DISCIPLINE AND DANGEROUS STUDENTS WITH DISABILITIES: WHAT ARE THE OPTIONS?

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A. Introduction

With the staggering increase in the number of students with mental health issues in schools, it goes without saying that it is extremely difficult for school personnel to understand what they can or cannot do when a student with a disability's escalating behavior poses a threat to the physical safety of other students, adults or the student himself. This session will provide an overview of statutory and regulatory provisions related to the management of dangerous students with disabilities. Among other things, the IDEA's 45-day interim alternative educational setting provision will be addressed, as well as other options available when "special circumstances" are not present. In addition, the topics of contacting criminal authorities and the use of seclusion and restraint will be discussed. All of these issues will be approached from a practical perspective and addressed in a Q&A format.

B. Questions and Answers Related to Discipline of Dangerous Students

1. General discipline provisions

Question #1:

Generally, what laws apply to the discipline process for students with disabilities?

Answer:

Most of the time, it is the IDEA's discipline provisions with which schools most concerned, which are found at 20 U.S.C. §1415(k) and 34 C.F.R. §§300.530-537. For students with disabilities who are not covered by the IDEA, Section 504 (and the ADA) will apply. For all students, the Gun-Free Schools Act (GFSA) will apply, but the Act's "special rule" provides that "[t]he provisions of this section shall be construed in a manner consistent with the Individuals with Disabilities Education Act…." 20 U.S.C. §7151(c).

Question #2:

What do these laws generally contemplate relative to disciplining students with disabilities who have violated the code of student conduct?

Answer:

The primary overall consideration relative to managing students with disabilities who have violated the school's student code of conduct is whether the contemplated disciplinary sanction (suspension, expulsion, transfer, re-assignment, etc.) is a "change of placement" for the student. Whether the student has engaged in dangerous behavior or not, the answer to this question will drive the procedural steps that must be taken regarding the imposition of disciplinary sanctions for a particular infraction. If a "change of placement" is to occur, school personnel must follow the IDEA's disciplinary "change of placement" procedures to ensure compliance with the law. Though the IDEA has changed since the Supreme Court decided *Honig v. Doe* in 1988 (559 IDELR 231, 108 S. Ct. 592), the overall concept that school personnel cannot use traditional forms of disciplinary removals to unilaterally change the placement of a student with a disability still applies and is reflected in the complex language of the IDEA and its regulations.

Question #3:

What is a disciplinary "change of placement?"

Answer:

34 C.F.R. § 300.536 specifically defines a "change of placement" because of disciplinary removals as follows:

> (a) For purposes of removals of a child with a disability from the child's current educational placement under §§ 300.530 through 300.535, a change of placement occurs if—
>
> (1) The removal is for more than 10 consecutive school days; or
> (2) The child has been subjected to a series of removals that constitute a pattern—
> (i) Because the series of removals total more than 10 school days in a school year;
> (ii) Because the child's behavior is substantially similar to the child's behavior that resulted in the series of removals; and
> (iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

Question #4:

So, isn't it just easier to treat any disciplinary removal beyond 10 days in a school year as a "change of placement"?

Answer:

Many States and Special Education Directors think so (and some state or local regulations/practices may dictate this). As confusing as the "pattern of removals" language may be, however, not every series of suspensions totaling more than 10 in a school year amounts to a "change of placement." For example, see the following:

a. *Joshua S. v. Sch. Bd. of Indian River Co.,* 37 IDELR 218 (M.D. Fla. 2002). Even though student was suspended for a total of 26 days, pattern of exclusions did not constitute a "change in placement" for the student. While the student's suspensions cumulated to more than 10 school days by the winter break, they did not constitute a significant change in placement. After two of the suspensions, the district reevaluated the child's IEP and after the fourth suspension, the school and parents were working to refine his behavior plan. The parents' argument that the district should have conducted manifestation determination reviews after every suspension is rejected because the student's placement had not improperly changed.

b. *East Metro Integration Dist. #6067*, 110 LRP 34370 (SEA Minn. 2010). District was not required to conduct an MD review based on a series of suspensions of a 16 year-old SLD student with behavioral problems, because the pattern of suspensions did not amount to a change of placement. The student was suspended for four days, then three more days for theft. Later in the school year, a classmate then accused the teen of having a weapon at school, and the district told his parents that while he was not being disciplined yet, they were to keep him at home, where the student remained for eight days (considered to be a suspension in Minnesota). Clearly, a pattern of suspensions totaling more than 10 days in a school year does not constitute a qualifying change of placement, such that a MD review must be conducted, unless the underlying conduct in the incidents is substantially similar. Here, the incidents were not substantially similar to one another, since the theft conduct leading to the first two suspensions was not comparable to possessing a weapon on campus. Thus, the final suspension did not trigger a "change of placement" and an obligation to hold an MD review. However, the district did violate the IDEA when it failed to determine what special education the student needed during the suspension to continue to participate in the curriculum and progress toward his IEP goals.

Question #5:

So, what is required if a disciplinary change of placement is contemplated?

Answer:

Typically, a removal that constitutes a change of placement, at the very least, is going to be contemplated for a student who is considered to have committed a dangerous offense. As a result, it is important for school personnel to be aware of the "procedural hoops" that must be cleared when a removal that constitutes a change of placement occurs. In general, these "procedural hoops" include the following:

a. Notifying the parents that a decision has been made, on the date that it has been made, to make a removal that constitutes a change of placement because of a violation of the code of conduct and providing the parents with their procedural safeguards notice.

b. Convening the student's placement team within 10 school days of any decision to change the student's placement to conduct a manifestation determination.

c. If it is determined that the conduct *was* a manifestation of the student's disability—

    i. Conducting a functional behavioral assessment and implementing a behavioral intervention plan (if not previously done);

    ii. If a behavioral intervention plan has already been developed, reviewing the BIP and modifying it, as necessary, to address the behavior; and

    iii. Returning the student to the placement from which the student was removed, unless the parent and school personnel agree to a change of placement as part of the modification of the BIP. 34 C.F.R. § 300.530(e) and (f).

d. If it is determined that the conduct *was not* a manifestation of the student's disability—

    i. Applying the relevant disciplinary procedures to the student in the same manner and for the same duration as the procedures would be applied to students without disabilities;

    ii. Determining educational services that will be provided during any removal so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

    iii. Providing, as appropriate, a functional behavioral assessment and behavioral intervention services and modifications designed to address the behavior violation so that it does not recur. 34 C.F.R. § 300.530(c) and (d).

