WHAT EVERY GENERAL EDUCATOR MUST KNOW ABOUT SPECIAL EDUCATION

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I. THE BASICS OF SPECIAL EDUCATION LAW

a. What laws govern the provision of special education?

a. The Individuals with Disabilities Education Act (IDEA)

The Individuals with Disabilities Education Act ("IDEA") is the federal law that governs the provision of special education and related services to eligible students with disabilities. The IDEA supercedes any State law or local board policy that conflicts with the federal law.

b. Section 504 of the Rehabilitation Act of 1973 (Section 504)

c. The Americans with Disabilities Act (ADA) – Title II

b. FAPE

a. Schools must provide a "free appropriate public education" to eligible students with disabilities who are in need of special education and related services. IDEA, 42 U.S.C. 1400(d).

b. What is "special education?"

"Special Education" means "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability…." It may include Speech-Language Pathology Services (and any other related service as defined by State law), Travel Training, and Vocational Education.

"Specially Designed Instruction" means "adapting, as appropriate to the needs of an eligible child…the content, methodology, or delivery of instruction…to address the unique needs of the child…and to ensure access to the general curriculum…." 20 U.S.C. 1401(29).

c. What are "related services?"

"Related Services" means "transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education. 20 U.S.C. 1412(a)(11).

d. What does "appropriate" mean?

1. Attainment of passing grades
2. Advancement from grade to grade
3. Meaningful progress towards IEP goals/objectives
4. Procedural and Substantive Compliance with IDEA

e. How do we determine "eligibility?"

1. Meeting State criteria for eligibility
2. Being "in need of" special education and related services
3. Response to Intervention (RTI) and Special Ed Eligibility

c. Least Restrictive Environment (LRE)

a. Schools must educate students with disabilities in the "least restrictive environment" to the maximum extent appropriate. 20 U.S.C. 1412(a)(5).

b. Does the IDEA mandate "full inclusion" or "mainstreaming?"

c. How does the IEP team make an LRE decision?

d. IEPS AND IEP TEAMS

a. The Composition of the IEP Team

Effective July 1, 1998, every IEP ("Individualized Education Program") team must include "at least one regular education teacher of the child." 34 C.F.R. § 300.344(2). IEP teams must convene "not less than annually" to review and revise each eligible student's IEP. 34 C.F.R. § 300.343(c)(1).

The IDEA defines an IEP team to include the following individuals:

(1) the **parents** of the child;

(2) at least **one regular education teacher of the child** (if the child is, or may be, participating in the regular education environment);

(3) at least **one special education teacher of the child**, or if appropriate, at least one special education provider of the child;

(4) a **representative of the school system** who –

(i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(ii) is knowledgeable about the general curriculum;

(iii) is knowledgeable about the availability of resources of the school system;

(5) an **individual who can interpret the instructional implications of evaluation results**, who may be a member of the evaluation team;

(6) at the discretion of the parent or the school system, **other individuals who have knowledge or special expertise regarding the child**, including related services personnel as appropriate, and;

(7) **if appropriate, the child**. 20 U.S.C. 1414(d)(1)(B) and 34 C.F.R. § 300.344.

b. **The General Educator's Role**

The IDEA specifically defines the legal responsibilities of the regular education teacher as a member of the IEP team:

The regular education teacher of the child, as a member of the IEP team, shall, to the extent appropriate:

(i) participate in the development of the IEP of the child;

(i) assist in the determination of appropriate positive behavior interventions and strategies for the child; and

(ii) assist in the determination of supplementary aids and services, program modifications, or supports for school personnel that will be provided for the child.

34 C.F.R. § 300.324(a)(3)

c. **Common IEP Errors**

1. "Drive-by" IEPs.

2. Forgetting the correct paperwork for the IEP meeting.

3. Refusing to consider requests from parents.

4. Refusing to let the parent contribute to the discussion.

5. Side-bar conversations.

6. Lack of follow-through on the IEP.

7. Leaving the teachers out of the "loop." (When only the LEA Rep. knows what the plan is!).

d. Specific IEP Meeting Questions and Answers

1. What is IEP "Consensus?"

Sackets Harbor Central Sch. District v. Munoz, 725 N.Y.S.2d 119 (N.Y.App.Div. 2001).

The court upheld an administrative order that allowed several individuals who demonstrated knowledge about a 3-year-old child with autism to vote at the child's IEP meeting. The IDEA's expansive definition of an IEP team allowed such individuals a voice in the decision-making process. The SRO's decision to include the votes of all meeting participants in the final tally was not arbitrary, capricious or affected by an error of the law. There was no dispute that the individuals present at the meeting all possessed knowledge and expertise about the child.

The parents argued that an aide and therapists present at the IEP meeting should be considered members of the committee and therefore entitled to vote. However, the committee chair only counted the votes of the six individuals she felt properly comprised the committee. The district challenged an SRO's decision that it should have considered the votes of all individuals with knowledge or expertise about the child. The trial court upheld the SRO's decision because the district did not raise any objection to the vote itself. The court also concluded the district could not seek judicial review of a vote that it initiated. The district appealed. Although the district correctly contended there was no provision in state law authorizing IEP decisions to be made by majority vote, the court pointed out there was nothing in the statutes that prohibited that decision-making process when the meeting took place. The SRO's decision to include the votes of all meeting participants in the final tally was not arbitrary, capricious or affected by an error of the law. The IDEA's definition of an IEP committee includes those who have knowledge or special expertise regarding the child. There was no dispute that the individuals present at the meeting all possessed knowledge and expertise about the child.

2. Is Tape-recording Allowed in IEP Meetings?

Letter to Anonymous, 40 IDELR 70 (OSEP 2003). The U.S. Dept. of Education opines that IEP meetings may be videotaped or audiotaped by parents consistent with local policy or State law. In other words, parents have a right to tape IEP meetings unless there is a local policy or State law which prohibits them from taping the meetings. However, parents with disabilities who require a tape recording of the IEP meeting in order to understand the proceedings retain the right to tape the meetings, despite local policy or State law to the contrary.

Horen v. Bd. Of Education of the City of Toledo Pub.Sch. Dist., 53 IDELR 79 (N.D. Ohio 2009). A school district in Ohio did not violate the IDEA by refusing to allow parents of a child with a disability to tape record an IEP meeting. This district had an official policy, which was applied consistently, which prohibited tape recording of IEP meetings. There was no evidence that either of the parents had a disability or language barrier which necessitated their taping of the proceedings.

E.H. v. Tirozzi, 16 IDELR 787 (D. Conn. 1990). This case involved a parent, E.H., who was a native of Denmark and had limited English proficiency. She asked the district for permission to tape-record her child's IEP meeting so she could review it at home with her dictionary to help her understand what was said. The district refused. The court ordered the district to allow her to record the meeting. It instructed that: "tape recording would allow E.H. to go home and review what was said at the meeting with the aid of a dictionary. It would allow her to go over the meeting again and again, until she was absolutely clear about what her child's IEP for the coming year entailed. It is therefore an essential part of her participation in the planning and evaluation of the IEP, a right she is guaranteed under the [IDEA]."

V.W. v. Favolise, 16 IDELR 1070 (D. Conn. 1990). A school district violated a parent's right to "meaningful participation" in her child's IEP meeting when it refused to allow her to tape record the meeting. The child's mother asked to tape record the meeting because she had a partial impairment in her hand which made note-taking difficult. The court rejected the district's argument that allowing the mother to tape record the meeting would have a "chilling effect" on the discussion and exchange of ideas.. Under the IDEA, the court stated, "participation means something more than mere presence" and the parent's right to effective participation necessarily encompassed the right to record IEP meetings.

Conley, 16 EHLR 1080 (OSEP 1990). OSEP's informal position is that videotaping should be permitted at the request of any party.

3. Are Parents Allowed to Behave Badly in IEP Meetings?

T.S. v. Weast, 54 IDELR 249 (D.Maryland 2010).

The parents of a 9-year-old with a seizure disorder failed to show that an IEP team's decision to meet without them denied their child FAPE. The U.S. District Court, District of Maryland ruled that the district was entitled to convene the IEP team without the parents after it made several unsuccessful efforts to include them, and that the resulting IEP offered the child an appropriate placement. The parents left, refused to attend, or postponed several meetings during the summer for various reasons. Because the school year was about to

begin, the team met without them in mid-August. The parents rejected the resulting IEP and placed the child in private school. They asserted that the IEP team violated the IDEA procedurally and denied the child FAPE. An ALJ sided with the district and declined to award tuition reimbursement. On appeal, the court noted that a district may meet without a parent if it is unable to convince the parents that they should attend. 34 CFR 300.322(d). In this case, the parents had the opportunity to participate, the court observed, but chose not to, "as was their right." However, that did not mean that the district violated the IDEA by continuing without them. Furthermore, any alleged procedural irregularity did not interfere with the provision of FAPE. The parents failed to provide evidence, other than stating their own preference, that the proposed placement was inappropriate. Finally, the parents acted unreasonably by declining to attend any of the summer meetings. "While the Parents may have been continuing to gather information and evaluations about their son's disorder, the IEP team meetings could not simply be pushed back over and over again, because an IEP needed to be created ... before the beginning of the school year," U.S. District Judge Deborah K. Chasanow wrote.

