

Legal Guidance Related to Behavioral Supports for Students with Disabilities

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Behavioral Supports, Students with Disabilities, & the Law

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Topics Covered

- ▶ Behavior and Child Find Duties
- ▶ Behavioral Supports, FAPE, FBAs & BIPs
- ▶ Behavioral Supports & LRE, HHB
- ▶ Behavioral Supports & Bullying
- ▶ When Lawyers Get Involved



Behavioral Supports & Child Find

Behavior & Child Find Duties

A Case Study:

- ▶ Molly is a kindergarten student who has been having behavioral problems in school;
- ▶ Molly's behavioral problems include outbursts, running from the classroom into the parking lot, throwing tacks at other students, and stabbing a child with the sharp end of a pencil
- ▶ Molly has been suspended from school 12 times (for one to one and half days at a time) by the end of April;
- ▶ Molly's mom has also been called to school to pick her up midday because of behavioral problems but the school did not term these suspensions;

Behavior & Child Find Duties

A Case Study:

- ▶ Molly is doing average or better academically;
- ▶ Mom, a single parent, has lost her job because she has had to come pick her daughter up from school so often;
- ▶ Molly has been diagnosed with a severe, bipolar-like form of ADHD by a developmental pediatrician.
- ▶ Should Molly be evaluated for special education services?

Behavior & Child Find Duties

Child Find, 34 C.F.R. § 300.111:

- ▶ Policies and procedures must be in effect to “ensure that all children with disabilities...and who are in need of special education and related services are located, identified, and evaluated.”
- ▶ Including “children who are suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade.”

Behavior & Child Find Duties

Georgia Reg. § 160-4-7-.04:

- ▶ “once a child is referred for an initial evaluation by a parent or SST to determine if the child is a child with a disability, the initial evaluation...
- ▶ ...must be completed within 60 calendar days of receiving parental consent for evaluation.”

Behavior & Child Find Duties

Standards for Complying with Child Find and Evaluation Obligations:

- ▶ School overlooked clear signs of a disability;
and
- ▶ Negligent in failing to order testing

Behavior & Child Find Duties

Standards for Complying with Child Find and Evaluation Obligations:

- ▶ School had reason to suspect a disability and that special education services might be needed
- ▶ Generally, the time to refer for evaluations following suspicion must be reasonable

Behavior & Child Find Duties

Examples:

- ▶ 1st grade student was disruptive, would fight with other students, yell when didn't get his way
- ▶ Also was a people pleaser
- ▶ No child find violation for failure to evaluate
- ▶ *Demarcus L. v. Board of Ed. Chicago* (N.D. Ill. 2014)

Behavior & Child Find Duties

Examples:

- ▶ 11 year old left threatening messages on principal's voicemail
- ▶ Had also become physical with and threatened other students
- ▶ Removed for a time to a behavioral program that recommended positive behavior supports
- ▶ Had IEP but behavioral problems and behavioral supports were not addressed by IEP
- ▶ Hearing officer and reviewing federal court found a child find violation
- ▶ *Sch. Bd. of City of Norfolk v. Brown* (E.D. VA 2010)

Behavior & Child Find Duties

Examples:

- ▶ 9th grade student with increasing behavioral problems: not following directions, talking out in class, refusing to sit still, tardies, absences, declining grades
- ▶ Problems began in 2008
- ▶ Had 504 plan by early 2009
- ▶ Child find violation found
- ▶ *D.G. v. Flour Bluff Indep. Sch. Dist.*, (S.D. Tex. 2011)

Behavior & Child Find Duties

What About RTI/Pyramid of Interventions?

- ▶ “RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation...to a child suspected of having a disability.” OSEP Memorandum 11-07, January 27, 2011.

Behavior & Child Find Duties

Manifestation Determination Reviews & Child Find:

- ▶ Children who have not yet been found eligible for special education services can assert disciplinary protections if the school “has knowledge” that the child was a child with a disability
- ▶ A school “has knowledge” if
 - ▶ The parent of the child “expressed concern” in writing to the school that the child is in need of special education
 - ▶ The parent has requested an evaluation of the child
 - ▶ The teacher or other school personnel expressed concerns about a pattern of behavior

Behavior & Child Find Duties

Back To the Case Study:

- ▶ So where does that leave Molly? Should she be evaluated?