2. "<u>Special circumstances" for dangerous students</u>

<u>Question #6:</u>

Are there any exceptions to the "procedural hoops" for dangerous students?

<u>Answer:</u>

There is a "special circumstances" provision under the IDEA which affords school personnel the option of unilaterally removing a student with a disability to an interim alternative educational setting (IAES) for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the student's disability. This exception applies if the student—

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. 34 C.F.R. § 300.530(g).

<u>Question #7:</u>

When one of the special circumstances applies, is the school still required to conduct a manifestation determination?

<u>Answer:</u>

Yes, according to the U.S. Department of Education:

a. "*Questions and Answers on Discipline Procedures*," 52 IDELR 213 (OSERS 2009), Question F-4. Even though the manifestation determination is required, the student may remain in the IAES, as determined by the IEP team, for not more than 45 school days, regardless of whether the violation was a manifestation of his/her disability.

But see:

b. <u>*A.P. v. Pemberton Township Bd. of Educ.*</u>, 45 IDELR 244 (D. N.J. 2006). ALJ's ruling that school district had improperly suspended a student for 20 days for drug use is overruled. Though the district failed to conduct a manifestation determination review within 10 days of the student's suspension for marijuana use, this was not sufficient error to justify ordering the student's return to school. IDEA 2004 permits districts to remove

students for up to 45 days for drug use or possession, so the district's failure to hold a manifestation determination review was harmless error. The school district could have suspended her for up to 25 days longer without regard to the outcome of the manifestation determination.

Question #8:

What is a "weapon" for purposes of this exception?

Answer:

Although some schools would rather use their own definitions (or a definition of weapon found in state and local laws), for purposes of the "special circumstances" disciplinary provision, a "weapon" has the meaning given the term "dangerous weapon" under the U.S. Code as follows:

> (2) The term "dangerous weapon" means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 21/2 inches in length.

18 U.S.C. § 930(g)(2).

There have been some administrative decisions addressing this question:

a. *Ocean Township Bd. of Educ. v. E.R.,* 63 IDELR 16 (D. N.J. 2014). District is not required to allow 18-year-old with ADHD, impulse control and adjustment disorder to return to his home high school to finish out his senior year while his mother challenged his suspension for bringing a knife to school. The IDEA allows a district to move a student with a disability to an interim alternative educational setting for up to 45 school days for such offenses—regardless of whether the offense was a manifestation of disability. The student's act of carrying a knife to school allowed the district to place him in the IAES for up to 45 school days. In addition, the subsequent MD review showed that the student's conduct was not related to his disability; thus, the alternative setting became his "current setting" for stay-put purposes when the parent challenged it. While the student would not be able to finish his senior year with his peers if the district did not allow his return to the high school, the severity of the student's misconduct, his history of problem behaviors, and the district's interest in maintaining a safe learning environment supported an order for an injunction to continue the student's alternative placement.

b. *California Montessori Project*, 56 IDELR 308 (SEA Cal. 2011). Even where the 8 year-old student with an emotional disturbance pointed a pair of scissors at a classmate in an apparent fit of anger, the charter school was not entitled to move him to an IAES and must return him to the general education classroom immediately. An instrument or device qualifies as a "weapon" under the IDEA only if it is used for or capable of causing death or serious bodily injury. The scissors that this student pointed at his classmate did not meet that standard, because the scissors had dull blades and rounded tips and could

cut paper only when the blades came together. As such, the scissors were not inherently dangerous, nor could the student use the scissors to inflict bodily injury. In this case, the student held the scissors with the blades in an open position, which would prevent them from cutting, and even if he had made contact with the other student's body with the scissors, the scissors were only capable of causing cuts or some physical pain, rather than "serious bodily injury." Thus, the scissors did not constitute a "weapon" as defined by the IDEA.

c. *Upper Saint Clair Sch. Dist.*, 110 LRP 57903 (SEA Pa. 2010). While the student with ADHD might not have meant to bring the knife with dual blades to school, it constitutes a "weapon" under the IDEA and the district had full discretion to remove him to an IAES for up to 45 school days. It is also irrelevant that the knife in question included non-weapon tools, such as a corkscrew. Because it had cutting blades of 2 and ½ and 3 inches, it is a weapon. In addition, whether the conduct was connected to a disability is irrelevant, as the IDEA regulations allow for the removal "without regard to whether the behavior is determined to be a manifestation of the child's disability."

d. *In re: Student with a Disability*, 50 IDELR 180 (SEA Va. 2008). The parents' claim that awls—metal spikes that are approximately 1 and ¾ inches long—do not meet the definition of "weapon" is rejected. Although the awls could be used for leatherworking, they fall within the law's definition of a weapon. Under the facts in this case, the awls carried to school were readily capable of causing serious bodily injury and, if misused by the student, were undoubtedly capable of injuring his victims, including notably causing the loss or impairment of an eye. In addition, the Fourth Circuit has held that "an object need not be inherently dangerous to be a dangerous weapon. Rather, innocuous objects or instruments may become capable of inflicting serious injury when put to assaultive use." *U.S. v. Sturgis,* 48 F.3d 784, 787 (4th Cir.1995). The evidence here establishes that the student put the awls to "assaultive use" by brandishing them (and the pen in which he carried them) to threaten and intimidate other students and to extort money. The student admitted that he carried the awls to school to scare some of his peers and that he wanted other students to believe that the pen containing the awls was a weapon. Thus, the awls constituted a "weapon" under Virginia law and a "dangerous weapon" under the IDEA.

e. *Scituate Pub. Schs.*, 47 IDELR 113 (SEA Mass. 2007). Where sixth-grader with Asperger Syndrome, ADHD and LD pulled on the principal's necktie when he found out that he would not be allowed to leave school early did not trigger the 45-day discipline exception. The student did not carry or possess an object that was readily capable of causing death or serious bodily injury, so there was no weapon offense. The necktie did not fall within the statutory definition of a weapon and there was no indication that when the student grabbed and pulled the tie, he exercised any control over it. Rather, he grabbed the tie and held it for a few seconds while it was around the principal's neck.

f. *Anchorage Sch. Dist.*, 45 IDELR 23 (SEA Alaska 2005). While scissors per se are not dangerous, it is their use for other than normal purposes which can make them fit within the definition of a weapon, as they could be capable of producing injury or death if used inappropriately. When the 11 year-old student with Prader-Willi disorder lunged at his

teacher with a pair of scissors, it was clear from the testimony of the teacher that she felt that she was put in danger. Thus, the principal had the right to suspend the student for a period of 45 school days because his use of the scissors constituted use of a weapon under the IDEA. It does not matter whether the student, because of his disability, would not have had the requisite intent to commit a felonious assault.

