DANGEROUS STUDENTS IN THE SCHOOLS: A LEGAL PERSPECTIVE ON SHARING INFORMATION OR NOT

Presented By:

DENISE HAYS
ATTORNEY AT LAW
dhays@wabsa.com

WALSH, ANDERSON, GALLEGOS, GREEN and TREVIÑO, P.C.
ATTORNEYS AT LAW

www.WalshAnderson.com

The information in this handout was created by Walsh, Anderson, Gallegos, Green & Treviño, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, consult an attorney.

---

505 E. Huntland Dr.
Suite 600
Austin, Texas 78752
(512) 454-6864

100 N.E. Loop 410
Suite 900
San Antonio, Texas 78216
(210) 979-6633

105 Decker Court
Suite 600
Irving, Texas 75062
(214) 574-8800

105 East 3rd Street
Weslaco, Texas 78596
(956) 647-5122

500 Marquette, N.W.
Suite 1360
Albuquerque, NM 87102
(505) 243-6864

10375 Richmond Ave.
Suite 750
Houston, Texas 77042
(713) 789-6864

OVERVIEW

What do you do when learning that a student has homicidal/suicidal tendencies or ideation? How does your district respond when a student threatens mass harm to others or assaults staff or students? And what does special education have to do with it? The presenters will provide you an overview of how public school districts can and should respond to students with identified or suspected disabilities who display the propensity for violence. They will guide a discussion of policy and emergency response to help you navigate the complex web of federal and state laws that apply. And they will offer strategies for responding to victims of school violence, as well as practical guidance for serving student perpetrators. Issues such as confidentiality, special education referral, IEP consideration and development, and the need for meaningful collaboration among stakeholders will be addressed.

DISTRICT LIABILITY AND PERSONAL LIABILITY IN THE CONTEXT OF STUDENT VIOLENCE

1. **Can a school district be held liable for the death or injury of victims of school violence?**

   Maybe. 42 U.S.C. § 1983 (Section 1983) provides an avenue of recourse for citizens when a governmental entity deprives them of a federal statutory or constitutional right. There are monetary damages available under this provision.

2. **Can an individual be held liable for the death or injury of victims of school violence?**

   Individuals, including employees, school board members, and administrators, may be sued under § 1983. However, individuals may assert the defense of qualified immunity when confronted with claims under § 1983.

3. **What is qualified immunity?**

   There are times when the school district or the employee is protected from liability in certain circumstances, given the work of the district as a governmental entity.

   The doctrine of qualified immunity may shield a government official from personal liability when the official, exercising his discretionary authority, deprives another of a right secured by federal law. According to the U.S. Supreme Court, the relevant question when determining the availability of qualified immunity is whether a reasonable public official could have believed that his conduct was lawful in light of clearly established law. If public officials or officers of "reasonable competence could disagree [on whether an action is legal], immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341, 113 LRP 4757 (1986). As the U.S. Supreme Court put it, qualified immunity is designed to protect from civil liability "all but the plainly incompetent or those who knowingly violate the law." *Id.*

School officials are among those protected by qualified immunity. Qualified immunity will protect school board members and district administrators from personal liability for actions performed: 1) in the course and scope of their official duties; 2) pursuant to clearly established law; and, 3) in good faith. This means that governmental officials are entitled to qualified immunity unless their conduct was objectively unreasonable in light of the clearly established law at the time of their actions.

To overcome the qualified immunity of government officials, a plaintiff must show: 1) a constitutional violation; 2) of a right clearly established at the time the violation occurred; and 3) that the defendant actually engaged in conduct that violated the clearly established right.

4. For victims of school violence, what constitutional right would be implicated?

The 14th Amendment of the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5. Tell us more about Section 1983 liability exposure of the public school district.

In order for the school district to be held liable under Section 1983, a plaintiff must show the existence of a **policy or custom** attributable to the school district that was the "moving force" behind the deprivation of the child's rights.1 That is, it must be proven that the alleged constitutional injury was caused by the execution of an official policy or the toleration or approval by some person who has final policymaking authority for the school district — that the policy maker of the school district showed **"deliberate indifference"** (i.e., turned a blind eye) to any violations of constitutional and federal rights of students.2

Similarly, a school district can be held liable for the **failure to train** its employees — such as if the school district has a policy regarding the response of employees to allegations of abuse, but as a result of inadequate training, it is not applied constitutionally. Under those circumstances, the school district can be held liable where the failure to train staff members can be shown to constitute deliberate indifference to the rights of students.

