada (2008)).
3. The Court, in upholding the appropriateness of an IEP, held that nothing in the IDEA or state law requires that a behavior intervention plan be in writing. Even though there was no BIP in the IEP, the Court found that the staff responded to the student's behaviors with set procedures and documented the student's behavioral incidents and the school's responses. School Board of Independent School District #11 v. Renollett, 440 F. 3d 1007, 45 IDELR 117 (U. S. Court of Appeals, 8th Circuit (2006)). Note: The Court did not include the reasoning for its conclusion that a BIP does not need to be in writing. Caution is urged in following this conclusion since the IDEA regulations require that a BIP be developed, reviewed and modified under 34 C.F.R. 300.530(f)(1)).
4. The parents of a student with autism challenged the appropriateness of their student's IEPs on several grounds. Regarding behavior, the parents alleged the IEPs were legally deficient since they failed to adequately address his behavior since the school did not conduct a functional behavioral assessment or implement a behavior intervention plan.

The Court upheld the IEPs holding that the alleged failure to conduct a functional behavioral assessment or develop a behavior intervention plan was "irrelevant" since the IDEA does not require such assessment or plan outside of certain disciplinary actions which were not present here. Although the school was having difficulty managing the student's behavior it was in the process of reassessing his behavior

interventions when the student was withdrawn from school. Andrew F. v. Douglas County School District 64 IDELR 38 (United States District Court, Colorado (2014))

5. A student with a learning disability and a speech impairment was arrested for stealing beer. As an alternative to a sentence in juvenile jail, the Court approved his placement in a residential facility.

The parents requested that the school district pay for the placement alleging that his IEP was inappropriate since it did not include a behavior intervention plan. The Court in upholding the IEP concluded that his behavioral problems did not rise to the level of severity to trigger a need for a behavior plan. Rodriguez v. San Mateo Union High School District 357 F.Appx. 752, 53 IDELR 178 (United States Court of Appeals, 9th Circuit (2009)) This is an unpublished decision.

B. Appropriateness of the IEP Behavioral Component

1. The Court upheld the IEP for a third grade student who exhibited several incidents of misconduct and assaultive behavior. Although an IEP must address disability related behaviors, the IDEA does not contain specific substantive requirements for IEP behavior intervention plans. Therefore, the Court held the behavior intervention plan cannot be deemed insufficient since there is no legal criteria by which to judge it. Alex R. v. Forrestville Valley Community Unit School District #221, 375 F.3d 603, 41 IDELR 146 (United States Court of Appeals, 7th Circuit (2004))

2. The parents of a student with autism alleged that the behavioral component of their student's IEP was not appropriate since his self-injurious behavior increased and he started having "rage incidents". Therefore, they contend that his IEP failed to provide him an educational benefit because it did not prevent his behaviors from substantially interfering with his learning.

Although the Court noted that there was a factual dispute on this point this is not the standard by which a Court evaluates compliance with the IDEA. In concluding that the IEP did provide the student a FAPE, the Court stated "The IDEA does not require a school district to eliminate interfering behaviors. It requires only that the school district "consider the use" of

positive behavioral interventions and supports to address the behavior.” The evidentiary record supported that the school met this responsibility by having a behavioral component to the IEP. J.W. v. Unified School District of Johnson County 58 IDELR 124 (United States District Court, Kansas (2012)).

3. The Court of Appeals, in overturning the District Court decision, held that the IEPs for twin brothers with autism provided them with a FAPE. Regarding behavior, the Court held that the lack of a behavior intervention plan did not compromise the students’ right to an appropriate education. Their IEPs noted individual behavioral issues and reflected that the Team considered methods and strategies to address their behaviors. School staff indicated that if these strategies proved unsuccessful, they would have conducted functional behavioral assessments and developed individualized behavior intervention plans. Since the students were never enrolled in the public school, the Court noted that the parents “frustrated this strategy”. Park Hill School District v. Dass 57 IDELR 121 (United States Court of Appeals, 8th Circuit (2011)).
4. A 9 year old student with ADHD and "autistic-like" behaviors had an IEP which included the use of a support room and a secure observation room (SOR), when necessary, to address his extreme and/or dangerous behaviors. The room is a regular-sized classroom where a student can go to take a break, to refocus, and to complete work in a quiet area. There is an observation window through which someone can observe from an adjoining room and staff are required to complete written reports whenever a student was sent to either the support room or the SOR. The parents initiated a due process hearing challenging, among other issues, the use of the secure observation room. The Court concluded that the student was subject to continuing observations and evaluations by his teachers and that numerous strategies and interventions designed with specific positive behavior goals were implemented continuously for the student. Furthermore, the overwhelming evidence showed that there was not indiscriminate use of the SOR, but rather it was a "last resort" after all other strategies had failed and by the end of the school year its use drastically decreased. The Court therefore upheld that IEP as being