A.R. v. State of Hawaii, Dept. of Education, 56 IDELR 202 (D. Hawaii 2011).

Because the parent of a teenager with a severe intellectual disability was responsible for the Hawaii ED's delay in developing her son's 2009-10 IEP, she could not use the IDEA's stay-put provision to recover the cost of the student's private placement. The U.S. District Court, District of Hawaii affirmed a due process decision that denied the parent's request for tuition reimbursement. The court observed that the parent did not challenge the substance of the IEP, which was developed two weeks into the school year. Rather, she alleged that the ED's failure to have an IEP in place on the first day of school entitled her to reimbursement under the stay-put provision. The court disagreed, noting that the parent had rejected the ED's numerous attempts to schedule an IEP meeting before the start of the school year. Although the student had attended the private school the previous year, the court explained that the parent could not transform what was essentially a unilateral private placement into the student's stay-put placement by obstructing the ED's efforts to timely develop an IEP. "Absent her actions, the substantively unchallenged IEP would have been in place before the school year began [at the local high school], and [the parent] would have had no basis to challenge the IEP or to seek private school tuition from [the ED] for the 2009-10 school year," U.S. District Judge Susan Oki Mollway wrote. The court declined to adopt a broad rule that stay-put does not apply to purely procedural IEP challenges, however, and explained that its holding was limited to the specific circumstances of the case.

Upper Freehold Regional Bd. Of Education v. T.W., 56 IDELR 215 (D.N.J. 2011).

Refusing to cooperate with the IEP process proved to be an expensive mistake for the parents of a kindergartner with PDD-NOS. Determining that the parents' conduct was unreasonable, the District Court reversed an order reported at 7 ECLPR 48 that required a New Jersey district to fund the child's out-of-district placement. The court observed that it could not determine whether the IEP proposed by the district was appropriate, as there was no IEP to review. The parents did not accept or reject a draft IEP, and they did not respond to the district's efforts to schedule a follow-up IEP meeting. U.S. District Judge Joel A. Pisano noted that the 3d U.S. Circuit Court of Appeals permits the reduction or elimination of tuition reimbursement when parents disregard their obligations to cooperate and assist in IEP formation. "The court finds that the parents' conduct in delaying, canceling, or refusing to set up additional meetings with the IEP team substantially precluded any possibility that the district could timely develop an appropriate IEP for [the child] and provide the necessary services to him, or that the parties could resolve this dispute without resort to litigation," Judge Pisano wrote in an unpublished decision. In the alternative, the court found that the parents' failure to provide timely notice of the out-of-district placement precluded them from recovering tuition expenses from the district.

J.J. v. District of Columbia Pub. Schs., 56 IDELR 93 (D.D.C. 2011).

The District of Columbia did not deny FAPE to a student with behavioral problems when it failed to convene a timely meeting to determine the child's eligibility and placement. The District Court affirmed an IHO's decision that the conduct of the child's parent and her attorney caused much of the delay. The district failed to comply with two deadlines set by an IHO requiring it to meet to determine whether the student was eligible and, if appropriate, develop an IEP. The district subsequently sent possible dates to the parent's counsel on multiple occasions, but received no response. Months after the district's initial invitation, the parent and attorney agreed to a meeting time. Meanwhile, the parent alleged that the district denied the student FAPE by failing to comply with the prior hearing officer's orders. An IHO dismissed the complaint. The IHO noted that the parent's counsel appeared to engage in the "troubling conduct" of avoiding the IEP process in favor of litigation, and in detriment to the child's educational interests. The parent appealed. The District Court agreed that the district made reasonable efforts to schedule a meeting, and that those efforts were frustrated by the plaintiffs. Several letters of invitation were faxed to the parent's attorney. However, lack of response or lack of availability of the attorney or the parent delayed the process. The court acknowledged that the district's first attempt to arrange a meeting did not occur until 15 days beyond the deadline set by the hearing officer, and that the second invitation was not issued until after the second

deadline expired. Nevertheless, by not responding to the district's invitations, "the plaintiffs interfered with [the district's] eventual attempts, while technically belated, to schedule the eligibility meeting," U.S. District Judge Richard W. Roberts wrote.

Encinitas Unified Sch. Dist., 56 IDELR 147 (SEA CA 2011).
Just because an IEP team leader refused to leapfrog over the placement continuum to consider a parent's preferred private school placement did not mean she prevented the parent's meaningful participation. The ALJ noted that the district was entitled to start the discussion of placement by considering those options that offered the highly social child the greatest opportunities for mainstreaming. The parent rejected the district's offer to place the 9-year-old with speech and hearing impairments in a special day class, with significant mainstreaming opportunities, and instead sought reimbursement for tuition at a private school for students with disabilities. The district filed a due process complaint, seeking a declaration that it offered the child FAPE. The ALJ rejected the parent's contention that the district denied the child FAPE by preventing her from genuinely participating in the meeting. The ALJ pointed out that the team leader's approach accorded with LRE. "In essence, the IEP team must start with placement in general education and ask, why not," the ALJ wrote. Thus, it was proper for the leader to discuss the SDC, before addressing the more restrictive private school option. Moreover, although the team leader considered the least restrictive settings first, several other team members attempted to discuss the student's strong social skills and concerns that the private school was too restrictive. However, the parent was adamant that the student was not ready to leave private school. Believing she was being ignored, the parent left with her advocate before the IEP meeting was finished. The ALJ determined that because the parent was afforded opportunity for meaningful participation, the parent was not entitled to tuition reimbursement.

French v. New York State Dept. of Education, 55 IDELR 128 (N.D.N.Y. 2010).

A New York district did not deny FAPE to a student with autism whose father kept her out of school, refused to attend IEP meetings, and continually opposed its proposed IEPs. Noting that the district went out of its way to accommodate the parent's concerns, the District Court held that the child's failure to receive FAPE was caused by her father's "dilatory tactics and unwillingness to compromise." The parent alleged that the district denied his daughter FAPE over a period of several years by committing various procedural errors, such as failing to provide prior written notice. The court noted that for a court to find a denial of FAPE on procedural grounds, there must be evidence that the error compromised the student's right to an appropriate education, seriously impeded the parent's opportunity to participate, or caused a deprivation of educational benefits. 20 USC 1415(f)(3)(E)(ii). None of those things occurred here. Although the student went for years without an appropriate program, the source of her dilemma was not

the district, but her father. The court observed that the district repeatedly demonstrated a desire to accommodate the parent's concerns. It pointed to minutes of a 2001 IEP meeting, in which the team reviewed the parent's written input, discussed his request for updated evaluations, and recommended a home-based program the parent had suggested. However, the parent refused to allow his daughter to participate in the program and "repeatedly delayed the implementation of Plaintiff's proposed IEPs, regardless of how reasonable they were and regardless of whether they provided every item of relief he requested," U.S. District Judge Frederick J. Scullin Jr. wrote.

e. DISCIPLINE - MELINDA'S TOP TEN SPECIAL ED DISCIPLINE STRATEGIES

1. In Manifestation Determinations, look for evidence of forethought and planning in student behavior to isolate willful actions from actions that are "caused" by a disability.

Look for:

- **Evidence of forethought and planning the behavior.**
- **Evidence of the student's ability to control his/her behavior in other situations.**
- **Evidence that the student is aware that poor choices have consequences.**
- **Evidence of problems with impulsive behaviors in the classroom.**
- **Evidence of past parental concerns regarding impulsivity.**
- **Evidence of drug use.**

a. What behaviors are typically *not* caused by ADHD?

- **Student enjoyed his misbehavior and planned it to achieve maximum effect.**

Medford Public Schools, 110 LRP 31566 (SEA MA 2010).