Finally, in some jurisdictions, the school district's **failure to protect** a student from the actions of third parties can give rise to school district liability. Generally, the 14th Amendment does not impose a duty by governmental entities, including school districts,

---

[1] *Monell v. Dept. of Social Services*, 436 U.S. 658, 694, 103 LRP 35365 (1978).
[2] *Id. See also Gonzalez v. Ysleta ISD*, 996 F.2d 745 (5th Cir. 1993).

to protect individuals from private third parties.3 However, there are two generally recognized exceptions: 1) when a special relationship exists between the district and the victim; or 2) the district affirmatively places the victim in danger by acting with deliberate indifference to a known or obvious risk.4 As to the former exception, several U.S. Circuit Courts of Appeals have held that a school district does not have a "special relationship" with a student resulting from the application of compulsory attendance laws. As to the second exception, deliberate indifference (as noted above) requires that the individual knew something was going to happen, ignored the risk, and exposed the student to the risk. For example, s*ee Patel v. Kent School Dist. et al.*, 57 IDELR 2, 648 F.3d 965 (9th Cir. 2011) (neither a teacher nor her employing school district were liable for violating a 16-year-old student's substantive due process rights where the teacher failed to escort the student, who had developmental disabilities, to the restroom, and the student there engaged in sexual encounters with classmates).

6. So if the perpetrator was a student and it was the student who fatally wounded or injured the victims, how is it that the school or school personnel could be blamed for constitutional deprivation?

It is well settled that a school's failure to protect an individual against private violence simply does not constitute a violation of the due process clause. However, as set forth above, the courts have recognized two exceptions to that general rule: 1) a special relationship; or 2) a state-created danger. The "special relationship" exception arises when, "The state by the affirmative exercise of its powers so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs — *e.g.*, food, clothing, shelter, medical care, and reasonable safety." *DeShaney*, 489 U.S. at 200. It is the restraint of an individual's liberty through incarceration, institutionalization, or other similar restraints that gives rise to a special relationship. *Id.*; *Walton v. Alexander*, 44 F.3d 1297, 1303, 44 F.3d 1297 (5th Cir. 1995). The 5th Circuit has refused to recognize a "special relationship" between a school district and its students. *See Walton*, 44 F.3d at 1300-01. Further, the 5th Circuit has not adopted the state-created danger theory of liability. *Kovacic v. Villarreal*, 628 F.3d 209, 214 (5th Cir. 2010); *Bustos v. Martini Club, Inc.*, 599 F.3d 458, 466 (5th Cir. 2010). If such a cause of action were to be recognized, the 5th Circuit has held that to state a claim, a plaintiff would have to show specific knowledge of immediate harm to a known victim. *Rios*, 444 F.3d at 424; *Saenz v. Heldenfels Bros., Inc.*, 183 F.3d 389, 392 (5th Cir. 1999); *de Jesus Benavides v. Santos*, 883 F.2d 385, 387 (5th Cir. 1989).

State-created danger was the theory asserted in a recent decision from the 6th Circuit. While the plaintiff did not prevail, the analysis is nonetheless relevant to litigation surrounding school shootings. In *Walker v. Detroit Public Schools*, 535 Fed. App'x 461 (6th Cir. 2013), victims of school shooting that began as a fight in the hallway sued the school system for violation of Section 1983. One student was killed during the shooting, and three others were injured. The school had a history of violence and guns on campus.

---

[3] *Morgan v. Gonzales*, 495 F.3d 1084, 1093, 113 LRP 4763 (9th Cir. 2007).

[4] *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 103 LRP 32360 (1989).

The court set out that in order for the plaintiffs to establish their claim for state-created danger, they would show that there was "(1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and (3) the state knew or should have known that its actions specifically endangered the plaintiff." The court stated that school officials breaking up a fight did not affirmatively create or increase the risk that the shooter would return to school and open fire on other students. Intervening and then subsequently returning a person into a situation with a preexisting danger is not an affirmative act for purposes of the state-created danger cause of action. Because there was no affirmative act, the court did not continue its analysis to determine if there was a special danger or whether the state knew or should have known of the specific danger created by its actions.

7. Do school districts have a duty to warn of the known or reasonable foreseeable danger of a student with a propensity to commit school violence?