appropriate. Clark v. Special School District of St. Louis County 58 IDELR 126 (United States District Court, Eastern District, Missouri (2012)).

5. The parents of a student with autism challenged his IEP on several grounds including their belief that the behavior intervention plan was inappropriate. The behavior component called for the use of a “calming room” which was a room the student was taken to when he became aggressive. The parents insisted that the calming room be eliminated from the behavior plan citing their independent educational evaluator’s recommendations.

The Court held that the IEP provided the student a FAPE and provided an education in the least restrictive environment. The behavior intervention plan included detailed strategies to address the student’s behavior problems. The Court observed that it is "largely irrelevant" if the school district could have employed "more positive behavior interventions" as long as it made a "good faith effort" to help the student achieve the educational goals outlined in his IEP. Although an IEP team must "consider" the results of independent educational evaluations, not all such recommendations need be adopted. The IEP team adopted the majority of the independent evaluator’s recommendations, but maintained use of the calming room because of the belief that it was important for the safety and development of the student. M.M. v. District 1 Lancaster County School 60 IDELR 92 (United States Court of Appeals, 8th Circuit (2012))

6. A student with an emotional disability had a behavioral component to her IEP that required her to follow a “point system” used in the special education class. The system required her to acquire a certain number of points every day with each point differing for different activities. The student never made it out of the lowest level of the point system which afforded her no classroom privileges. In addition, the student was repeatedly physically restrained, sometimes multiple times per day, without its use ever being mentioned in her IEP and with no notice to her parents.

The Court noted that there was no “peer reviewed research” introduced into evidence to support the use of the point system. The evidence supported the conclusion that the point

system was incomprehensible to the student and was inconsistently applied.

In addition, she was repeatedly physically restrained by staff for her behaviors, sometimes multiple times per day---from August through October the student was restrained 21 out of 26 days and on one occasion restrained 8 times in one day. The parent was not always notified when physical restraint was used, or why, even though she specifically requested that she be advised. The use of physical restraint was not indicated anywhere in the student's IEP, and no prior written notice was provided to parent when it was used on a regular basis.

The Court, in affirming the hearing officer and reversing the state appeals officer, held that the school denied the student a FAPE when it failed to meet her behavioral needs. It neglected to implement appropriate positive behavioral interventions, set increasingly low behavioral expectations, and employed physical restraint, even where shown to be ineffective. The school's failure to properly address her behavior constituted a denial of FAPE, especially where her behavior goals themselves demonstrated regression. B.H. v. West Clermont Board of Education 788 F.Supp.2d 682, 56 IDELR 226 (United States District Court, Southern District, Ohio (2011)).

7. The Court held that the IEP for a three year old child with autism was appropriate even though it did not address parent training or include a home behavioral intervention plan in response to reports by his parents of serious behavioral problems at home. Because the child's behavioral issues did not impede his education in school or that of his classmates, the school was not obligated to provide a behavioral plan or at home services. M.W. v. Clarke County School District, 51 IDELR 63 (United States District Court, Middle District, Georgia (2008)).
8. The Court held that the IEPs for a student with severe behavioral and mental health issues denied the student a FAPE because the IEP Team did not consider or address recent information made available about the student's sexual behavioral issues. Because this information was not considered, the student's IEPs could not have been reasonably calculated to enable the student to receive educational

benefit. The Court noted that “It was not objectively reasonable to disregard this information and neglect to incorporate a plan to address these new behaviors within the IEP.” D.S. v. Hawaii Department of Education 62 IDELR 112 (United States District Court, Hawaii (2013))

9. In a case addressing the issue of students with disabilities and bullying, the District Court reversed the hearing officer’s and state review officer’s decisions and concluded the student was denied a FAPE due to being the victim of bullying.