No evidence supported a parent's argument that the misconduct of a 17-year-old with ADHD and a learning disability was related to his disabilities. The student accumulated nine out-of-school suspensions for violating school rules and faced criminal charges for an off-campus incident. His Massachusetts district determined that there was not a direct and substantial connection between the

student's disabilities and his behavior. It suspended him indefinitely and proposed placing him in an IAES. The student's parent challenged the MD review and objected to the proposed placement. The hearing officer explained that when a student is facing exclusion for more than 10 days for disciplinary reasons, the district must conduct an MD review to determine 1) whether the student's behavior was caused by or directly and substantially related to his disability, and 2) whether the student's offending behavior is a direct result of the district's failure to implement his IEP. Finding no evidence to suggest that the district did not implement the student's IEP, the hearing officer focused on the relationship between the student's disability and his behavior. The student's teachers and his counselor agreed that there was no direct or substantial relationship. ***They explained that the student was able to conform his behavior when he wanted to, that he enjoyed the drama of misbehavior, and that he planned his conduct to achieve maximum effect. A school psychologist who evaluated the student reported that the student knew that his poor choices had consequences. Moreover, the psychologist indicated that the circumstances of the misconduct involved advanced planning rather than the impulsivity associated with ADHD.*** Although the MD team did not consider the evaluation, the district could use it to support the team's conclusion that there was no connection between the student's conduct and his disability. Finding that the parent failed to show that the proposed placement was inappropriate, the IHO upheld the district's decision.

- **Trading marijuana for food and cash at school.**

Okemos Public Schools, 45 IDELR 115 (SEA Mich. 2006).

A district correctly determined that ***a ninth-grader's trading of marijuana for food or cash with other students was not related to his ADHD.*** Although the student received special education services under the categories of OHI and SLD, his parents only argued that the impulsivity related to his ADHD caused his misconduct. The district showed that the student's record did not support this contention. The student's teachers characterized him as "a mature, thoughtful and reflective student who did not display impulsive behaviors or an inability to control his behaviors." Moreover, the records showed his teachers had never contacted administration with respect to any problematic impulsive behaviors. Although his parents had recently participated in IEP meetings and wrote letters regarding his program to the district, they did not mention any problems with the student's impulsivity. The IHO gave little weight to the testimony of an expert who agreed that ADHD could result in an individual's tendency to engage in risky, criminal behaviors. The expert had initially testified only with respect to drug use, was surprised by the addition of the drug dealing issue, and revised his testimony after being led by the parents' attorney's questions.

- **Making an obscene gesture at classmates and threatening physical harm.**

Hollingsworth v. Hackler, 53 IDELR 298 (Tex.Ct.App. 2009).

An MD team's finding that a middle schooler's misconduct was unrelated to his ADD helped to insulate a principal and vice principal from Section 1983 claims arising out of the student's proposed placement in an IAES. Determining that the student's parents had no right to participate in the placement decision, the Texas Court of Appeals held that the officials were immune from suit. Public officials are immune from liability under Section 1983 when their conduct does not violate a clearly established statutory or constitutional right. The parents claimed that the officials' unilateral decision to place the student in an IAES violated their right under the IDEA to participate in placement decisions. The court disagreed. While the parents had a right to participate in the MD review -- a right that they exercised fully -- they did not have the right to participate in placement decisions if the student's behavior was not found to be a manifestation of his ADD. Rather, the district was free to discipline the student in the same manner that it would discipline students without disabilities, so long as it ensured that the student received FAPE. ***Because the MD team found that the student's behavior, which included making an obscene gesture at classmates and threatening physical harm, was unrelated to his disability, the officials were allowed to impose the same disciplinary sanctions they applied to other students.*** "The [parents] did not allege nor did they present any evidence showing that the disciplinary procedures applicable to [district] children without disabilities require parental involvement in the school's disciplinary decisions," Chief Justice John Cayce wrote. Absent evidence that the officials violated the parents' IDEA rights, the parents could not pursue a Section 1983 claim.

2. Develop Viable "Interim Alternative Educational Placements"

a. "Expelling" a Student To an Alternative School

Reiser v. Fairfax County Sch. Board, 44 IDELR 187 (E.D. Va. 2005).

A 10th-grade-student who was expelled from his Virginia district school for conduct unrelated to his disability, ADD, was offered FAPE in the district's alternative placement. A federal District Court decided that Virginia state law did not impose any greater burden on the district to provide opportunities that were unrelated to the implementation of his IEP than did the IDEA. Despite the fact the

student was no longer able to participate in the Japanese immersion program provided by his school, the student was offered online advanced placement classes. The court reviewed the language of the IDEA and state regulations and found that the district was required to offer an alternative placement that allowed for a continuum of special education services under both federal and state rules. The parents did not offer any evidence to show the district had failed in this respect. Their request for tuition reimbursement for their unilateral placement of the student was denied.

b. <u>In-School Suspension ("ISS"):</u>

<u>China Spring Independent School District</u>, 110 LRP 36343 (SEA TX 2010).

A Texas district did not deny FAPE to a student with ADHD, a mood disorder and ODD by placing him in ISS as a disciplinary consequence for misconduct. Having concluded that the student's behavior was not a manifestation of his disabilities, the district placed him in an IAES for an undisclosed period of time. The placement was fulfilled on campus in the ISS classroom rather than at the off-campus IAES in order to implement the student's IEP. The student received assignments from his teachers during the IAES. The student's parent argued that the district denied the student FAPE in the IAES by failing to provide him with his IEP modifications and accommodations, and by failing to provide him with appropriate academic assignments. Because the MD team concluded that the student's behavior was not a manifestation of his disability, the imposition of the IAES was appropriate to hold the student accountable for his behavior, the hearing officer said. The evidence showed that while the student did not have access to his IEP accommodations for the first two days of the IAES, the issue was promptly resolved once the principal was notified. Moreover, the student was allowed to attend some of his classes and to receive counseling during the IAES. "While the student may have elected not to produce much work ... the credible evidence did not show the school district failed to provide student with anything to do," the hearing officer wrote. The hearing officer concluded that the parent failed to show that the IAES was inappropriate or that the district failed to provide him with FAPE during his stint in ISS.

3. Understand the 45-day Rule for Students with Disabilities Who Commit Violent/Illegal Acts At School

a. What is a "weapon":

Upper St. Clair School District, 110 LRP 57903 (SEA PA 2010).

A high school student with autism, ODD, and ADHD might not have meant to bring a knife to school, but that could not stop his Pennsylvania district from assigning him to an IAES for 45 days. ***Because the knife with dual blades fit the IDEA's definition of a weapon, the district was entitled to remove him regardless of whether bringing the item to school was simply a mistake.*** The student was reaching into his backpack when he realized he had the knife. He immediately gave it to a therapist in the room. The district then began steps to remove him for violating school weapons policies. The parents requested an expedited due process hearing challenging that decision. The IHO rejected the parents' argument that the district first had to establish the student acted intentionally. The IDEA implementing regulation at 34 CFR 300.530(g)(1), which permits temporary removal for weapons possession, makes no mention of intent, the IHO observed, nor did the school's policies or the applicable state statutes. The IHO also noted that evidence of whether the conduct was connected to a disability was irrelevant, given that 34 CFR 300.530(g) allows removal "without regard to whether the behavior is determined to be a manifestation of the child's disability." It also was irrelevant that the knife in question included non-weapon tools, such as a corkscrew. Because it had cutting blades of 2 1/2 and 3 inches, it was a weapon under the IDEA. Finally, the IHO rejected the parents' argument that the removal should have been for a shorter period. "Student did possess an instrument which constitutes a weapon on school property," the IHO wrote. Thus, under the IDEA, the district had full discretion to determine the length of removal up to 45 days.

b. What is the "Infliction of Serious Bodily Injury":

"Serious bodily injury" requires substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted impairment of a bodily member, organ, or mental faculty. IDEA, 20 U.S.C. 1415.

Southern York County School District, 54 IDELR 3-5 (SEA PA 2010).

A Pennsylvania district must return a student with autism to his original educational placement after it improperly concluded that the student's

misbehavior on the bus necessitated his removal to an IAES. The seventh-grader was riding the bus when his driver changed the route due to weather conditions. The sudden change triggered an inappropriate behavioral response from the student; he allegedly physically assaulted a district employee. Although the IEP team determined that the student's conduct was a manifestation of his disability, it also determined that the student's behavior involved serious bodily injury which justified his removal to an IAES for up to 45 days. The parents appealed, arguing that the student's behavior did not meet the IDEA's definition of serious bodily injury. To justify unilateral IAES placement, the infliction of bodily injury must involve "a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ or mental faculty," the hearing officer explained. Here, ***no one received outside medical care as a result of the bus incident. Moreover, all district personnel returned to their duties after the incident, and no one missed work.*** "Although the student's behavior was injurious and frightening," the hearing officer wrote, "it does not fit within the IDEA's narrow definition of the infliction of serious bodily injury." The hearing officer thus concluded that the district's unilateral removal of the student to an IAES was inappropriate.

In re: Student with a Disability, 54 IDELR 139 (SEA KS 2010).