It depends. First of all, as set forth above, the district would be liable under § 1983 for a violation of due process rights under the 14th Amendment if the plaintiff can establish that the district was deliberately indifferent to the rights of the victims. In other words, the issue is whether the district turned a blind eye to the dangerous situation.

In *Gonzalez v. Ysleta ISD*, 996 F.2d 745 (5th Cir. 1993), a Texas school district faced the issue of Section 1983 liability based on allegations that an elementary school student had been sexually molested by her first-grade teacher. The plaintiff argued that Section 1983 liability should be imposed upon the school district for the deprivation of her constitutional rights because the Board of Trustees of the district elected to keep the teacher employed in the district, despite similar allegations that had been brought forward two years earlier. At that time, the Board transferred the teacher to a new campus (the plaintiff's school) from his position at a different school, rather than relieve him of his teaching responsibilities altogether. The Board argued that the evidence presented at trial did not demonstrate that the Board acted with deliberate indifference, and the Court agreed. The Court resolved that the school district could not be found liable unless it was shown that the Board of Trustees was not merely mistaken or negligent, but deliberately indifferent — a high standard that is difficult to prove. Here, that standard was not met.

Plaintiffs have argued in lawsuits filed against Virginia Tech that the school violence was caused by a mentally disturbed student of which the school was aware yet failed to warn the victims of the danger.

Below is language from a respondent superior claim against Virginia Tech from a complaint filed by the family of one of the victims.

> *165. Defendant Virginia Tech is liable respondent superior for the negligence, gross negligence and deliberate indifference of the Cook Counseling Center and its agents and employees.*

> *166. The university's anticipated defense that the killings and the maimings were the act of a demented student over which it had no control and less responsibility, are belied by the abject failure of the officers, agents and employees associated with the Cook Counseling Center to meet anything close to the applicable standard of professional care, their failure to render Seung-Hui Cho mental health services of any kind or form, despite being literally begged to do so by concerned faculty members, the failure of the officers, agents and employees of the Cook Counseling Center to heed the warnings of those concerned faculty members, and their failure to create even a case file on Seung-Hui Cho which might alert other mental health professionals to this student in need.*

In Texas, such a claim would be examined as to whether that failure to warn constituted a deliberate indifference on the part of the school. Whether such a claim constitutes a deliberate indifference is likely contingent upon the extent of knowledge of the school and its failure to take any measures to protect students and staff from bodily harm. In litigation involving school violence, plaintiffs in other jurisdictions have relied upon the United States Secret Service and the United States Department of Education, May 2002 report, *Threat Assessment in Schools: A Guide to Managing Threatening Situations and to Creating Safe School Climates*. This report is available on the Department of Education's website at: www.ed.gov/offices/OESE/SDFS and the Secret Service website at: www.secretservice.gov/ntac.shtml. *See attached*. Plaintiffs will assert that the failure to follow the above-referenced guide contributes to a 14th Amendment violation.

It should be noted that in some states, a plaintiff may assert a viable negligence claim under state law. In *Rith Kok, individually and administrator of the Estate of Samnang Kok, Deceased; et al v. Tacoma School District No. 10*, 113 LRP 42810 (10/22/13), the Washington Court of Appeals held that the school's decision to place a paranoid schizophrenic student in the general education setting did not amount to negligence. Specifically, the perpetrator shot and killed a teenage boy in the hallway of the high school, giving rise to the negligence claim before the court. The court explained that a district's duty to exercise reasonable care when supervising students on school grounds only extends to foreseeable risks of harm. The court held, "There was no indication that he might intend to harm someone, let alone with a weapon, and many of the student's past difficulties took place before his diagnosis or while health care providers were still adjusting his treatment." The court rejected the estate's argument that the student's schizophrenia diagnosis alone made him dangerous. The court further noted the LRE requirements in IDEA.

In *Tarasoff v. Regents of the University of California*, 113 LRP 12440 (Cal. Sup. Ct. 07/01/76), the Supreme Court of California held that mental health professionals have a duty to protect individuals believed to be at risk of bodily harm from a patient. In *Tarasoff*, patient confided in therapist his intention to kill the victim, and while the therapist notified law enforcement, the therapist never alerted the victim or her family, claiming he owed them no duty. The court rejected the idea that this is not a national standard, and the level of duty varies from state to state.