The Court stated that “a disabled student is deprived of a FAPE when school personnel are deliberately indifferent to or fail to take reasonable steps to prevent bullying that substantially restricts” the educational opportunities of the student with disabilities. The conduct does not need to be outrageous in order to be considered a deprivation of rights of a disabled student. It must, however, be sufficiently severe, persistent, or pervasive that it creates a hostile environment. Where there is a “substantial probability that bullying will severely restrict a disabled student’s educational opportunities, as a matter of law an anti-bullying program is required to be included in the IEP”. (emphasis added)

The Court concluded in this case the fact that the IEP Team refused to take bullying into account when drafting the student’s IEP and behavior intervention plan denied a FAPE.

The Court reviewed the goals and services in the IEP and BIP and observed that “a lay parent would not have understood them as reasonably calculated to provide a FAPE” in light of the bullying that occurred. The law requires that “the substance of the IEP must be intellectually accessible to parents” so that they could make an informed decision as to its appropriateness. T.K. v. New York City 63 IDELR 256 (United States District Court, Eastern District, New York (2014)).

10. The parents of a fifth grade student who is emotionally disturbed challenged the appropriateness of her IEP which included a behavior intervention plan. The evidence showed that at the end of her fourth grade year and into her fifth grade year, she would have outbursts in the classroom that would require the teacher to redirect her, take her out of the classroom, and, if she did not de-escalate, the counselor or

other staff would have to move her to a cool-down area and counsel her on coping strategies and de-escalation.

By the end of her fifth grade year, the student was self-regulating when she was shutting down and would self-remove from the classroom to the cool-down area. The number of outbursts in class decreased significantly, and she was able to come back to the classroom on her own initiative.

The evidence demonstrated that the school district reviewed the BIP with the student's teachers, trained her teachers on the BIP, and implemented the BIP. The student showed progress under the BIP in that she was learning to use self-control. Therefore, the Court found that the IEP and BIP were appropriate. C.P. v. Krum Independent School District 64 IDELR 78 (United States District Court, Eastern District, Texas (2014)).

C. Behavior Interventions v. Disciplinary Actions

1. "Easement Days," defined as days when a parent of a student who is acting up or disrupting a class comes to school and takes the student home, were not appropriate. The Court also held a District cannot insist that parents consent to medication as a necessary component of an IEP. Valerie J. v Derry Cooperative School District, 17 IDELR 1095 (United States District Court, New Hampshire (1991))
2. A student who was suspended cumulatively for 14 days out of school and 11 days in school had been denied her rights under the IDEA. Compensatory educational services were ordered. In so holding, the Court found that the student was given a choice of going to an in school suspension or going home. The student chose to go home. The Court held that after it became abundantly clear to school officials that the student would choose to leave school and go home, such removals constituted a de facto or constructive suspension. In allowing this pattern to continue, the school acted contrary to the IDEA Big Beaver Falls Area School District v. Jackson, 19 IDELR 1019 (Pennsylvania Commonwealth Court (1993)).

D. Liability for the Use of Behavioral Interventions

1. The parents of a student with multiple developmental and intellectual disabilities challenged the Constitutionality of the use of a particular desk seeking monetary damages. The desk in question is U-shaped, such that when a student's chair is completely pulled in, the student is surrounded by the desk on three sides. The cutout portion of the desk is lined with rubber. A wooden bar runs the length of the back of the desk. When a student is sitting at the desk, the bar rests behind the student's chair preventing her from pushing her chair out. A barrel bolt, akin to the fastener on the door of a restroom stall, can be used to secure the bar.

The Court held that the use of the desk did not violate the Fourth or the Fourteenth Amendments. The Court discussed three key facts that supported its conclusion. First, while it is undisputed that the desk restricted the student's movement, the position that it forced her to assume -- seated in a chair faced forward -- is the standard pose required of countless schoolchildren across the nation. The restrictions imposed on her did not remove her from the classroom environment. Second, the student had the ability to remove herself from the restraints imposed on her by crawling over or sliding under the front portion. Finally, the Court found significant that the restraining mechanisms were not attached to her body. Physically binding a student is a much more significant imposition on her dignity and bodily integrity than the use of the desk.