Although a paraprofessional suffered pain, discomfort and disorientation after being hit by a student that was no basis for a Kansas district to place the child in an IAES. ***Because the paraprofessional did not suffer extreme pain, her injuries did not fall within the statutory definition of "serious bodily injury."*** The student, an 83-pound 12-year-old, struck the paraprofessional on the head four times with his knuckles. ***The paraprofessional reported dizziness, blurred vision, and pain that she rated at "seven" on a scale of one to 10. However, she was given no pain medication at the hospital and was back to normal the next day.*** The student's parent filed a due process complaint, arguing that the MD review team's decision to move the child to an interim placement for 45 days was inappropriate. An IHO agreed, and the district appealed. On appeal, the state review officer noted that serious bodily injury must involve: 1) a substantial risk of death; 2) extreme physical pain; 3) protracted and obvious disfigurement; or 4) protracted impairment of a bodily member, organ or mental faculty. 18 USC 1365(h). Under the facts, the IHO correctly ruled that the injury did not fit the statute. "The Review officer is not insensitive to the fact that [the district] believes that [the paraprofessional's] injuries were traumatic, painful and significant," the SRO wrote. However, he declined to alter the decision of the IHO, who reasoned that "common minor symptoms from knuckle wraps to the head by a small child ... while without doubt very uncomfortable" do not fit the statutory definition of extreme physical pain.

Bisbee Unified School District No. 2, 54 IDELR 39 (SEA AZ 2010).

An ALJ found that an Arizona district was not justified in removing a student with autism to an IAES because he kicked his elementary school's principal. ***Although the district claimed that the student inflicted extreme physical pain when he lunged at the principal and kicked him while being restrained, the principal's actions following the incident revealed otherwise. The principal said he felt a "sharp pain" and went home for the rest of the day. Although his knee was swollen, he did not seek medical attention. The next day, he drove 200 miles. Three weeks later, he received a cortisone injection.*** Despite finding that the incident was related to the student's disability, the district removed the student to an IAES. The parent claimed the removal violated the IDEA. The ALJ agreed. A district can move a student to an IAES for up to 45 school days without regard to whether his conduct was related to his disability in several instances, including when the student has inflicted serious bodily injury. "Serious bodily injury" requires substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted impairment of a bodily member, organ, or mental faculty. Here, the evidence did not support the district's contention that the principal suffered extreme pain. The principal never claimed in his statement or testimony that he was in severe pain. His actions following the incident were not those of a person who was. "Therefore, [the district] did not have legal authority to place [the student] in an IAES," the ALJ wrote. No compensatory education was warranted, however, as the student received a FAPE in the IAES.

4. Respond to Truancy as a Behavior Problem

Questions to Ask:

a. Is the student's truancy chronic or episodic?

b. Does the student's educational disability cause the student to be truant?

c. If the student's disability causes his/her to be truant, has the school district attempted strategies to encourage the student to attend school?

***Question*: Can truancy trigger an obligation to conduct an FBA and develop a BIP?.**

Rodriquez v. San Mateo Union High School District, 109 LRP 72424 (9th Cir. 2009).

A California district was not required to develop a BIP for a student merely because he was arrested for stealing and had a problem with truancy. The 9th U.S. Circuit Court of Appeals agreed with the District Court and an ALJ that the student's behavior was not severe enough to warrant a BIP. The student was arrested for taking beer from a supermarket. Pursuant to an agreement with a juvenile court, the student's parent placed him in a private residential program. Claiming that the district's failure to develop a BIP after the student's arrest amounted to a denial of FAPE, the parent sought reimbursement for the residential placement. An ALJ found for the district, and the District Court affirmed at 109 LRP 44926. The parent appealed. Affirming the District Court's ruling, the 9th Circuit reasoned that the student's behavioral problems did not cause harm or a serious threat of harm to persons or property, as outlined in California regulations. As such, the student was not entitled to a BIP under state law. Nor did the parent provide evidence of other circumstances warranting a BIP under the IDEA. While the student's truancy interfered with his learning, the district adequately addressed that issue in the student's IEP. The plaintiffs also raised a new argument on appeal — that the student's IEP required consultation with mental health services. However, the court pointed out that such consultation was required only if the student's condition worsened. Furthermore, the court could not consider issues that the parent failed to raise at the due process hearing.

Springfield School Committee v. Doe, 53 IDELR 158 (D. Mass. 2009).

An IEP team's failure to promptly respond to the frequent truancy of a 16-year-old with cognitive, attention, and behavioral difficulties denied the student a FAPE. Given the extent of the teenager's absenteeism, and the fact that his IEP addressed improving his handling of school responsibilities, the district should have determined that a reevaluation was in order. The student was truant 32 days during a two-month period. The district did not reconvene its IEP team or take any independent action as a result of the absences. The student filed a due process complaint, alleging that the district deprived him of a FAPE. An independent hearing officer agreed, and required the district to provide compensatory education. The hearing officer based his decision on the IDEA implementing regulation at 34 CFR 300.303, which requires a district to reevaluate a child if it determines that his educational or related services needs warrant it. Echoing the IHO's opinion, the court observed that once the truancy became excessive, the district had an affirmative duty to respond. The court noted that the goal regarding managing school responsibilities was grounded in the student's often being late and walking out of class. Given that concern

and the number of absences, the district should have determined that a reevaluation was warranted. The court was not persuaded by the district's argument that there was no specific showing that the error caused the loss of an educational benefit. Its failure to respond to the student's chronic truancy within the context of his IEP was reason enough for the IHO to conclude that the student was denied a FAPE, the court observed.

5. Don't Assume that Emtionally Disturbed (ED) Students' Misconduct Is Always Caused By Their Disability

- **ED Student Smoking Pot – Not a Manifestation of his ED**

Baltimore County Public Schools, 46 IDELR 179 (SEA Maryland 2006).

A Maryland LEA did not violate the IDEA when it suspended a 16-year-old student with an emotional disturbance for smoking marijuana just before coming to school. Administrative Law Judge Una M. Perez noted that the student's parent, as the party challenging the LEA's manifestation determination, bore the burden of proving that the student's marijuana use was caused by or had a direct and substantial relationship to the student's disability. The parent submitted a letter from the student's therapist, stating that the student had a major psychiatric disability that significantly affected the student's psychological, social and academic development. As Judge Perez observed, however, the letter did not state that the student's marijuana use was a manifestation of his emotional disturbance. Furthermore, the judge pointed out that the IEP team considered several factors in making the manifestation determination, including the student's record, his progress, his referrals, the implementation of his IEP, his achievements and his behavioral assessments. Concluding that the IEP team conducted the manifestation meeting in accordance with the IEP, Judge Perez affirmed the manifestation determination.

- **ED Student Planning Attack on the Bus – Not a Manifestation of ED**

In re: Student with a Disability, 51 IDELR 231 (SEA VA 2008).

A surveillance video that showed a 13-year-old student discussing an attack on a schoolmate in advance helped to persuade an IHO that the attack was not a manifestation of the student's emotional disability. The video, along with staff and

expert testimony, undermined the parents' claim that the student acted out of frustration. The student, who had intermittent explosive disorder, had a history of verbally and physically attacking others without an apparent reason. Although the parents asserted that the seventh-grader was upset about changes made to his IEP, and that other students were encouraging his behavior, neither explanation tied the attack was to his disability. A video tape taken on the school bus, which showed the student kicking the head of his classmate, revealed that he planned the attack. "The event was filmed and it clearly shows ... that [the student] communicated his intentions to other students on the bus and he delivered the blow at a predetermined point in time," the IHO wrote. Multiple district staff members and expert witnesses testified that the student was aware of the consequences of his behavior, that his attack was a premeditated act of violence, and that it was not directly or substantially related to his disability. Furthermore, a teacher testified that she discussed the changes to the student's IEP with him just prior to the incident, and that he did not appear upset. Finding no evidence that the attack was a manifestation of the student's disability, the IHO upheld the results of the district's MD review.

- **Girl Kicked A Male Student in the Groin – Was a Manifestation of ED**

Manteca Unified School District, 50 IDELR 298 (SEA CA 2008).

Concluding that a student's treating psychiatrist was far more knowledgeable about her PTSD than a school neuropsychologist, an ALJ overturned the results of a district's MD review. The ALJ found that the student's conduct -- kicking a male schoolmate in the groin -- was directly related to her disability. The neuropsychologist observed that the student had never attacked another student before the incident in question. She also opined, without explanation, that the student's conduct was unrelated to her PTSD. However, the ALJ pointed out that the neuropsychologist had not assessed, treated, or even met the student. The student's psychiatrist, in contrast, had worked with the student for more than year. As a child and adolescent psychiatrist, he was qualified to diagnose and treat PTSD. Most importantly, the ALJ noted, the psychiatrist offered a detailed and credible explanation of how the student's PTSD influenced her actions. "He explained that [the student's] behavior was very likely related to her PTSD because the boy who student kicked was sexually harassing her before she kicked him, and her PTSD was caused by a sexual assault," the ALJ wrote. According to the psychiatrist, the ALJ observed, individuals with PTSD are "hyper-vigilant" and have difficulty regulating their emotions. Finding that the psychiatrist was more credible than the school neuropsychologist, the ALJ ordered the district to immediately return the student to her pre-discipline placement.