Behavioral Supports, FAPE, FBAs & BIPs

Behavioral Supports, FAPE, FBAs & BIPs

A Case Study:

- ▶ 12 year old student, Johnny, with autism spectrum disorder;
- ▶ Not attending school regularly, sometimes refusing to go;
- ▶ Johnny's mom is tired of fighting with him and feels bad for him so she lets him stay home;
- ▶ Grades have been average to slightly below average;
- ▶ Cannot complete tasks like using his lock on his locker or tying shoes;
- ▶ Other kids make fun of him and he doesn't understand it; he also hugs indiscriminately and will obsess about Nascar;
- ▶ Has not yet been found eligible for special education but is being evaluated.
- ▶ Might Johnny be eligible for special education?

Behavioral Supports, FAPE, FBAs & BIPs

Categories of Eligibility That Might Implicate Behavioral Issues (and the Need for Behavioral Supports):

- ▶ Developmental delay
- ▶ Autism
- ▶ Deaf-blindness
- ▶ Deafness
- ▶ Emotional disturbance
- ▶ Hearing impairment
- ▶ Mental retardation
- ▶ Orthopedic impairment

Behavioral Supports, FAPE, FBAs & BIPs

Categories of Eligibility That Might Implicate Behavioral Issues (and the Need for Behavioral Supports):

- ▶ Other Health Impairment
- ▶ Specific Learning Disability
- ▶ Speech Language Impairment
- ▶ Traumatic Brain Injury
- ▶ Visual Impairment

34 C.F.R. § 300.8

Behavioral Supports, FAPE, FBAs & BIPs

“Autism,” for example, 34 C.F.R. §300.8:

- ▶ “a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child’s educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.”

Behavioral Supports, FAPE, FBAs & BIPs

FAPE & Grades, 34 C.F.R. § 300.101 (c):

- ▶ FAPE “must be available to any individual child with a disability who needs special education and related services even though the child has not failed or been retained in a course or grade and is advancing from grade to grade.”

FAPE & Grades, GA Regulation § 160-4-7-.04:

- ▶ Eligibility requires adverse impact on educational performance
“(academic/functional/developmental)”

Behavioral Supports, FAPE, FBAs & BIPs

Back To the Case Study:

- ▶ Should Johnny be found eligible for special education?
- ▶ If Johnny is found eligible, should he have an FBA? A BIP? Other behavioral supports?

Behavioral Supports, FAPE, FBAs & BIPs

The IEP & Behavioral Supports Generally, 34 C.F.R. § 300.324:

- ▶ The IEP team must “in the case of a child whose behavior impedes the child’s learning or that of others **consider** the use of positive behavioral interventions and supports, and other strategies, to address that behavior.”

Behavioral Supports, FAPE, FBAs & BIPs

The IEP & Related Services, 34 C.F.R. § 300.34:

- ▶ “**Related Services**” are “transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to **benefit** from special education”
- ▶ “**includes** speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation...counseling services, including rehabilitation counseling, orientation and mobility services...school health services and school nurse services, social work services...and parent counseling and training.”

Behavioral Supports, FAPE, FBAs & BIPs

The IEP & Behavioral Supports in the Disciplinary Context, 34 C.F.R. § 300.530:

- ▶ For children whose behavior would be subject to discipline except that it is a manifestation of a disability, the IEP team “must”
 - ▶ Conduct an FBA and develop a BIP, or
 - ▶ If a BIP exists, review and revise, as needed, to address behavior

Behavioral Supports, FAPE, FBAs & BIPs

The IEP & Behavioral Supports in the Disciplinary Context, 34 C.F.R. § 300.530:

- ▶ For children whose behavior is not a manifestation of the disability, they “must”
 - ▶ Receive an FBA “as appropriate”
 - ▶ And receive behavioral intervention services and modifications “as appropriate”

Behavioral Supports, FAPE, FBAs & BIPs

Example:

- ▶ 12 year old student on Autism spectrum and with learning disability, prone to inappropriate behavior
- ▶ 1997-98 school year, was 6th grade age but in 5th grade for assistance and did 4th grade level work
- ▶ However, teacher often moved him to 3rd grade level work to boost confidence and decrease misbehaviors
- ▶ Teacher used a number of behavior management techniques, but none were considered by IEP team or were in IEP
- ▶ In 1997-98, behavior problems got much worse
- ▶ Finding at due process hearing was that any academic progress (had met some IEP objectives) did not negate the failure to include behavioral interventions in IEP
- ▶ Affirmed on appeal: *Neosho RV Sch. Dist. V. Clark*, (8th Cir. 2003)

Behavioral Supports, FAPE, FBAs & BIPs

Example:

- ▶ Student with autism spectrum disorder in elementary school
- ▶ Had significant interfering behaviors, including self-stimulating and maladaptive behaviors
- ▶ Had received 1:1 ABA therapy in private school in NY until parents moved to NJ
- ▶ NJ IEP team recommended 6:1:1 ratio placement
- ▶ Parents challenged placement, failure to conduct FBA and the failure of the behavior strategies to directly address specific behaviors
- ▶ On appeal, Second Circuit concluded lack of FBA was not a denial of FAPE but failure to match behavioral strategies with behaviors was a denial of FAPE
- ▶ *CF v. NY City Dept. of Ed.*, (2nd Cir. 2014)

Behavioral Supports, FAPE, FBAs & BIPs

Example:

- ▶ Student with PDD had academic difficulties and behavioral problems
- ▶ IEP included goals such as “will write a correct sentence with 80% accuracy”
- ▶ IEP contained no behavioral goals
- ▶ IEP did not provide FAPE because of vague goals that did not provide sufficient guidance to achieve a FAPE and because of the failure to include a behavior management plan, which the court termed a “serious omission.”
- ▶ *Penn Trafford Sch. Dist. v. CF*, (W.D. PA. 2006)

Behavioral Supports, FAPE, FBAs & BIPs

Example:

- ▶ Student with autism in elementary school had behavioral problems including physical aggression on an average of 7 times per day
- ▶ Parents took student to Kennedy Krieger Institute, which developed behavioral strategies for the student
- ▶ Kennedy Krieger recommended against use of a calming room
- ▶ Student's IEP team incorporated a number of the elements of the KKI plan but still included the used of the calming room
- ▶ No denial of FAPE; that the "school district could have employed 'more positive behavior interventions'" is "'largely irrelevant'" if it made "a 'good faith effort' to help the student achieve the educational goals in his IEP
- ▶ Although the IEP team must "consider" outside evaluation, it does not have to adopt all of them.
- ▶ *MM v. Lancaster County Sch.*, (8th Cir. 2012)

Behavioral Supports, FAPE, FBAs & BIPs

▶ So...Are FBAs Required?

Behavioral Supports, FAPE, FBAs & BIPs

- ▶ **Are BIPs Required?**
- ▶ **Does Johnny, from our Case Study, need an FBA? A BIP? Something else?**



Behavioral Supports, LRE, and Hospital/Homebound

Behavioral Supports, LRE, & Hospital Homebound

A Case Study:

- ▶ Johnny's mom wants him to stay at home because she feels he is traumatized by going to school right now
- ▶ Johnny has been increasingly acting out in school and has been VERY disruptive
- ▶ Johnny's pediatrician is at a loss to help and is willing to sign a HHB form
- ▶ Should Johnny be put in HHB?

Behavioral Supports, LRE, & Hospital Homebound

Least Restrictive Environment, 34 C.F.R. § 300.114-.115 & Georgia Regulation § 160-4-7.07:

- ▶ “to the maximum extent appropriate children with disabilities...are educated with children who are nondisabled”
- ▶ “special classes, separate schooling, or other removal of children with disabilities from the regular educational environment only occurs if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily”
- ▶ In considering the continuum of alternative placements, the continuum must “make provision for supplementary services...to be provided in conjunction with regular class placement.”