g. *Chester Upland Sch. Dist.*, 35 IDELR 104 (SEA Pa. 2001). A cigarette lighter with a retractable blade is a "weapon" under the IDEA and the district did not err in removing the student to an IAES for 45 days.

h. *Anaheim Union High Sch. Dist.*, 32 IDELR 129 (SEA Cal. 2000). Although the student used a paper clip to cut another student's neck on the school bus, the paperclip was not a "weapon" under the IDEA. The district did not show that the student used it to cause death or serious bodily injury or that the paper clip was "readily capable" of inflicting such harm.

i. *Alameda Unif. Sch. Dist.*, 32 IDELR 159 (SEA Cal. 2000). Because neither the district nor the parent provided information about the size of the knife that the student brought to school, no determination can be made as to whether the knife is a "weapon" under the IDEA.

j. *Independent Sch. Dist. #831*, 32 IDELR 163 (SEA Minn. 1999). The fact that a student used a pencil to poke a classmate in the hand did not qualify the pencil as a "weapon" under the U.S. Code or the IDEA. Thus, the district erred in removing the student to an IAES for 45 days based upon a weapons offense.

Question #9:

What if the Superintendent insists that the law requires expulsion of the disabled student for at least a year when he brought the firearm to school?

Answer:

Under the Gun-Free Schools Act (GFSA), this may be true. However, there is that "special rule" contained in GFSA that provides that its provisions must be construed in a manner consistent with the IDEA. 20 U.S.C. § 7151(c). Thus, it is advisable that only where it is determined that the student's behavior was not a manifestation of disability, the student can be "expelled," as long as FAPE is provided. If the behavior was a manifestation, the IEP team will need to make the placement determination in accordance with IDEA's provisions.

There are a few reported cases addressing this issue:

a. *Montgomery Co. Bd. of Educ.*, 49 IDELR 119 (SEA Ala. 2007). The GFSA overrides the provision in the IDEA that limits certain disciplinary removals to 45 days, but the one-year expulsion for a BB gun offense nevertheless violated the IDEA because a manifestation determination was not conducted and the amount of homebound services

dictated by the disciplinary hearing officer did not take into consideration the student's individual needs.

b. *Jefferson Co. Bd. of Educ.*, 56 IDELR 300, 788 F.Supp.2d 1347 (N.D. Ala. 2011). District's policy requiring at least one year of expulsion for all students who bring handguns to school pursuant to the GFSA supports the district's position that a 12th grader with SLD should not be permitted to participate in graduation exercises. Such participation was not part of the student's IEP and graduation is not a component of FAPE. In addition, the student was not excluded on the basis of his disability, as the district had determined that his behavior was unrelated to his SLD. Thus, enforcement of the hearing officer's order that required the district to allow the student to participate in graduation is enjoined.

Question #10:

What about a definition of "illegal drug" and "controlled substance" for purposes of the "special circumstances" 45-day exception?

Answer:

Remember, the special circumstance exists if a student 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. Under the IDEA, an "illegal drug" is a subset of the larger universe of "controlled substances." The term "controlled substance" is defined as "a drug or other substance identified under schedules I, II, III, IV, or V in Section 202(c) of the Controlled Substances Act (21 U.S.C. § 812 (c))." The schedules of the Controlled Substances Act are extensive and extremely detailed.

An "illegal drug," which is defined by the IDEA as a controlled substance does not include "a substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law." Thus, a student could possess an illegal drug, but if it is prescribed for that student, the student would not fall under the exception for bringing it to school.

To illustrate the distinction made between a "controlled substance" and an "illegal drug" under the IDEA, consider the following hypothetical: Two students take Ritalin for ADHD. One has a prescription for Ritalin, which is a controlled substance, but it is not an illegal drug in that student's case for purposes of removal to an IAES. However, if that student sells her medication to the other student at a football game, that would trigger the special circumstances provision if she is caught. If she is not caught and the other student takes the Ritalin to school the next day and ingests it at lunch, that would be possession of an illegal drug by the second student. Right?

Question #11:

What is "serious bodily injury" for purposes of this exception?

Answer:

"Serious bodily injury" is defined by the IDEA by reference to 18 U.S.C. § 1365(h)(3) (a consumer products tampering law), which defines it as bodily injury inflicted upon another person which involves—

(A) a substantial risk of death;
(B) extreme physical pain;
(C) protracted and obvious disfigurement; or
(D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

So, it is *really serious* bodily injury! It is important to note that a threat to inflict serious bodily injury is not sufficient and the fact that the student is injuring him/herself is not covered. There are a couple of cases that provide examples of what is/is not "serious bodily injury" for purposes of the special circumstances exception:

a. *Westminster Sch. Dist.*, 56 IDELR 85 (SEA Cal. 2011). District was justified in moving a 6 year-old student with autistic-like behaviors to an IAES regardless of the fact that his conduct was a manifestation of his disability. The teacher suffered a serious bodily injury when the student ran at her at full force, hitting her in the chest with his head. Doctors diagnosed her with an internal chest contusion and she was prescribed two medications that failed to resolve her pain, which she described as the worst of her life. The threshold of "extreme physical pain" was reached here where the teacher saw a physician three times in one week after her initial visit for pain. In addition, two drugs failed to provide relief, she had to curtail her daily activities, she missed a week of work and she described her pain as a "10" on a scale of one to ten. Thus, she suffered serious bodily injury.

b. *In re: Student with a Disability*, 54 IDELR 139 (SEA Kan. 2010). Although a paraprofessional suffered pain, discomfort and disorientation after being hit on the head four times by a student with his knuckles, that was not a basis for the 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." Though the paraprofessional reported dizziness, blurred vision and pain that she rated a "seven" on a scale of one to 10, she was given no pain medication at the hospital and was back to normal the next day. Clearly, 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. Under the facts, the IHO correctly ruled that the injury did not fit the statute when he 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.

c. *Bisbee Unif. Sch. Dist. No. 2*, 54 IDELR 39 (SEA Az. 2010). School district was not justified in moving the autistic student to an IAES based upon his kicking of the principal. Although the district claimed that the principal experienced extreme physical pain, the principal's statements and actions after the incident revealed otherwise, where

he said he felt a "sharp pain" and went home for the rest of the day. Although the principal's knee was swollen, he did not seek medical attention, drove 200 miles the next day and received a cortisone injection three weeks later.