- **Teenage Boy Wrote List of Students to Kill – Not a Manifestation of ED**

Westford Public Schools, 55 IDELR 27 (SEA MA 2010).

The parents of a 13-year-old who allegedly penned a list of students he planned to shoot failed to overcome a district's decision to expel the student. There was no evidence that the teen's conduct was caused by, or directly and substantially related to his social anxiety or selective mutism, an impartial hearing officer concluded. The seventh-grader had a behavior plan that addressed his tendency to withdraw and become aggressive when anxious. The list, which he created with other students' input, contained 75 names. On the other side of the paper, the student had written "I am bored" 50 times. After a classmate reported that the teenager said he planned to shoot the people on the list, the district determined that the behavior was unrelated to his disabilities and excluded him for the rest of the year. The parents filed a due process complaint, challenging the MD review team's conclusion. The IHO noted that the usual triggers for the student's aggressive behavior were not present when he authored the list. Furthermore, his typical responses to triggering situations, such as non-responsiveness, increased anxiety, or verbal and physical aggression, were absent. The IHO pointed to teachers' testimony that they had never observed the student's behavior escalate because he was bored and that his development of the list was a unique behavior. In addition, the IHO was un-persuaded by the testimony of the student's psychiatrist, who stated generally that the student could be unpredictable when upset or anxious. "The standard to determine whether [the student's] conduct was caused by or had a direct and substantial relationship to his disabilities requires more than a general relationship between his conduct and his disabilities," the IHO wrote. Moreover, there was no evidence that the student was experiencing such emotions when he made the list.

- **ED Student Planning Paintball Raid – Not a Manifestation**

Fitzgerald v. Fairfax County Board of Education, 50 IDELR 165 (E.D. Va. 2008).

The parents of an 11th-grader with anxiety issues may have objected to the manner in which an MD review was conducted, but that did not invalidate the district's decision to suspend the student for the remainder of the school year. The U.S. District Court, Eastern District of Virginia held that the district conducted a proper MD review before determining the student's punishment. The court rejected the parents' argument that they had an "equal right" to determine the members of the student's MD team. While parents have the right to invite additional participants to an MD review, they do not have the right to veto a district's choice of team members. Nor did the parents have the right to veto the MD team's finding that the student's weekend paintball raid on the high school

was unrelated to his emotional disability. "Consensus may be desirable as a goal, but cannot always be reached and is not statutorily required," U.S. District Judge T.S. Ellis III wrote. The court acknowledged that the student's special education teacher prepared a draft IEP in advance of the MD review that recommended a home placement. However, noting that the MD team thoroughly discussed the nature of the student's disability, the student's educational records, and the conduct at issue, the court found insufficient evidence of predetermination. The court also pointed out that the student orchestrated the incident, and was not swayed by his friends to engage in inappropriate behavior. Based on the nature of the incident and the student's disability, the court concluded that the extended suspension was appropriate.

6. Use Emergency Removals for Violent/Dangerous Students

Most courts will approve the emergency removal of a student with disabilities in response to clearly dangerous and/or significantly disruptive behaviors in school:

M.M. v. Special School District No. 1, 49 IDELR 61, 512 F.3d. 455 (8th Cir. 2008).

A Minnesota district did not deny FAPE to a middle schooler with an emotional disturbance by suspending her on multiple occasions for assaulting teachers and schoolmates, carrying weapons to school, and engaging in threatening and disruptive behavior. The 8th Circuit determined that the district fulfilled its FAPE obligation by offering a placement in an alternative educational setting. As a preliminary matter, the court determined that the parents bore the burden of persuasion. Although Minnesota law requires school districts to prove their compliance with the IDEA, the 8th Circuit echoed its holding in *School Bd. of Indep. Sch. Dist. No. 11 v. Renollett*, 45 IDELR 117 (8th Cir. 2006), that the burden of persuasion falls on the party bringing the action. The 8th Circuit thus overturned the District Court's determination that the district bore the burden of persuasion. Turning to the merits of the claim, the court noted that the members of the student's IEP team, including the parent, agreed that the student could not receive an educational benefit in her current setting. However, the parent declined the district's offer to place the student in a more restrictive program at another school and requested mediation. Under the IDEA's stay-put provision, the court explained, the district had to maintain the student's current setting until the parties agreed on an alternative. "The parties have agreed that a change of placement is needed; only their failure to agree on an interim change, combined with the school district's stay-put obligations, have left the child in a setting that is not successfully controlling her dangerous misbehavior," U.S. Circuit Judge James B. Loken wrote. Judge Loken further observed that the student's lack of educational

services during her suspensions stemmed from the parent's refusal to accept the district's offer of home schooling services. Moreover, the evidence showed that the student received "some educational benefit" during her eighth-grade year. Determining that the district offered the student FAPE, the 8th Circuit reversed an award of compensatory education and attorney's fees.

Smithton R-VI School District, 110 LRP 22863 (SEA MO 2010).

Because a student's physical aggression could not be appropriately addressed in a general education setting and posed a safety risk, his district could move him to in an IAES, an IHO found. Although his parents preferred that the district maintain him in his current placement in a general education class 80 percent of the day, doing so was likely to result in injury to himself or others. During the 2008-09 and 2009-10 school years, the student engaged in frequent aggressive behavior. At one point, he threatened to kill himself. On March 25, 2010, the district requested an expedited due process hearing, seeking to place the student in an IAES. If a student's current placement is substantially likely to result in injury, either to the student or to others, an IHO can order that the student be placed in an IAES for up to 45 days. 34 CFR 300.532 (b)(2)(ii). The IHO noted the severity of the student's past behavior, which included striking and leaving marks on adults. Furthermore, although the parents insisted that the frequency of behavioral incidents had decreased, the IHO pointed to a March 3, 2010 assault as evidence that the behavior continued to endanger others' safety and could not be adequately addressed in his current placement. Underlining the inappropriateness of the placement was the fact that the child, who had been diagnosed with ODD, interim explosive disorder and adjustment disorder, was receiving just 15 minutes of special education services. "This is not remotely equivalent to the comprehensive structured setting ... which Student clearly needs," the IHO wrote. The IHO remarked that in hindsight, the district should have placed the child in a self-contained special class, as it initially advocated in 2008, but that at the time, the parents would only agree to a general education class.

Collingwood Borough Board of Education, 54 IDELR 336 (SEA NJ 2010).

A district was entitled to place a first-grader with ADHD and ODD in a highly structured out-of-district program for students with behavioral challenges, an ALJ concluded. Although the parent preferred that her child attend an in-district day care facility, the out-of-district program had the staff and services necessary to address the child's aggressive behavior. An ALJ issued a prior emergent order that removed the student from a district school based on his escalating behavioral issues. The ALJ agreed that the student should be placed in a highly structured program with behavioral supports. The student was placed at home while the

parties searched for an appropriate placement. However, the parent and district could not agree on placement. The district sought an emergency order placing the student in the out-of-district program. The ALJ noted that the prior emergency order that placed the student on home-bound instruction was only a temporary measure until a suitable placement was found. Moreover, the emergent nature of the issue had not abated. A review of the record showed that prior to home placement the student's aggressive and destructive behaviors were escalating. Furthermore, the out-of-district placement would provide the highly structured, intensive setting the student required. In addition, its staff members were certified to educate special needs children with severe behavioral issues. The placement preferred by the parent, on the other hand, was a small facility with programs for nursery through kindergarten students. Although licensed as a child care center, it was not approved by the New Jersey ED as a school for students with disabilities. Moreover, the class the student would enroll in would not include any first- or second-graders, and the school did not have a curriculum for those grades.

Saddleback Valley Unified School District, 52 IDELR 56 (SEA CA 2009).