The parent also contended that the desk violated the student's rights by restricting her liberty without due process. However, the Court held that due process rights are not implicated by minimally restrictive actions and cannot be triggered by every time-out and after-school detention. The Court observed that her disabilities presented unique pedagogical challenges, and it was certainly conceivable that requiring her to sit in a special desk was a rational response to those challenges. Ebonie S. v. Pueblo School District 60 59 IDELR 181, 695 F.3d 1051 (United States Court of Appeals, 10th Circuit (2012)). Appeal to the United States Supreme Court denied.

2. The parents initiated a lawsuit alleging the school district and staff improperly restrained and mistreated their student who has cerebral palsy, a seizure disorder and is non-verbal. The

parents alleged that the student was restrained all day in her wheelchair without educational services and was subjected to cruel and abusive remarks. The Court held that the special education teacher and paraprofessional were not protected by qualified immunity since the allegations support the conclusion that their conduct was motivated by malice. A reasonable teacher would know that maliciously restraining a child for long period was unlawful.

It is important to note that the Court stated:

“...our opinion is one that no reasonable teacher who errs in judgment ought to fear. Qualified immunity is intended to protect officials who make reasonable mistakes about the law. But the immunity simply does not extend protection to an official motivated by the kind of bad faith alleged here.” H.H. v. Moffett (United States Court of Appeals, 4th Circuit (2009))
This is an unpublished decision.

3. The parent initiated a lawsuit alleging that the repeated use of time out interventions used with their child who is emotionally disturbed violated the child’s due process rights under the Fourth and Fourteenth Amendments. The Court held there were no due process violations since the use of time out (which was expressly listed in the IEP) was not the equivalent of an out of school suspension requiring a hearing prior to it’s imposition. The Court noted a teacher’s ability to manage his/her classroom would be inappropriately undermined by a hearing requirement prior to placing a student in timeout. Couture v. Board of Education of the Albuquerque Public Schools 535 F.3d 1243, 50 IDELR 183 (United States Court of Appeals, 10th Circuit (2008)).
4. The parents of a first grade student with disabilities initiated a lawsuit for monetary damages under Section 1983 against their student’s special education teacher and special education aide based on the allegation that they “intentionally grabbed and/or pinned ... [N.R.], in an overly aggressive manner, resulting in physical marks and bruises upon his person”. In addition, they sued the school district and school building administrators for negligence in their hiring, training, and supervisory practices.

The defendants filed a Motion to Dismiss contending that they were protected by qualified immunity. Based on Supreme Court case law, a government official or employee is entitled to qualified immunity against claims for "civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The two-part test for determining whether a government official is entitled to qualified immunity is: (1) whether the facts that a plaintiff alleges demonstrate a violation of a constitutional right; and (2) whether the right at issue was "clearly established" at the time of the alleged misconduct.

The Court held that the special education teacher and aide were not protected by qualified immunity. For purposes on the motion, which requires the Court to accept the factual assertions as true, the conduct alleged is such that "it would have been apparent to the special educators that the use of egregious force against a special needs student is unlawful".

The Court, however, dismissed the claims against the administrators. Under Section 1983, a supervisor is liable for the acts of his/her subordinates only "if the supervisor participated in or directed the violations, or knew of the violations [of subordinates] and failed to act to prevent them." In this case, the facts did not demonstrate that the alleged administrative failures caused the constitutional violation at hand. Nor were there factual allegations that the administrators were previously aware of the teacher's or aide's conduct and did nothing to prevent it. Rosenstein v. Clark County School District 63 IDELR 185 (United States District Court, Nevada (2014))