The Arkansas legislature added language that made its previously permissive duty mandatory in 2013. Another product of legislative efforts this past year was the New York Secure Ammunition and Firearms Enforcement (SAFE) Act of 2013. This piece of legislation creates a broader duty for mental health professionals to warn as well as increases the duty to report history of mental health concerns before someone can get a gun license.

While there are states that have taken strides toward increasing obligations and duties in the interest of safety, there are still a number of states where disclosure is only permissible or some states where statutes are silent regarding disclosure. In Texas, the permissive duty for disclosure does not shield mental health professionals who disclose, even those who disclose in good faith, from civil liability. In one Texas case, *Thapar v. Zezulka*, 994 S.W.2d 635 (Tex. 1999), the state Supreme Court ruled in favor of the therapist who failed to warn anyone, including the victim and his wife, that patient expressed that he felt like killing the victim. A concern in the absence of this safeguard measure is that this concern over improper disclosure could chill actions taken by mental health professionals that would protect others.

For more information or to find the relevant laws for the duty to report in each state, visit http://www.ncsl.org/research/health/mental-health-professionals-duty-to-warn.aspx.

8. **Tell me more about the United States Secret Service and the United States Department of Education, May 2002 report, *Threat Assessment in Schools: A Guide to Managing Threatening Situations and to Creating Safe School Climates* (*Threat Assessment Guide*).**

This is a guidance document developed by the United States Secret Service and the Department of Education to develop accurate and useful information about prior school attacks that could help prevent some future attacks from occurring. The findings suggest that it may be possible to prevent some future school attacks from occurring, and that efforts to identify, assess, and manage students who may have the intent and capacity to launch an attack may be a promising strategy for prevention. This document sets forth a process for identifying, assessing and managing students who may pose a threat of targeted violence in schools. The Secret Service Threat Assessment approach was developed based upon findings from an earlier Secret Service study on assassinations and attacks of public officials and figures, and the Safe School Initiative.

9. **What are some key findings from the underlying study relevant to Special Education?**

According to the study, most attackers engaged in some behavior prior to the incident that caused concern or indicated a need for help. Most attackers were known to have difficulty coping with significant losses or personal failures. Many had considered or attempted suicide. More than three-quarters of school shooters had a history of suicidal thoughts, threats, gestures, or attempts. Most of these students were known to have been severely depressed or desperate before their attacks. An example provided by the Secret Service in the *Threat Assessment Guide* is as follows:

"Example: One school shooter submitted a series of poems describing his thoughts of suicide and homicide to his English teacher. One poem read:

> Am I insane
> To want to end this pain
> To want to end my life
> By using a sharp knife
> Am I insane
> Thinking life is profane
> Knowing life is useless
> Cause my emotions are a mess
> Am I insane
> Thinking I've thing to gain
> Considering suicide
> Cause love has died
> Am I insane
> Wanting to spill blood like rain
> Sending them all to Hell
> From humanity I've fell."

Threat Assessment Guide, page 22.

10. Among the proactive measures set forth in the *Threat Assessment Guide,* what are some elements essential to the development of an effective school threat assessment program?

School should have policies on conducting a threat assessment inquiry or investigation. The *Threat Assessment Guide* emphasizes the importance of sharing information about a student who may pose a risk of violence. This sharing of information should be done consistent with FERPA. Additionally, a threat assessment team should be created prior to a crisis. The members of this disciplinary threat assessment team should include a mental health professional or school psychologist, counselors, an administrator, and a school resource officer. The *Threat Assessment Guide* specifically addresses students of concern who are also eligible for Special Education as follows:

> "If the student of concern is being provided services under the IDEA, a representative from the IEP team that developed or manages the student's IEP also should be brought onto the threat assessment team as an *ad hoc* member for the inquiry regarding the particular student."

11. As a district employee serving in the role of an LSSP, diagnostician, special education director or special education teacher, how does the *Threat Assessment Guide* implicate me?

Special educators have access to records, such as full and individual evaluations, psychological reports, and functional behavioral assessments, that may contain the type of information deemed helpful by the *Threat Assessment Guide*. For example, if a

psychological evaluation reveals that a student has homicidal ideations, it may be prudent for that information to be shared with school officials who would have a need to know and to take precautionary measures, if needed.