A 12-year-old with an emotional disability and ADHD was placed in a special day class due to years of self-injury, throwing items and verbal aggression arising from anger. When his behavior improved, the student was placed in a general education setting. Three weeks later, he poked a classmate's leg with a retractable knife. The assistant principal stated the incident was a thoughtless act by a student who was trying to appear different, but still the district found that the incident was a manifestation of the student's disability. It removed the student to an IAES for 45 days. After the student returned, he teased a classmate. He also verbally threatened a student. However, the student did not engage in any conduct for which he was formally disciplined. Teachers reported that he sometimes became tense since returning but was easily calmed. Other teachers stated that he was well-behaved. The district sought to remove the student to an IAES for an additional 45 days. A hearing officer may order a change in placement of a child with a disability to an appropriate IAES for not more than 45 school days if the officer determines that maintaining the child's current placement is substantially likely to result in injury to the child or to others. 34 CFR 300.532(b)(2)(ii). The district failed to show that keeping the student in his current placement was substantially likely to result in injury. While acknowledging that the knife incident was serious, the ALJ observed that weapons possession alone is not enough for a second 45-day removal. Plus, the assistant principal's testimony indicated that the incident was not dangerous conduct related to anger. Moreover, the evidence showed that the student was improving his self-control and no longer engaged in self-injury and throwing items. There was no indication that he would return to those behaviors if not removed. Finally, the few minor incidents of misconduct that occurred in the current school year were not enough to warrant a

change of placement. The ALJ denied the district's request to move the student to an IAES for an additional 45 days.

7. Understand that Drug/Alcohol Abuse May Not Be Caused by a Disability

Many parents and advocates will assert that a student with disabilities is "self-medicating" by using illegal drugs at school and, therefore, should not be punished for this behavior (which, they argue, is related to the student's disability). However, courts do not always adopt this view:

Nguyen v. District of Columbia, 54 IDELR 18 (D.D.C. 2010).

The tenuous connection between a 17-year-old student's depression and his poor performance in high school undermined his parent's claim that he was eligible for IDEA services. Finding that the student's truancy and drug use were at least partially responsible for his educational difficulties, the District Court held that he was not a "child with a disability." ***The court rejected the parent's argument that the student had an emotional disturbance. Although the student had been diagnosed with depression, a condition that could affect his ability to attend school, the parent failed to establish a direct link between the student's depression and his poor academic performance***. In contrast, the court observed, the evidence showed that the student's truancy and drug use negatively affected his education. As for the parent's claim that the student had a specific learning disability, the court pointed out that the student scored higher than his aptitude level on all but two areas of testing. In the remaining areas, the difference between his ability and achievement was inconsequential. "Small differences between achievement scores and intelligence scores are insufficient to support [a] classification as having a specific learning disability," U.S. District Judge James Robertson wrote. Noting that the discrepancy might stem from the student's poor attendance, the court affirmed an IHO's finding that the student was ineligible for IDEA services.

Baltimore County Public Schools, 46 IDELR 179 (SEA MD 2006).

A Maryland LEA did not violate the IDEA when it suspended a 16-year-old student with an emotional disturbance for smoking marijuana just before coming to school. Administrative Law Judge Una M. Perez noted that the student's parent, as the party challenging the LEA's manifestation determination, bore the burden of proving that the student's marijuana use was caused by or had a direct and substantial relationship to the student's disability. The parent submitted

a letter from the student's therapist, stating that the student had a major psychiatric disability that significantly affected the student's psychological, social and academic development. As Judge Perez observed, however, the letter did not state that the student's marijuana use was a manifestation of his emotional disturbance. Furthermore, the judge pointed out that the IEP team considered several factors in making the manifestation determination, including the student's record, his progress, his referrals, the implementation of his IEP, his achievements and his behavioral assessments. Concluding that the IEP team conducted the manifestation meeting in accordance with the IEP, Judge Perez affirmed the manifestation determination.

In re: Student with a Disability, 52 IDELR 239 (SEA WV 2009).

A West Virginia district had to reverse its expulsion of a 13-year-old boy with ADHD and ODD after an independent hearing officer found its MD review deficient. The district erred in failing to consider evidence that the student's ingestion of a pill was linked to his disabilities. The student was in the bathroom when a bigger boy handed him a pill used for the treatment of anxiety. The student took it, later stating that he felt pressured to do so. The district held an MD review to determine if it could expel him for violating the code of conduct. During the 20-minute meeting, the principal read aloud teacher observation reports indicating that the student was easily manipulated into wrongdoing. There was no discussion of his medications, disabilities, or the possibility that they might related to his conduct. The committee concluded that they were unconnected, and expelled him. The parent requested a due process hearing, alleging that the MD review violated the IDEA. At the hearing, the student's physician and parent testified that his disabilities caused him to act impulsively, and that he was easily talked into wrongdoing. As part of an MD review, a district must review all relevant information in the student's file, including the IEP, teacher observations and parental input to determine if the conduct was caused by, or had a direct and substantial relationship, to the child's disability. 34 CFR 300.530(e). The district neglected to evaluate all of the pertinent information it possessed, including the student's diagnoses and medications, the IHO observed. Furthermore, the parent presented credible evidence that the student's behavior was directly and substantially related to his disabilities. The teachers' reports, undisputed physician's testimony, parental input, and the student's own testimony clearly linked the ingesting of the pill to the student's impulsivity and vulnerability to peer pressure.

Omak School District, 45 IDELR 54 (SEA WA 2005).

An ALJ concluded that a Washington district appropriately implemented a student's IEP and BIP and had no reason to suspect that drug use would be a problem or needed to be addressed in his educational program. After he was charged with smoking marijuana on school grounds and expelled, the district provided the appropriate notices to the parents and conducted a manifestation determination. The team determined that the student's IEP was implemented appropriately, he had the ability to control his actions and understood the consequences of the behavior. Despite the parents' request that the ALJ "drop" the allegations of smoking marijuana, she explained that the IDEA did not confer jurisdiction within the context of a due process hearing for her to make that factual determination. However, the ALJ found that smoking marijuana was not a manifestation of ADHD. Although she conceded that the behavior was likely related to his disability, as argued by the student's father and as noted in *Honig v. Doe*, 559 IDELR 231 (U.S. 1988), it was "attenuated conduct." According to the Supreme Court, an example of such conduct was behavior that resulted from a student's loss of self-esteem and manifested itself in his engaging in misconduct to win the approval of his peers.

8. Use Restraint/Isolation Properly

The subject of restraint and/or isolation of public school students is on the "front-burner" as Congress moves toward the reauthorization of NCLB and the IDEA. Published reports such as "School Is Not Supposed To Hurt: Investigative Report on Abusive Restraint and Isolation in Schools" (published by the National Disability Rights Network, 2009) have highlighted concerns about incidents where students have been killed or seriously harmed during restraint and/or isolation. When, and under what circumstances, can restraint/isolation be used properly for students with disabilities?

T. W. v. School Board of Seminole County, Fla., 610 F.3d 588 (11th Cir. 2010).

Despite claiming that the teacher of an autism class provoked the behaviors that prompted her to physically restrain a middle schooler with PDD-NOS, a parent could not show that the teacher or the district violated the student's constitutional rights. The 11th Circuit affirmed a decision reported at 52 IDELR 155 that the teacher's actions were not unreasonable in light of the student's in-class behaviors. The court explained that excessive corporal punishment is actionable only when the conduct is arbitrary, egregious and conscience-shocking. ***Although the parent alleged that the teacher's actions were rooted in malice and sadism, the court observed that her use of restraint could be viewed as an attempt to restore order,***

maintain discipline, and prevent the student from harming himself. For example, the court observed that the teacher pinned the student's hands behind his back on one occasion when he refused to follow her instructions and swung his hands at her. In another incident, the teacher put the student face down on the floor and sat on him after he refused to go to a "cool down room." Recognizing that the teacher may have resorted to force too soon, the 11th Circuit nonetheless observed that her use of restraint was not wholly unjustified. "We disapprove of [the teacher's] actions in no uncertain terms, and we are sympathetic to the harm that [the student] and his classmates suffered as a result of [her] misconduct," U.S. Circuit Judge William H. Pryor Jr. wrote. Given the connection to the student's behavior, however, the court could not find that the teacher's conduct was conscience-shocking. U.S. Circuit Judge Rosemary Barkett dissented from the majority's opinion, determining that the teacher's use of restraint and excessive force violated the student's constitutional rights.

C.N. v. Willmar Public Schools, 53 IDELR 251 (8th Cir. 2010).