5. An 11 year old student with intellectual disabilities engaged in the following series of events based on evidentiary findings by the Court: (a) the student began throwing pebbles, then rocks, while on the playground, which his aide told him to put down; (b) when told by his physical education teacher to stop throwing the rocks, the student became agitated and defiant; (c) a teacher's assistant took the rock from the student, at which time he became upset and began yelling and running; (d) the school security guard testified that when she told the student he could not throw rocks he became very agitated; (e)

when another security guard approached the student, he assumed a boxing stance and began running around in an attempt to make physical contact; (f) one security guard held the student's right arm down at his side by holding his right wrist with both of her hands while the other security guard held the student's left arm down; (g) the student screamed and tried to run, pulling the guards along with him; (h) when the guards let go of the student, he tried to swing at bystanders so they again held his arms; (i) the guards sat the student down in a sandy area by dropping down in a seated position while holding him; (j) the student continued thrashing around as testified to by the principal and the student's teacher; (k) the student tried to bang his head and continued thrashing when the school's resource police officer arrived and handcuffed the student; (l) the parent was contacted, came to school and took the student home for the remainder of the day.

The parent then sued the school district, school staff and the police department for unlawful detention, assault and battery, intentional and negligent infliction of emotional distress, and a violation of the student's civil rights under the Constitution. The Court affirmed the granting of a Motion for Summary Judgment in favor of all of the defendants finding that "the minimal amount of force that was used to seize [the student] for his safety and the safety of those around him was, as a matter of law, reasonable under the circumstances". E.C. v. County of Suffolk et.al. 514 F.Appx. 28, 60 IDELR 242 (United States Court of Appeals, 2nd Circuit (2013)). Note: This is an unpublished decision.

6. The parent of a student with autism sued the special education teacher and the school district under Section 1983 for alleged violations of her student's Constitutional rights under the 4th and 14th Amendments.

The use of an unlocked "safe room" was in the IEP's behavior component to be used to calm the student down if overly stimulated or aggressive. The parents alleged the teacher used a locked dark "safe room" to punish the student. The parent alleged that the student was kept in the room for an undetermined amount of time and often took his clothes off, urinated and defecated in the room. The parent also claimed that the teacher kept the student in the safe room until

he defecated and then made him clean up his own feces as a form of punishment.

The Court of Appeals, in reversing the District Court, held that the special education teacher was entitled to qualified immunity under both the 4th and 14th Amendment claims. The Court found “at the time she acted, it would not have been clear to a reasonable official that placing [the student] in the safe room, as part of his aversive and behavioral intervention plan, was an unconstitutional seizure” and “it would not have been clear to a reasonable official that having [the student] assist in cleaning up after he defecated in the safe room violated [the student’s] substantive due process rights”. The Court remanded the matter for further proceedings on the remaining claims. Payne v. Peninsula School District 115 LRP 35065 (United States Court of Appeals, 9th Circuit (2015)). Note: This is an unpublished decision.

V. Section 504 and Behavior Intervention Plans

- A. Pursuant to section 504 of the Rehabilitation Act a school must accommodate a disabled student's behavioral difficulties by developing a behavior management/discipline plan. Morgan v. Chris L. 25 IDELR 227 (United States Court of Appeals, 6th Circuit (1997))
- B. A student moved into a new school district with a Section 504 plan based on the previous school district’s determination that the student had a post-traumatic stress disorder, depression and anxiety. The student had several disciplinary incidents at his new school including suspensions for making threatening remarks, being disrespectful and being disruptive. He eventually was expelled from school after the school determined that his behaviors were not a manifestation of his disability. The parents withdrew the student and filed a complaint with OCR alleging the school had violated Section 504. Although behavior interventions were developed for the student, his teachers were unaware of the intervention plan. OCR determined that the failure to address the student’s known behavioral needs as part of his Section 504 plan and to develop or use a meaningful behavioral intervention plan when his needs continued and worsened amounted to a denial of a FAPE.

Regarding the manifestation determination, OCR concluded that the school violated the process required by Section 504. Section 504

requires that the Section 504 team meet to reevaluate a student when a school proposes a significant change in placement such as a long-term suspension or expulsion. In addition, here the Team considered only 3 of the 9 disciplinary incidents and did not have available sufficient information to have an informed discussion about the student's behavior and his disability related needs. Lincoln Charter School 63 IDELR 83 (United States Department of Education, Office for Civil Rights (2013))

- C. OCR investigated a systems complainant alleging that a district program for students with social and emotional needs discriminated against the students with disabilities through the use of improper restraint and seclusion practices.