d. *Southern York Co. Sch. Dist.*, 54 IDELR 305 (SEA Pa. 2010). Student did not inflict serious bodily injury when he allegedly physically assaulted a district employee on the bus. Although the behavior was injurious and frightening, no one sought outside medical attention.

e. *Pueblo City Schs. Dist. 60*, 110 LRP 7461 (SEA Co. 2009). Striking a teacher and running into a teacher is not serious bodily injury.

f. *Pocono Mountain Sch. Dist.,* 109 LRP 26432 (SEA Pa. 2008). The student's behavior of following another student into the bathroom and breaking the peer's nose may have been a violation of the district's "violent behavior" policy, but it did not justify removal to an IAES. Although the behavior was frightening and intimidating, a broken nose does not fit into the IDEA's narrow definition of infliction of "serious bodily injury."

g. *In re: Student with a Disability*, 108 LRP 45824 (SEA W.Va. 2008). Where the student kicked teacher's shins and stomped her toes, she did not suffer serious bodily injury. Even though her shins and toes were red after the incident, she had no bruises, bleeding or extreme pain and required no medical care.

h. *El Paso Co. Sch. Dist. Eleven*, (SEA Tx. 2007). Evidence did not establish a "serious bodily injury" where student assaulted district administrative and security personnel. Although he bit was staff member on the arm and caused injury, it was not sufficient to rise to the "stringent definition" of serious bodily injury.

i. *Tehachapi Unif. Sch. Dist.*, 106 LRP 22450 (SEA Ca. 2006). Though the student's conduct resulted in a mild concussion to another student and a broken nose to another, it did not involve serious bodily injury within the meaning of the IDEA. There was no evidence of extreme physical pain, substantial risk of death, or protracted injury.

j. *Altheimer Sch. Dist.*, 38 IDELR 149 (SEA Ark. 2003). Student's behavior, which included a fight with another student and verbal threats against the school resource officer after being accosted where disruptive, verbally abusive and insubordinate. However, the behavior did not reach the standard for justifying removal to an IAES.

3. The obligation to continue "FAPE" to the expelled student

Question #12:

Assuming a dangerous student is properly "expelled" or otherwise placed in an IAES, what constitutes FAPE in the "expulsion" or IAES placement and who decides it?

Answer:

According to the regulations, the student's IEP Team determines the interim alternative educational setting for continued services. 34 C.F.R. § 300.531. As noted previously, the regulations also provide that such student must continue to receive educational services so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP. 34 C.F.R. § 300.530(d)(i).

The U.S. Department of Education set out some interesting language when faced with this question by clarifying in the commentary to the 2006 regulations that services so as to enable the child "to continue to participate in the general educational curriculum" does not mean "that a school or district must replicate every aspect of the services that a child would receive if in his or her normal classroom. For example, it would not generally be feasible for a child removed for disciplinary reasons to receive every aspect of the services that a child would receive if in his or her chemistry or auto mechanics classroom, as these classes generally are taught using a hands-on component or specialized equipment or facilities." 71 Fed. Reg. 46716.

In subsequent commentary, DOE clarified further that:

> while children with disabilities removed for more than 10 school days in a school year for disciplinary reasons must continue to receive FAPE, we believe the Act modifies the concept of FAPE in these circumstances to encompass those services necessary to enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child's IEP. An LEA is not required to provide children suspended for more than 10 school days in a school year for disciplinary reasons, exactly the same services in exactly the same settings as they were receiving prior to the imposition of discipline. However, the special education and related services the child does receive must enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child's IEP.

71 Fed. Reg. 46716 (2006).

In its *Questions and Answers on Discipline Procedures* issued by OSERS in 2009, the U.S. DOE opined that what constitutes an appropriate IAES "will depend on the circumstances of each individual case." 52 IDELR 231 (OSERS 2009), Question C-1. Apparently, then, the best answer may be "it depends." There is some decisional guidance on this one that may be of some help:

a. *Farrin v. Maine Sch. Admin. Dist. No. 59*, 35 IDELR 189, 165 F.Supp.2d 37 (D. Me. 2001). Where the student's sale of marijuana at school was not a manifestation of his disability or his "impulsivity" problem, his "expulsion IEP" is upheld. Although the alternative program excluded art, computers and physical education, it did not foreclose the student's ability to obtain the credit or skills needed to graduate later. In addition, the program enabled him to progress in the general curriculum.

b. *Windemere Park Charter Acad.*, 111 LRP 1872 (SEA Mich. 2010). The IAES providing 75 minutes of instruction three days per week did not enable the student to continue to participate in the general curriculum and to progress toward meeting his IEP goals where the student is not receiving "anything near" the educational services that his IEP determined he needed before his expulsion. Further, he did not receive services on a daily basis, as he did prior to the expulsion and not all subjects were covered each session. Finally, the student received none of the supports in his IEP, such as extended time for completing assignments.

Question # 13:

What about the use of "home instruction" as an IAES?

Answer:

Although OSEP has opined that "home instruction" cannot be offered as a district's *only* IAES option from which IEP teams can choose, whether a student's home would be an appropriate interim alternative setting would depend on the particular circumstances of an individual case, such as the length of each removal, the extent to which the student has been previously removed from his/her regular placement, and the student's individual needs and educational goals. 52 IDELR 231 (OSERS 2009), Question C-2.

Question #14:

What if the parent challenges the removal to an IAES?

Answer:

Where the district has found no manifestation and recommends a disciplinary removal to an IAES, the parent can challenge the manifestation determination or the IAES selected by "appealing" to a hearing officer and initiating an expedited due process hearing. 34. C.F.R § 300.532. If the hearing officer determines that the removal was not done in accordance with the IDEA or that the student's behavior was a manifestation of the student's disability, the hearing officer may—

1. Return the student to the placement from which the student was removed; or

2. Order a change of placement of the student to an appropriate IAES for not more than school days if the hearing officer determines that maintaining the current placement of the student is substantially likely to result in injury to the child or others.

This process may be repeated, if the school district believes that returning the student to the original placement is substantially likely to result in injury to the child or to others. 34 C.F.R. § 300.532.

If there is an expedited due process hearing initiated under the above provision, the student is to remain in the IAES pending the decision of the hearing officer or until the expiration of the time period decided by the team or the 45-days if the exceptional circumstances provision was used, whichever occurs first, unless the parent and the SEA or LEA otherwise agree. 34 C.F.R. § 300.533.