A special education teacher did not violate a third-grader's constitutional rights when she used seclusion and restraint to manage the child's behaviors. Noting that the child's BIP allowed the teacher to use such techniques, the 8th Circuit affirmed a decision reported at 50 IDELR 274 that dismissed the parent's Section 1983 claim. ***The court noted that the child's BIP expressly permitted the use of seclusion and restraint to manage problem behaviors.*** Although the parent allegedly objected to the use of aversives, the court pointed out that she did not challenge the child's IEP until after the child left the district. The court explained that the BIP set the standard for the teacher's use of seclusion and restraint. "Because [the IEP] authorized such methods, [the teacher's] use of those and similar methods ..., even if overzealous at times and not recommended by [the independent evaluator], was not a substantial departure from accepted judgment, practice or standards, and was not unreasonable in the constitutional sense," U.S. Circuit Judge C. Arlen Beam wrote. Thus, the court observed, the teacher's use of seclusion and restraint did not amount to a Fourth Amendment violation. As for the parent's claim that the teacher violated the child's Fourteenth Amendment rights, the court pointed out that the parent made only vague allegations of physical and emotional abuse. Without more information, the court explained, it could not determine whether the teacher's alleged actions were so shocking to the conscience that they amounted to a violation of fundamental constitutional rights. The 8th Circuit also ruled that the parent's failure to request a due process hearing before she withdrew the child from the district ended any subsequent bid for relief. In a concurring opinion, U.S. Circuit Judge Steven M. Colloton indicated that an exception to that rule might exist when the child's continued enrollment

would result in physical harm. Because the parent failed to demonstrate a likelihood of harm, however, the 8th Circuit did not have to decide whether such an exception existed.

9. Don't Forget About 504 Students

Section 504 says nothing directly about discipline procedures for students with disabilities. However, many experts recommend that the discipline procedures of the IDEA be used for Section 504 students as well.

OCR Memorandum, 307 IDELR 5 (OCR 1988).

Manifestation determinations must be conducted for 504 students prior to long-term suspension or expulsions.

Long Beach Unified School District, 53 IDELR 58 (OCR 2009).

A California district failed to comply with its district's policies for the development of BIPs. OCR investigated whether the district properly followed Section 504's evaluation and placement requirements when developing and implementing BIPs. OCR found that 80 percent of students who received resource room services had BIPs. OCR's investigation concluded that school officials started adding a BIP to all IEPs at the request of administrative staff. However, none of the BIPs OCR examined included the six-page monitoring plan and progress worksheet, which were required by district policy. "Even more problematic is the consequence of the blanket imposition of BIPs," OCR observed. The BIPs OCR examined were not developed for individual students; some were typed with boilerplate language except that the target behavior was handwritten. Some BIPs were identical, OCR observed, with no variation that was specific to the student. Although placing a student on a BIP can be of great benefit when warranted, OCR observed, placing a student on a BIP when it is not appropriate serves to unnecessarily stigmatize the student. For example, a student with a learning disability should not think that experiencing difficulties with academic tasks is "misconduct," OCR explained. Having a BIP also made students more vulnerable to transfer in the event of misbehavior, OCR suggested. Because of a pattern of inappropriate creation and application of BIPs at the middle school, OCR reasoned, the district failed to ensure that the evaluation process for creation of BIPs met the individualization and FAPE requirements of Section 504 and the equal treatment requirements of Section 504, Title II, and their supporting regulations.

<u>Ellenberg v. New Mexico Military Institute</u>, 52 IDELR 181, 572 F.3d 815 (10th Cir. 2009).

Two words in the Section 504 regulations foiled a student's attempt to sue a military academy that rejected her application because of her behavioral problems, drug use, and need for counseling services. ***Finding no evidence that the student's ODD "substantially limited" her ability to learn, the 10th Circuit ruled that she did not have a disability under Section 504 or the ADA.*** The court acknowledged that the definition of "qualified handicapped person" in the Section 504 regulations includes individuals who are entitled to receive FAPE under the IDEA. However, the court pointed out that the definition of "qualified handicapped person" incorporates the regulations' definition of "handicapped person." Under the Section 504 regulations, the court observed, an individual is a "handicapped person" if she has a physical or mental impairment that substantially limits one or more major life activities. The court recognized that the student in this case had an IEP -- a circumstance that suggested Section 504 eligibility. However, noting that the IDEA covers a broad range of disabilities, the court explained that the mere existence of an IEP did not in itself establish a substantial limitation on the student's ability to learn. "Of course an IDEA disability may -- and in the majority of cases probably will -- substantially limit a major life activity," U.S. Circuit Judge Timothy M. Tymkovich wrote. "But the point here is that it need not, and thus a plaintiff must individually show substantial limitation." The court noted that the ADA also requires a showing of substantial limitation. Because the student here did not present any evidence that her ODD substantially limited a major life activity, such as learning, she could not demonstrate that she was a "qualified handicapped person" entitled to the protections of Section 504 or the ADA. The 10th Circuit affirmed a judgment in favor of the military institute.

10. <u>Implement Appropriate Behavior Intervention Plans (BIPs)</u>

Every student's IEP must consider "whether the student's behavior impedes his or her learning, or that of others." However, I find that many school districts fail to thoughtfully consider this question when developing IEPs. Failure to do so may lead to legal difficulties, as illustrated by the following cases:

<u>North St. Paul – Maplewood Independent School District #622</u>, 110 LRP 34454 (SEA MN 2010).

The increasing behavioral problems of a teenager with an emotional disturbance should have caused her IEP team to consider PBIS, the Minnesota ED concluded. ***Because it was reasonable to find that the student's behavior, including aggression***

in class, anxiety and threats of suicide, was impeding her learning or that of her classmates, the district violated the IDEA by not doing so. Each time the student threatened suicide, she was referred to the district's mental health crisis intervention team. The student would calm down, but the IEP team did not meet. Responding to a due process complaint filed by the student's mother, the ED pointed out that in developing an IEP for a child whose behavior impedes the child's learning or that of others, an IEP team must consider the use of PBIS, and other strategies, to address that behavior. 34 CFR 300.324 (a)(2)(i). Despite evidence of failing grades, significant behavioral incidents that were increasing in severity and intensity, and five threats of suicide, the district failed to address the student's behavior in an IEP, consider the FBA or develop a BIP. "The Student's behavior was of great enough concern ... that an IEP meeting should have been held to address it," the ED wrote.

Special School District of St. Louis, 110 LRP 36327 (SEA MO 2010).

Although a formal BIP might have increased a student's academic progress, a district did not deny her FAPE by failing to supply one. The district met the IDEA's requirements by including in her IEP behavioral interventions that adequately addressed her difficulties with staying on task and interacting with peers, a Missouri hearing panel concluded. The student with ADHD, and diagnoses of bipolar disorder and Asperger syndrome, showed an increase in behaviors related to aggression and task completion. In response, the district offered an IEP that listed behavioral goals, modifications and accommodations to address the behaviors. The student's mother challenged the IEP on the basis that it lacked a formal BIP. ***Where a behavior impedes a student's learning or that of others, a district must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 CFR 300.324 (a)(2)(i). However, the IDEA does not require a formal BIP in every case.*** Here, the lack of a BIP did not deny the child FAPE, the panel concluded. The student's teachers testified that she was progressing academically and meeting her goals. Furthermore, the current IEP contained interventions addressing her focus and aggression. The panel also pointed to the IEP team's statement that aggression was a problem more at home than in school. While it was a paramount concern for the child's mother and grandmother, the child's teacher stated aggression wasn't a problem. "While conducting a FBA and development of a formal BIP may have allowed greater academic progress, this is not required by the IDEA," the panel wrote.

In re: Student with a Disability, 110 LRP 22976 (SEA VA 2010).

A Virginia district denied FAPE to a student with mental retardation by failing to implement her BIP targeting her fighting and verbal aggression, an impartial hearing officer concluded. The district's failure was material, since it stretched over a 10-month period during which the student's behavior caused her frequent removal from class. The March 2009 BIP required designated personnel to document incidents of the behaviors and to review the BIP monthly. The district stated that it did not document behaviors or meet because the student did not engage in the targeted conduct. The student's parent alleged in a due process complaint that the district denied the student FAPE. The IHO noted that the failure to properly or consistently implement an intervention contained in a student's BIP may amount to a denial of FAPE. The SRO pointed out that the district tried to justify its failure by defining verbal aggression to exclude the student's behaviors. However, the evidence established that the student had ongoing behavioral difficulties subsequent to the BIP's creation that fell within the scope of the targeted behavior, including yelling at students and other verbal outbursts. Yet the district failed to respond with interventions until after the parent filed a due process complaint in December 2009. During the period in question, the student regressed in reading and achieved mostly failing or near failing grades. "Considering the above, I find [the student] received, at best, a trivial educational benefit and the [district's] failure to implement the BIP constitutes a denial of FAPE," the IHO wrote.

But school districts are not obligated to prepare BIPs in every case of student misbehavior:

Doe v. Hamdren-Wilbraham Regional School District, 54 IDELR 214 (D. Mass. 2010).