Behavioral Supports, LRE, & Hospital Homebound

LRE & Supplementary Aids and Services, 34 C.F.R. § 300.42:

- ▶ **“Supplementary Aids & Services”** are “aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate.”

Behavioral Supports, FAPE, FBAs & BIPs

The IEP & Behavioral Supports Generally, 34 C.F.R. §

- ▶ “A service that enables a handicapped child to remain at school during the day is an important means of providing the child with the meaningful access to education that Congress envisioned. The act makes specific provision for services, like transportation, for example, that do no more than enable a child to be physically present in class.”

Irving Unified School District v. Tatro, 468 U.S. 883 (1984)

Behavioral Supports, LRE, & Hospital Homebound

LRE & HHB, Georgia Regulation § 160-4-7.07:

- ▶ “HHB is used for students with disabilities who are placed in a special education program and have a medically diagnosed condition that will significantly interfere with their education and requires them to be restricted to their home or hospital for a period of time.”

Behavioral Supports, LRE, & Hospital Homebound

Back to the Case Study:

- ▶ Can Johnny be placed on HHB? Should he be placed on HHB?

Behavioral Supports & Bullying

Behavioral Supports & Bullying

Statistics:

- ▶ Bullying disproportionately affects students with disabilities
- ▶ 43-60% of children with disabilities report being bullied (studies vary)
- ▶ 88% of children with autism have been bullied at school (according to a 2009 Massachusetts Advocates for Children survey)
- ▶ 65% of parents of children with Asperger's reported bullying of their children (from a study done at Columbia University)

Behavioral Supports & Bullying

A Case Study:

- ▶ Bobby had disciplinary problems throughout much of middle school and into the beginning of high school
- ▶ He slapped, spit, punched and kicked others
- ▶ Several of the incidences were retaliation because other students provoked him
- ▶ 7th grade: suicide attempt and hospitalization
- ▶ Diagnosed with ADHD, ODD, and major depressive disorder, recommended for special education evals

Behavioral Supports & Bullying

A Case Study:

- ▶ 8th grade: 14 disciplinary referrals
- ▶ Made C average grades and thus was found not eligible for special education
- ▶ In 9th grade, Bobby repeatedly physically harassed, had clothes stolen, backpack dumped by other students, called “flamer” and “faggot” and was hit with a piece of metal by another student in welding class
- ▶ High school principal knew of these incidences and transferred Bobby to another welding class
- ▶ Was Bobby bullied?
- ▶ Should Bobby have been found eligible for special education?

Behavioral Supports & Bullying

Georgia Bullying Law, GA Code §20-2-751.4:

- ▶ Any willful attempt or threat to inflict injury on another person, when accompanied by an apparent present ability to do so;
- ▶ Any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm; or
- ▶ Any intentional written, verbal, or physical act which a reasonable person would perceive as being intended to threaten, harass, or intimidate, that:
 - ▶ Causes another person substantial physical harm...or visible bodily harm as such term;
 - ▶ Has the effect of substantially interfering with a student's education;
 - ▶ Is so severe, persistent, or pervasive that it creates an intimidating or threatening educational environment; or
 - ▶ Has the effect of substantially disrupting the orderly operation of the school.

Behavioral Supports & Bullying

Bullying & the IDEA—Child Find:

- ▶ Bobby's real case: *Moore v. Hamilton Southeastern Sch. Dist.*, (S.D. Ind. 2013)
- ▶ The school had “ample evidence of Jemarcus’s behavioral problems and at least some basis for an inference that his emotional symptoms were dampening his classroom ability as well”
- ▶ “the decision to not classify a student who admittedly otherwise qualified—solely on the basis of his supposedly satisfactory grades—seems unreasonable.”