4. Practical approach for placement changes for dangerous students not subject to 45-day exception

Question #15:

Would it make more sense to just work through a dangerous student's IEP team and propose a long-term or permanent change of placement rather than to invoke the disciplinary provisions of the IDEA and seek to "expel" the student or place the student in an IAES?

Answer:

Maybe so. In an emergency situation involving one of the "special circumstances," the school may need to resort to the immediate removal for up to 45 school days but, even then, should go ahead and convene an IEP team to propose a long-term change of placement for the student. If the parent does not challenge the proposed change of placement after receiving sufficient written notice and notice of procedural safeguards, then the district could proceed with the proposed change of placement after a reasonable period of time. This would take it out of the disciplinary context and would work like any other change of placement to a more restrictive setting. *See, e.g., M.M. v. Special Sch. Dist. No. 1*, 49 IDELR 61, 512 F.3d 455 (8th Cir. 2008).

The same would hold true for a dangerous student who did not commit one of the "special circumstances" offenses. Although the emergency 45-day removal could not occur, the district could convene an emergency IEP team that could work with the parent to effectuate a long-term change of placement (not discipline) to a more restrictive environment, as appropriate, rather than seeking to suspend, expel or otherwise impose traditional disciplinary sanctions. Should the parent disagree with the proposed change of placement and the parent requests a due process hearing to challenge it, the district could then defend its proposed change of placement as appropriate under the IDEA. In this case, however, the student's current placement would be the "stay-put" placement while the due process hearing was pending, unless the team also determined that the student's behavior is not a manifestation and proposes an IAES (which is typically unusual when dealing with your chronically dangerous disabled students).

If this approach leaves a dangerous student in an inappropriate setting during stay-put for too long, the school district could (and probably should) seek temporary injunctive relief from a court to keep the student out of the current placement until such time as the due process hearing officer determines whether the proposed change of placement is appropriate. *See, e.g., Gadsden City Bd. of Educ. v. B.P.*, 28 IDELR 166, 2 F.Supp.2d 1299 (N.D. Ala. 1998) and *Alex G. v. Board of Trustees of Davis Jt. Unif. Sch. Dist.*, 44 IDELR 130, 387 F.Supp.2d 1119 (E.D. Cal. 2005). This would seem preferable to asking for an expedited due process hearing, since the hearing officer only has the authority to remove the dangerous student for up to 45 school days

and the "expedited" hearing may not be "expedited" enough (the expedited hearing must occur within 20 school days of the hearing request and the hearing officer is to make a determination within 10 days after the hearing, for a total of 30 school days). In addition, the decision of a hearing officer is "appealable." 34 C.F.R. § 300.532(5). So, where would that leave the dangerous student during the appeal?

There are a few recent court decisions where the school district sought court assistance to remove a dangerous student from campus:

Seashore Charter Schs. v. E.B., 64 IDELR 44 (S.D. Tex. 2014). District's motion to change the autistic student's stay-put placement from a K-8 charter school to a special education program in the student's neighborhood high school pending the outcome of the due process hearing brought by the parent is granted. Given the charter school's unsuccessful efforts to hire a special education teacher after the previous one resigned, the school was no longer capable of addressing the student's aggressive behaviors. In contrast, the local high school was "ready, willing and able" to implement a program for the student with age-appropriate peers and post-secondary transition services. In addition, the student was substantially larger than his classmates and had a tendency to hit, bite, scratch and pull hair, even when accompanied by a teacher or aide. Thus, his continued presence at the charter school created a dangerous situation and a substantial risk of harm to others. Thus, it is ordered that he not return to the charter school and remain in the high school's self-contained program until the hearing officer issues a decision in the due process case.

Wayne-Westland Comm. Schs. v. V.S., 64 IDELR 139 (E.D. Mich. 2014) and 65 IDELR 15 (E.D. Mich. 2015). District's motion for an injunction temporarily prohibiting a teenager with a disability from entering the high school grounds is granted where an administrator's statement indicates that the student has become physically violent on multiple occasions. A court may, in appropriate situations, temporarily enjoin a dangerous student from attending school when the student poses an immediate threat to the safety of others, Here, the district's complaint showed that the 6-foot, 250-pound student kicked, punched and spit on students and staff; threatened to rape a female staff member; and threatened to stab two staff with a pen. After the IEP team reduced the student's attendance to one hour a day, the student attacked the school's security liaison. When told to leave the school building, the student tried to force his way back into the building and four staff members were required to hold the school doors shut to keep him out. Since then, the student had also threatened to bring guns to school, made racist comments to staff, and punched the school's director in the face. Thus, the district may temporarily educate the student through an online charter school program. <u>NOTE</u>: On February 4, 2015, the court granted a permanent injunction barring the student from entering any premises owned by the district or attending school events. The district was able to prove all four factors required to obtain permanent relief: 1) that it would suffer irreparable harm; 2) the remedies available at law are inadequate to compensate for that harm; 3) the balance of hardships tip in its favor; and 4) the injunction would not be against public interest. This is so because of the student's history of physical violence that demonstrated an "extreme risk" of imminent and irreparable injury. Remedies such as money damages would be inadequate to address any injuries to others resulting from the student's conduct and schoolmates and staff would suffer a far greater injury

than the student, who can continue his education through an online program. Protecting the safety of others is in the public's interest.

Troy Sch. Dist. v. v. K.M., 64 IDELR 303 (E.D. Mich. 2015). District's request for a temporary restraining order is denied where it was not shown that the district would suffer irreparable harm or imminent injury if the teenager returned to his public high school. The IDEA's stay-put provision requires that a student remain in his then-current educational placement during any pending administrative proceedings. While a court can authorize a change in placement when a student engages in violent or dangerous behavior, it cannot do so unless the district shows that maintaining the student in his current placement is substantially likely to result in injury to the student or others. Here, the district did not meet that burden where the incident that resulted in the student's most recent suspension occurred in the absence of the "safe person" required by his IEP and no serious injuries were recorded. Thus, the student is not substantially likely to injure himself or others if the district implements his IEP. NOTE: In a subsequent case regarding placement for the student and appealing a hearing officer decision, the court upheld the parent's challenge to the district's proposed placement in a center-based program for children with ED. Based upon testimony from psychologists and autism experts, the student could have made educational progress in a general education setting. While the student has had multiple behavioral incidents in mainstream classes, several of which resulted in emergency evacuations or police intervention, the experts testified that the student was on "high alert" because he was so fearful during the school day—"Police involvement, restraints and seclusion can be frightening for any student, but more so for a student with disabilities." According to the psychologists and autism experts, the student is highly intelligent, learns quickly, has a strong work ethic and wants to be successful. In addition, experts have opined that he needs to interact with nondisabled peers to acquire social and behavioral skills and that he could benefit from a mainstream class if provided appropriate support services. Thus, the ALJ's decision that the district denied FAPE is upheld and the order requiring the district to provide a one-to-one psychologist with autism training as the student's "safe person" is clearly permissible under the IDEA.