OCR found that the program utilized school-wide behavior management systems, which include a component termed the re-orientation (RO) area. The re-orientation area is intended to provide students a place outside their classrooms but within the building if they are having difficulty maintaining their behavior. It is not, however, meant as punishment. Students can elect to go to the RO area on their own, teachers can require that students go to the RO area to de-escalate if they are disrupting the classroom, not following directions, or failing to complete their work. Program staff typically required that students transition to the RO area after they have been placed in restraint and/or seclusion before they return to their classrooms. Although there is a seclusion room within the RO area, RO is not seclusion because students are not physically prevented from leaving by a closed or locked door and are not alone in the RO area. While a variety of reasons may land a student in the RO area, students cannot exit the RO area until they follow and complete a process designed by staff. Time completing the RO process varies, from ten minutes to several hours. Program personnel sometimes required students to remain in the RO area for the remainder of the school day or to serve In-School Suspension (ISS) in the RO area. The RO process may include several behavioral interventions including counseling, downtime, and use of physical restraint and/or seclusion.

OCR found that the repeated and frequent use of restraint, seclusion, and RO, in the absence of individualized assessments, denied the students in the program a FAPE under Section 504. OCR observed that the frequent use of these restrictive interventions suggested these strategies were not effective at changing or minimizing the problematic behavior. Moreover, once students are removed, they

are effectively denied educational instruction or access to the curriculum for the duration of the removal. Nonetheless, there was neither consistent review of how these interventions were being used with each student nor an attempt to re-evaluate students who were frequently removed. OCR concluded that the school district had reason to believe that many of the students' placements, including frequent use of restraint, seclusion and time in RO, were not appropriate, and that it had failed to convene a knowledgeable group of people to examine whether additional evaluation and/or a change of placement (including a change in services provided by the Program) is needed, as required by Section 504. Prince William County Public Schools 114 LRP 34872 (United States Department of Education, Office for Civil Rights (2014))

- D. A kindergarten student was identified as being disabled under the classification of “Developmental Delay—Atypical Behavior”. In 1st grade, the student was enrolled in a charter school. There were multiple disciplinary incidents and the student was restrained repeatedly. During the school year, the student was restrained 211 times on 69 different school days.

OCR determined that the student’s IEP, Behavior Intervention Plan and Crisis Plan did not consider or address the use of restraint for this student. Since restraint was not a “behavioral tool” meaningfully considered or approved by the Team, the multiple restraints denied the student a FAPE in violation of Section 504. In addition, OCR concluded that the school did not properly address the student’s placement. The student continued to exhibit significant behavioral problems that resulted in the school repeatedly restraining him and calling the local police and placing him, for a period, on shortened school days. Despite indications that the student's disability was quite severe and that the school may not have been able to meet his needs through its existing programs, the IEP team only considered placement at the school, including a regular classroom setting, a resource setting, a separate classroom with two adults and no other students, and homebound. There was no indication the Team considered any other placement options including a self-contained classroom for students with behavior disabilities, a therapeutic placement, or a private setting. The fact that certain options may not be typically offered by the school does not excuse the Team from considering them if they are necessary. The failure by the Team to consider a broader range of placements was deemed inconsistent with the requirements of Section 504.

Crosscreek Charter School 114 LRP 23584 (United States Department of Education, Office for Civil Rights (2014)).

VI. Miscellaneous Issues

- A. The Court rejected the school district's Motion for a Temporary Restraining Order which would have prohibited the student from returning to the public high school and would have changed the student's placement to an Interim Alternative Educational Setting. The school district was unable to prove that the student's return would have likely resulted in injury to himself or others. The Court's analysis was based on the lack of full implementation of the student's IEP behavioral component which called for a "safe person" to accompany the student. Troy School District v. K.M. 115 LRP 2247 (United States District Court, Eastern District, Michigan (2015)).

Note: This outline is intended to provide workshop participants with a summary of selected Federal statutory provisions and selected judicial interpretations of the law. The presenter is not, in using this outline, rendering legal advice to the participants. The services of a licensed attorney should be sought in responding to individual student situations.