Behavioral Supports & Bullying

Bullying & the IDEA—Child Find:

- ▶ Bullying can trigger a school's child find obligations, US DOE Dear Colleague Letter, August 20, 2013.
- ▶ It does not matter whether the bullying is related to the disability, US DOE Dear Colleague Letter October 21, 2014.

Behavioral Supports & Bullying

Bullying & the IDEA—Child Find:

- ▶ Examples of triggers from US DOE Dear Colleague Letter, October 21, 2014:
 - ▶ Sudden decline in grades
 - ▶ Onset of emotional outbursts
 - ▶ Increase in frequency or intensity of behavioral disruptions
 - ▶ Rise in missed classes

Behavioral Supports & Bullying

Back to the Case Study:

- ▶ Should Bobby be found eligible for special education?
- ▶ If Bobby is found eligible for special education, should bullying be addressed on his IEP? If so, how/in what way?

Behavioral Supports & Bullying

Bullying, the IEP & FAPE:

- ▶ Schools have an obligation to ensure that students who are the targets of bullying continue to receive FAPE, 2013 DCL 2014 DCL.
- ▶ The bullying that triggers this obligation does not have to be bullying on the basis of disability—it can be for any reason, 2014 DCL.
- ▶ Schools therefore have an obligation to convene an IEP meeting to determine whether the student's needs have changed as a result of the bullying and if so revise the IEP, 2013 & 2014 DCLs.

Behavioral Supports & Bullying

Bullying & the IDEA—LRE & Placement:

- ▶ Schools “may not attempt to resolve the bullying situation by unilaterally changing the frequency, duration, intensity, placement or location of the student’s special education and related services.” 2013 DCL.
- ▶ Those decisions must be made by the IEP team.
- ▶ The IEP team should also determine if additional supports or services are needed to address the bullying causes or effects.

Behavioral Supports & Bullying

Bullying & the IDEA—the IEP & FAPE:

- ▶ IEP for the Bully:
 - ▶ BIPs
 - ▶ Behavioral Goals
 - ▶ Counseling
 - ▶ Social Skills Training/Curriculum
 - ▶ NOT: restorative justice, mediation
- ▶ Others?

Behavioral Supports & Bullying

Bullying & the IDEA—the IEP & FAPE:

- ▶ IEP for the Victim:
 - ▶ Counseling
 - ▶ Social Skills Training/Curriculum
 - ▶ BIPs to address social deficits that bullies target
 - ▶ BIPs or behavioral goals to address affects of bullying
 - ▶ NOT: restorative justice, mediation
- ▶ Others?

Behavioral Supports & Bullying

Section 504 & Title II of the ADA:

- ▶ Bullying can also rise to the level of disability harassment and violate both Section 504 & the ADA
- ▶ Example: students call another student with a disability “stupid,” “idiot,” and “retard” while in school and on the school bus. One student tackled him, hit him with a binder and threw his personal items in the garbage.
- ▶ The student targeted complained to his teacher and was offered counseling services but the school did not discipline or otherwise intervene to address the behavior of the bully.
- ▶ The harassment continued and the bullied student often refused to go to school

Behavioral Supports & Bullying

Section 504 & Title II of the ADA:

- ▶ 2010 DCL cited this as an example of disability harassment because the school did not adopt a comprehensive approach to stop the bullying behavior/disability harassment
- ▶ Such steps should have included
 - ▶ intervention with the bullies
 - ▶ consultation with the District 504/Title II coordinator to ensure a comprehensive response
 - ▶ Special training for staff to recognize and respond to the harassment
 - ▶ Monitoring to ensure the harassment did not continue

Behavioral Supports & Bullying

Back to the Case Study:

- ▶ If Bobby is found eligible for special education, should bullying be addressed on his IEP? If so, how/in what way?
- ▶ Should the school address the behaviors of the bully/bullies in any way?

When Lawyers Get Involved

- ▶ We are not all built the same.
- ▶ We are not out to sue schools.
- ▶ Our clients are sometimes scared, sometimes mad, but they love their children and are trying their best.
- ▶ Questions? Concerns?