Question #16:

Why would a district ever need to request an expedited due process hearing in the context of discipline?

Answer:

In *Letter to Huefner*, 47 IDELR 228 (OSEP 2006), OSEP "clarified" that a school district would use the expedited hearing process if, for instance, a child has been removed from the current placement pending a manifestation determination and the district seeks a hearing officer's intervention to challenge the decision to return the child to the current placement as a result of a finding that there was a manifestation. In addition, a district might initiate an expedited hearing at the conclusion of a 45-day placement in order to extend that placement if the district believes that returning the student to the current placement is substantially likely to result in injury to the child or others. Again, why not request a due process hearing to defend a proposed change of placement and seek immediate court relief to enjoin the dangerous student from returning to the current placement?

5. <u>The role of criminal authorities</u>

<u>Question #17:</u>

What about reporting behaviors that are crimes to criminal authorities?

<u>Answer:</u>

Prior to the 1997 IDEA Amendments, the Sixth Circuit Court of Appeals had affirmed the decision of a Tennessee district court that contacting criminal authorities by filing a juvenile court petition was an initiation of a "change of placement" that could not be done until the appropriate procedural steps had been taken. *Morgan v. Chris L.*, 25 IDELR 227, 106 F.3d 401 (6th Cir. 1997). In response to this decision, Congress amended the IDEA in 1997.

The IDEA now specifically contains a "rule of construction" that addresses referral to and action by law enforcement and judicial authorities as follows:

> Nothing in this part prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities or prevents State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

20 U.S.C. § 1415(k)(6) and 34 C.F.R. § 300.535.

Several courts and hearing officers have interpreted these provisions:

a. *Rochester Community Schs. v. Papadelis,* 55 IDELR 79, 2010 WL 3447892 (Mich. Ct. App. 2010). Where the school district filed a petition with the juvenile authorities for school incorrigibility as contemplated under state law, the filing does not constitute a "change in educational placement." Thus, a manifestation determination was not required prior to the filing of the petition with juvenile authorities.

b. *Osseo Sch. Dist.*, 53 IDELR 35 (SEA Minn. 2009). The assistant principal's referral of a student to the police liaison officer at the school for fighting with a classmate did not deny FAPE to the 9th grade ED student, even where the office subsequently brought charges against the student in juvenile court. The actions of school officials pursuant to school policy did not reduce the student's access to special education services or supports.

c. *Poteet Indep. Sch. Dist.*, 29 IDELR 423 (SEA Tx. 1998). The 14 year-old's status as an LD student did not immunize him from truancy charges. Thus, the district did not violate the IDEA by filing charges without conducting a manifestation determination.

d. *Northside Indep. Sch. Dist.*, 28 IDELR 1118 (SEA Tx. 1998). An IEP meeting is not required for a student with a disability who is removed from school for more than 10 school days as a result of the school's calling the police.

e. *Fort Smith Pub. Schs.*, 29 IDELR 399 (SEA Ark. 1998). Whether a school district should file a juvenile court petition alleging misconduct by a student with a disability is a matter of judgment. Nothing in the IDEA bars a school district from filing such a petition.

Notwithstanding the provision in the IDEA allowing for the reporting of crimes, school administrators should be cautioned against the "over-use" of school resource officers or the juvenile system, particularly if such is being used as a "substitute" for the school's IDEA/programming obligations:

a. *In re: Tony McCann*, 17 IDELR 551 (Tenn. Ct. App. 1990). Where the district filed an "unruly child petition" in juvenile court, but took no action to address the student's needs under IDEA while waiting two months for the juvenile court to take action, the district's filing constituted a "change of placement." The student remained out of school pending the completion of the juvenile court-ordered evaluations.

Again, schools should be very cautious when calling on school resource officers or other law enforcement personnel when dealing with difficult behaviors at school. Recently, a number of lawsuits have been brought regarding the use of resource officers or deputy sheriffs who have handcuffed the student with a disability. Training is key in this regard.

J.V. v. Albuquerque Pub. Schs., 67 IDELR 55 (10th Cir. 2016). School district did not violate the ADA when it briefly used mechanical restraint to manage the child's behavior. In order to prove disability discrimination, the parents needed to show that: 1) the child has a disability; 2) the district discriminated against the child; and 3) the discrimination was based on the child's disability. Here, the parents failed to meet the second and third requirements. This court has held that a law enforcement officer does not violate the ADA if her actions are based on the student's conduct rather than his disability. Here, the school safety officer handcuffed the child based on his conduct consisting of two hours of disruptive behavior, including running from room to room, kicking the officer and a social worker and refusing to stop, not based upon the student's disability. In addition, the parents failed to prove that discrimination occurred where they promptly enrolled the child in another school district and could not show that the handcuffing resulted in a denial of educational benefits. In addition, they failed to show that the district failed to accommodate the child or disregarded an obvious need for staff training. In addition, the school safety officer contacted the child's mother during the behavioral incident and requested permission to restrain the child if necessary.

S.R. v. Kenton Co. Sheriff's Office, 115 LRP 58577, 52 NDLR 83 (E.D. Ky. 2015). In lawsuit brought by parents of two students with ADHD and other mental disabilities against sheriff's office and school resource officer, sheriff's office is a proper defendant under the ADA as a "public entity" covered under Title II of the ADA. In addition, the children pled appropriate claims at this stage of the litigation, pleading intentional discrimination and failure to accommodate. The allegations that the sheriff's office's practice of handcuffing students with

disabilities is impermissible since it bypassed less severe measures and that the sheriff's office failed to modify its practices for students with disabilities are sufficient to survive the defendants' motion to dismiss.

It is also important to note that recently, the U.S. DOE issued a document: "Guiding Principles: A Resource Guide for Improving School Climate and Discipline" which addresses, among other things, the appropriate role/use of SROs. This document can be found at the following link:

http://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf

In September 2016, the Obama administration also issued guidance on the use of SROs on school campuses. This can be found at the following link:

http://www.ed.gov/news/press-releases/obama-administration-releases-resources-schools-colleges-ensure-appropriate-use-school-resource-officers-and-campus-police

Question #18:

What about sending education records to the authorities to whom the agency reports the crime?