The IEP of a child with autism, which specifically addressed his at-school behavior, offered him FAPE, a federal District Court held. ***While noting that the impact of the IEP's behavioral strategies would likely spill over to the home environment, the court pointed out that the district was only obligated to address those behavioral issues the student displayed in school.*** The parents alleged in an administrative hearing that the IEP denied the student FAPE by failing to address the student's severe at-home interfering behavior, and because it lacked specific statements regarding specialized instruction and generalization of skills. As relief, they sought reimbursement for a unilateral private placement. An ALJ denied that request, and the parents appealed. The District Court noted that an IEP must be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade, but need not maximize his potential. *North Reading Sch. Committee v. Bureau of Special Educ. Appeals of the Massachusetts Dept. of Educ.*, 47 IDELR 215 (D. Mass. 2007). The court observed that the IEP contained behavioral goals and specific steps the district would take to decrease the student's interfering behaviors and keep him on task, such as preferential seating and support during transitions. "While there is no specific reference in the IEP about how to deal with the interfering behaviors at home ... the IEP does focus on what can be

done in the environment that the school district can control -- school itself," U.S. District Judge Nancy Gertner wrote. The court also noted that the IEP included a detailed statement of special education and related services, and numerous plans for generalizing skills to different settings. Because the IEP offered the student FAPE, his parents could not obtain tuition reimbursement.

Roderiquez v. San Mateo Unified High School District, 53 IDELR 178 (9th Cir. 2009).

A California district was not required to develop a BIP for a student merely because he was arrested for stealing and had a problem with truancy. The 9th U.S. Circuit Court of Appeals agreed with the District Court and an ALJ that the student's behavior was not severe enough to warrant a BIP. The student was arrested for taking beer from a supermarket. Pursuant to an agreement with a juvenile court, the student's parent placed him in a private residential program. Claiming that the district's failure to develop a BIP after the student's arrest amounted to a denial of FAPE, the parent sought reimbursement for the residential placement. An ALJ found for the district, and the District Court affirmed. The parent appealed. Affirming the District Court's ruling, the 9th Circuit reasoned in an unpublished decision that the student's behavioral problems did not cause harm or a serious threat of harm to persons or property, as outlined in California regulations. As such, the student was not entitled to a BIP under state law. Nor did the parent provide evidence of other circumstances warranting a BIP under the IDEA. While the student's truancy interfered with his learning, the district adequately addressed that issue in the student's IEP. The plaintiffs also raised a new argument on appeal -- that the student's IEP required consultation with mental health services. However, the court pointed out that such consultation was required only if the student's condition worsened. Furthermore, the court could not consider issues that the parent failed to raise at the due process hearing.

Lauren P. v. Wissahickon School District, 51 IDELR 206 (3d Cir. 2009).

The parents of a teenager with ADHD could not recover the costs of their daughter's private placement from a Pennsylvania district. Noting that the private school did not address the student's key behavioral needs, the 3d Circuit reversed a decision reported at 48 IDELR 99 that awarded tuition reimbursement for the student's 11th-grade year. The 3d Circuit observed that the U.S. District Court, Eastern District of Pennsylvania failed to give due weight to the findings of an appellate panel. Although the panel found that the private placement was inappropriate, the District Court held that the behavioral supports offered by the private school met the student's needs. The 3d Circuit acknowledged that the private school addressed the student's lack of confidence and auditory processing

difficulties. Nonetheless, the lower court should not have overlooked the school's failure to address the student's distractibility and failure to complete assignments. "The failure of [the private school's] educational plan to address these problems could not be overcome by a recognition of [the student's] low self-esteem and a generalized school curriculum built around small class sizes," U.S. Circuit Judge D. Brooks Smith wrote in an unpublished decision. Because the private program had the same flaws that made the student's IEP inappropriate, the 3d Circuit held that the parents were not entitled to tuition reimbursement. However, the 3d Circuit affirmed the District Court's ruling that the district's failure to address the student's behavioral needs entitled the student to compensatory education.

f. PROCEDURAL SAFEGUARDS

a. Prior Written Notice
b. 10-day Notice of Private Placement
c. Due Process Hearings
d. Formal Mediation

II. COMMON MISTAKES TEACHERS MAKE

a. Failure to Document Your Efforts

b. Failure to Implement the IEP/BIP/Modifying the IEP/BIP

Sanchez v. Commonwealth of Puerto Rico, 53 IDELR 325 (D.P.R. 2010). Actions taken by an employee of the Puerto Rico ED violated a student's constitutional rights. Rather than building a fenced-in play area for the student and his classmates, the parents alleged that the ED placed him in a cage to contain him. The student's parents sued the ED and the employee in her individual capacity under Section 1983, alleging that they violated the student's constitutionally protected liberty rights. The ED and its employee appealed the unfavorable outcome, arguing that the evidence did not support the jury's verdict. Affirming the verdict, the court noted that the employee raised several defenses and the jury individually and meticulously considered each claim. The employee further argued that she was entitled to qualified immunity because she did not violate the student's constitutional rights. The employee's understanding was that the parent consented to the construction of a gate, leading a reasonable person in her position to believe that her conduct was lawful. The fact that the

jury awarded punitive damages assisted the court in finding that the employee was not entitled to qualified immunity. The construction of a gate was part of the student's behavioral modification plan in which he and his classmates would play in a created, secured yard and would participate in recreational activities during recess. The evidence demonstrated that the implementation of the plan by the employee "constituted a clear departure from the agreement inasmuch as a barred cage was built instead," U.S. District Judge Camille L. Velez-Rive wrote. This could have reasonably led the jury to believe that the employee violated the student's rights.

Kaitlin C. v. Cheltenham Township Sch. Dist., 54 IDELR 44 (E.D. Pa. 2010). Without deciding whether a district's failure to implement a 10th-grader's IEP could qualify as disability discrimination, the District Court dismissed the parent's Section 504 claim. The court held that the parent could not recover monetary damages under Section 504 without showing intentional discrimination. According to the parent, the district discriminated against the student when it required her to participate in a physical fitness test despite her physical limitations. The court acknowledged that the student's IEP exempted her from physical activities, and that the fitness teacher was unaware of the IEP provision. However, the court explained that a request for monetary damages under Section 504 requires a showing of intentional discrimination. Although the 3d U.S. Circuit Court of Appeals held in *Ridgewood Board of Education v. N.E.*, 30 IDELR 41 (3d Cir. 1999), that a parent seeking relief under Section 504 does not need to establish discriminatory intent, the District Court observed that *Ridgewood* did not involve a claim for monetary damages. The court noted that the parent only alleged negligent conduct on the part of the school district. "The operative facts in the complaint establish that school officials were unaware that the Fitness for Life class included some physical activities like the fitness test that resulted in [the student's] injury," U.S. District Judge R. Barclay Surrick wrote. Concluding that the parent's failure to allege intentional discrimination defeated her claim for monetary damages, the court granted the district's motion to dismiss.

A.L. v. Ann Arbor Pub. Schs., 56 IDELR 15 (E.D. Mich. 2011). The parents of a teenager with an emotional impairment and a learning disability were not required to exhaust administrative remedies before seeking monetary relief over their daughter's sexual assault in a school stairwell. Because the parents sought money damages, the student had graduated, and the alleged harm could not be undone by the IDEA's administrative process, exhaustion would have been futile, the District Court held. The parents signed a mediation agreement placing the student

at a district school on the condition that she have an adult escort. They believed the student's lack of appropriate emotional regulation made her vulnerable. Subsequently, the escort and a school administrator allegedly pressured the student and parents into foregoing the service. Shortly thereafter, a classmate sexually assaulted the student. The parents sued the district for failing to accommodate her and for subjecting her to a "state-created danger." Relying largely on the 6th Circuit's decision in *Covington v. Knox County School System*, 32 IDELR 29 (6th Cir. 2000), the District Court ruled that it would have been pointless for the parents to pursue a due process hearing. As in *Covington*, the parents were seeking solely money damages and the student had graduated. Nor was this a case where the parents had the chance to obtain relief before the student left school. Although the student was still attending at the time they filed the complaint, "the administrative process could not have undone the harm that she suffered," U.S. District Judge Mark A. Goldsmith wrote. However, the court dismissed the parents' state-created-danger claim, finding insufficient evidence that the district was aware there was a substantial risk of serious harm to the student.

c. <u>Saying Stupid Things</u>

1. "We just can't do that here."
2. "I'm not trained to work with your child."
3. "If we do that for your child, we'll have to do it for everyone's child."
4. "We don't have the funding for that."
5. "You need to hold your questions until the end of the IEP meeting."

d. <u>Doing Stupid Things</u>

1. Confiding in parents/failure to use the chain-of-command.
2. Asking parents to write IEP goals/objectives.
3. Telling parents ahead of time what the IEP team will recommend.
4. Sending emails/texts re: students containing negative/damaging statements/information.