Answer:

The IDEA regulations provide that the agency reporting a crime committed by a student with a disability must ensure that copies of the special education and disciplinary records of the student are transmitted for consideration by the appropriate authorities to whom the agency reports the crime. 34 C.F.R. § 300.535(b)(1). However, the agency reporting a crime may transmit those copies of records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act (FERPA). 34 C.F.R. § 300.535(b)(2). Passing personally identifiable information (that is not directory information) on to police without parental consent would violate FERPA (unless some health/safety exception applies, etc.).

a. *Baltimore Co. Pub. Schs.*, 51 IDELR 201 (SEA Md. 2008). The district did not violate the IDEA when it failed to provide the school resource officer with a copy of the student's educational records when it reported a teenager's criminal conduct. Because the resource officer was not a school official with legitimate educational interest in the student's records, the district could not disclose those records without the parent's written consent.

b. *Letter to Shay*, 107 LRP 20017 (FPCO 2007). FERPA's exception that allows disclosure of education records in compliance with a judicial order or lawfully issued subpoena does not apply because the judges' orders to prepare reports were issued to probation officers, not to the school district. The district can only disclose personally identifiable information from education records to a probation officer, without parental consent, if a judicial order or subpoena is issued to the district.

<u>Question #19:</u>

Can a juvenile judge "change the placement" of the student without running afoul of the IDEA?

<u>Answer:</u>

Yes, and they have.

a. *In the Matter of P.E.C.,* 46 IDELR 47, 211 S.W.3d 368 (Tex. Ct. App. 2006). Where judge committed juvenile delinquent to the Texas Youth Commission, this is not a "change in placement" under the IDEA. The authority of a juvenile court to modify a juvenile's disposition by removing him from probation and committing him to the TYC is not limited by the IDEA. IDEA's provisions deal with exclusion of disabled children by *schools*, not courts.

6. <u>Discipline under Section 504</u>

<u>Question #20:</u>

Is discipline of a 504-only student different from one who is also covered by the IDEA?

<u>Answer:</u>

It is important to remember, particularly in the context of managing dangerous students with disabilities, that Section 504 is an anti-discrimination statute. As an initial matter, then, schools need to be careful not to exclude a disabled student from school solely on the basis of disability.

Unfortunately (or fortunately, depending upon your perspective), neither 504 nor its regulations contains any provisions similar to IDEA's regarding discipline of disabled students. In 1995, OCR issued *Letter to Zirkel*, 22 IDELR 667 (OCR 1995), wherein OCR acknowledged that 504 does not contain such provisions and does not have a specific "stay-put" requirement. However, OCR did point out that the 504 regulations do require school districts to provide procedural safeguards to students and their parents regarding identification, evaluation and placement of students with disabilities who need special instruction or related services. 34 C.F.R. § 104.36. In addition, the 504 regulations require school districts to evaluate students before initial and subsequent significant changes are made in placement. 34 C.F.R. § 104.35. OCR went on to say that although there is no "stay put" under 504, "OCR believes that a fair due process system would encompass the school district waiting for the results of the due process hearing before making the change." (Yeah, right!)

OCR also discussed the disciplinary exception related to disabled students who are "currently engaging in the illegal use of drugs" under the Americans with Disabilities Act (and, therefore, 504). OCR notes that both the ADA and 504 allow school districts to take disciplinary action pertaining to the use or possession of illegal drugs against any student with a disability who is currently engaging in the illegal use of drugs (including possession, selling, etc.) to the same extent that such disciplinary action is taken against nondisabled students. 22 IDELR 667.

For all intents and purposes, it seems that OCR applies the "change of placement" concepts with an emphasis on "evaluation" of the manifestation issue to ensure that discrimination on the basis of disability has not occurred:

a. *Gates-Chili (NY) Cent. Sch. Dist.*, 50 IDELR 51 (OCR 2007). Where IEP team found that student's possession of a weapon on school grounds was unrelated to his disability, his 8-month suspension to an IAES was appropriate.

b. *Gwinnett County (GA) Pub. Schs.,* 46 IDELR 291 (OCR 2006). OCR found no discrimination under Section 504 when SLD student was suspended for one year for repeated assaults against female classmates. Because the district conducted manifestation determinations for each suspension exceeding 10 school days and offered alternative education, district offered FAPE. In addition, OCR noted that the district has a specific disciplinary policy for students with disabilities and that staff followed it by placing the student on a behavior contract before suspending him.

7. <u>The use of restraint and seclusion</u>

<u>Question # 21:</u>

Where are we with restraint and seclusion?

<u>Answer:</u>

While neither IDEA nor Section 504 (or any other federal law) addresses the use of restraint/seclusion in schools, it is (and has been) a topic in the courts and one of great interest to the U.S. Department of Education. In addition, certain members of Congress had been working since 2009 to obtain passage of federal legislation on this issue and most states, like Georgia, have added to their statutes, regulations or rules in response to Congress' interest in this issue.

On December 28, 2016, the Office for Civil Rights (OCR) issued a Dear Colleague Letter/Q&A document on this topic:

Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities, 116 LRP 53792 (OCR 2016). Although school districts are not prohibited by Section 504 or the ADA from using restraint and seclusion, they must determine whether their use is impacting on the provision of FAPE to a student with a disability. Restraint and seclusion could deny a student FAPE where it has a traumatic impact or results in the student not receiving needed services, and where use could violate Section 504 where it: 1) constitutes unnecessary different treatment; 2) is based on a policy, practice, procedure or criterion that has a discriminatory effect on students with disabilities; or 3) denies a student's right to FAPE. There are multiple ways in which restraint or seclusion may deny a student FAPE, and "[d]epending on the nature of his or her disability, a student with a disability may be especially physically or emotionally sensitive to the use of such techniques." For example, a student might develop new behavioral or academic difficulties as a result of the use of restraint or seclusion that, if not addressed, could result in a denial of FAPE.

Further, a student may be denied FAPE as a result of the cumulative impact of repeated seclusion that deprives the student of educational instruction or services. If there is reason to believe that the use of seclusion or restraint has adversely affected the provision of Section 504 FAPE services to a particular student, such that the student's needs are not being met, the district must respond, in part, by determining what additional or different interventions or support and services the student needs, including positive behavioral interventions. The district must also determine if current interventions are being implemented, ensure that needed changes are made promptly and remedy any denial of FAPE. With respect to unidentified general education students, the use of restraint could be a sign that unidentified student may have a disability and may need to be evaluated. With respect to a student who has already been identified, it could be an indication that the student needs to be reevaluated and that the student's 504 plan needs to be revised.

There has also been a great deal of litigation concerning the use of restraint/seclusion. Some recent cases include:

Beckwith v. District of Columbia, 68 IDELR 155 (D. D.C. 2016). Court adopted Magistrate's recommendation finding a denial of FAPE when the district repeatedly failed to follow its own established policies and procedures regarding the use of restraint. Here, there was evidence that the district restrained a 9 year-old at least six times and that its non-compliance with its own requirements impeded the parent's participation in the IEP decision-making process. Specifically, school staff failed to contact the parent within one hour of restraining the student, failed to give the parent a written report of restraint within one school day, and failed to convene an IEP meeting within five days of each incident. Every time a restraint occurred, school staff would only send the written report when the parent's counsel insisted on it. In addition and instead of receiving notice of restraint within one hour, the parent often learned about it from the student after she returned home. Even though the district convened an IEP meeting after the sixth incident, the team did not include the staff members who restrained the student, which is a key component of the district's policy.

Miller v. Monroe Sch. Dist., 67 IDELR 32 (W.D. Wash. 2016). Claims may proceed against the school district under Section 504 and ADA alleging that two teachers frequently placed an 8 year-old autistic student in seclusion when he lashed out. The district's alleged failure to ensure that its employees were using aversives properly could amount to disability discrimination. A reasonable juror could find that the child was subjected to intentional discrimination where parent claims that the district did not respond to her concerns about the teachers' failure to attempt less severe crisis management strategies before frequently placing him in seclusion--sometimes several times a day--when his autism caused him to become disruptive or aggressive. However, the claims under Section 1983 against the teachers are dismissed based upon qualified immunity, since they had no reason to believe they were violating the child's constitutional rights by using the "quiet room" and other strategies set out in the student's IEP.

Phipps v. Clark Co. Sch. Dist., 67 IDELR 91 (D. Nev. 2016). Parties' motions to dismiss Section 1983 claims are denied where school district refuted the aide's description of her classroom conduct and use of physical restraint with a nonverbal student with autism. School officials testified that the aide's physical interactions with the student were not appropriate crisis

management techniques where the aide's testimony suggested that she was acting in accordance with district policy and training. Where sufficient evidence exists for a reasonable jury to find either that the aide restrained the student in the way she was trained or that her actions were in defiance of the district's training and policies, motions to dismiss are denied. School districts can be held liable under Section 1983 for an employee's violation of a student's constitutional rights if the employee acted in accordance with district policy, custom or practice. The district here did not contest the parents' claim that the aide violated the student's constitutional rights when she dragged him from under a table by the wrist, pinned him to the floor with her knees and elbows, and shoved another student into him. Police arrested the aide on the date of the restraints in question after seeing her conduct on live-feed surveillance via installed hidden cameras in the classroom and based upon 2 reports of suspected physical abuse from parents of other students.

Payne v. Peninsula Sch. Dist., 66 IDELR 3 (9th Cir. 2015) (unpublished). District court's denial of qualified immunity to special education teacher who placed student in a 63-inch by 68-inch "safe room" to manage his behavior is reversed. Teacher is entitled to qualified immunity defense under Section 1983 where the child's constitutional rights were not "clearly established" at the time of the incident. While the district court held that the teacher should have known she was violating the child's constitutional rights when she allegedly locked him in the small, dark closet and purportedly required him to clean up his feces when he defecated in it, the child's IEP authorized the teacher to use the safe room. Thus, at the time the teacher acted, it would not have been clear to a reasonable official that placing the child in the room was an unconstitutional seizure.

Schiffbauer v. Schmidt, 65 IDELR 100, 95 F.Supp.3d 846 (D. Md. 2015). Action alleging hostile educational environment under Section 504 and ADA is dismissed where school district was not shown to be deliberately indifferent to disability harassment by a classroom aide who had restrained a student with ADHD, OCD and a mood disorder on one occasion after he tried to attack a classmate on the playground. To establish deliberate indifference, parents must show that the alleged disability harassment was so severe or pervasive that it altered the condition of the student's education or created an abusive learning environment. In addition, parents must show that the district had actual knowledge of such disability-based harassment and was deliberately indifferent to it. Here, though the parents stated that they believed the aide abused their son on several occasions, their complaint identified only a single incident of restraint. While an allegation of harassment by a staff member "significantly raises the potential severity and pervasiveness of the interaction," the brief duration of the incident at issue shows that the student was not subjected to a hostile educational environment.

Zdrowski v. Rieck, 119 F.Supp.3d 643, 66 IDELR 42 (E.D. Mich. 2015). Actions of two elementary school teachers in using the "transport position" to bring the violent second-grader with Asperger syndrome to the school office were not unreasonable in light of their need to remove the student from the classroom and to minimize any additional stress to the student that the "team control position" may have caused. While one teacher testified that she considered using the "team control position," which is the recommended position for a student who is struggling, she decided that the student would experience greater stress if required to put his head between his legs. In the context of this case, where the student was threatening to harm himself

and had a history of violent outbursts and may have been agitated by being restrained in the control hold, no reasonable jury could find that the teachers acted with bad faith or gross misjudgment. Thus, the district's motion for judgment on the parent's Section 504 and ADA claims is granted.

8. <u>General FERPA concerns</u>

<u>Question # 22:</u>

What if a student threatens to harm another or has revealed information that creates a safety issue for another student or staff person?

<u>Answer:</u>

FERPA allows districts to disclose personally identifiable information from an education record to appropriate parties in connection with an emergency when knowledge of the information is necessary to protect the health and safety of the student or other individuals. 34 C.F.R. 99.36. In *Letter to Anonymous*, 109 LRP 59140 (2008), the U.S. Department of Education issued a "Dear Colleague" letter that explained several changes brought about by the 2008 FERPA regulatory amendments, including when agencies may disclose information in student records. The Department noted that school officials have greater leeway under the FERPA regulations in determining that a health or safety emergency exists which would justify the release of personally identifiable information and that the Department of Education would not second-guess the basis of their decision. The Department noted that such an emergency exists if there is a "significant and articulable threat to an individual's health or safety, considering the totality of the circumstances," as set forth at 34 CFR § 99.36(c). The Department also explained that under the amended regulations, officials must merely have "reasonable grounds" for reaching the conclusion that a health or safety emergency exists. "If, considering the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency in evaluating the circumstances and making the determination." It was also emphasized that officials must record in the student's record the basis of the determination that a health or safety emergency existed.