12. Are there other government resources that utilize this threat assessment perspective for preventing school violence?

Yes. In May 2011, the FBI issued a report titled *The School Shooter: A Threat Assessment Prospective*. This report can be found at: www.fbi.gov/stats-services/publications/school-shooter.

13. In the FBI report, were there any specific personality traits identified by the FBI that were associated with school violence?

Yes. First, this report noted that signs of serious mental illness can significantly elevate the risk for violence and should be evaluated by a mental health professional. Some of the behaviors and traits associated with school violence in this report were developed by the National Center for Analysis of Violent Crime (NCAVC) and were derived from their intensive review of eighteen specific school shooting cases. The traits are as follows:

- Leakage (A student reveals clues to feelings, fantasies, and intent. This may be conveyed through drawings, poems, songs or videos.)
- Low tolerance for frustration
- Poor coping skills
- Lack of resiliency
- Failed love relationship
- Injustice collector (Resentment over real or perceived injustices.)
- Signs of depression
- Narcissism
- Alienation
- Dehumanizes others
- Lack of empathy
- Exaggerated sense of entitlement
- Attitude of superiority
- Exaggerated or pathological need for attention
- Externalizes blame
- Masks low self-esteem
- Anger-management problems
- Intolerance
- Inappropriate humor
- Seeks to manipulate others
- Lack of trust
- Closed social group
- Change of behavior
- Rigid and opinionated

- Unusual interest in sensational violence
- Fascination with violence filled entertainment
- Negative role models
- Behavior appears relevant to carrying out threat

The NCAVC also examined family dynamics of school shooters, school dynamics and social dynamics.

14. Could an IDEA claim be implicated in the context of school violence?

Yes, but only if the petitioner can establish that the student was denied a free appropriate public education (FAPE).

15. What analysis do hearing officers use to determine whether FAPE has been provided?

The 5th U.S. Circuit Court of Appeals, in *Cypress-Fairbanks Indep. School District v. Michael F.*, 118 F.3d 245, 253, 26 IDELR 303 (5th Cir. 1997), provided a four-factor test to analyze whether a District provided a FAPE: 1) whether the program is individualized on the basis of the student's assessment and performance; 2) whether the program is administered in the least restrictive environment; (3) whether the services are provided in a coordinated and collaborative manner by the key stakeholders; and (4) whether positive academic and non-academic benefits are demonstrated.

16. Give us an example of how this plays out in the context of violent (or threatening) students and situations.

A student eligible for special education as a student with autism makes a terroristic threat over the Internet, threatening harm to classmates. Classmates, in the wake of recent school violence nationally, are terrified. They report the incident to their parents, who in turn contact the police. The student with disabilities is subsequently arrested and taken into custody, where he remains pending the outcome of a forensic evaluation. The student's parents request a special education due process hearing against the school district, challenging that had the district provided appropriate programming in the area of social skills in addition to related services such as counseling, the student would not have engaged in the criminal activity.

See J.F. v. Karnes City Indep. Sch. Dist., Cause No. Sa-08-CA-726-OG (W. D. Tex. 2010). Key quote from the underlying special education due process hearing decision:

> The crux of Petitioner's complaint is that Respondent's educational program for Petitioner lacked appropriate instruction and intervention that, in effect, failed to prevent Petitioner's alleged threat to his peers. Specifically, Petitioner alleges that Petitioner suffered harassment and bullying by peers over a three-year period prior to Petitioner's alleged threat. By contrast, Respondent believes that the educational program provided to Petitioner was appropriate in all respects. As a result, Respondent believes that

Petitioner failed to identify and prove, by a preponderance of the evidence, that Petitioner was denied a FAPE under Respondent's program. Instead, Respondent believes that Petitioner made educational progress under his program up to his withdrawal from public education. ...

As previously discussed above, I conclude that Petitioner did not carry his burden to show the inappropriateness of Respondent's program in these areas. Respondent's program delivered instruction to address Petitioner's needs in behavioral and social skills acquisition with a program designed to augment Petitioner's non-academic benefit in these areas. This program included practice in social skills with his peers delivered in the LRE general education setting. At no time prior to the Petitioner's isolated alleged misbehavior directed toward his peers did Respondent have any information that Petitioner's needs had changed, and as a result, required more intensive intervention in these areas.

Even after Petitioner's single alleged misbehavior, Respondent addressed the potential seriousness of the behavior by reviewing his educational program, adding related services of special education counseling, offering more social skills training opportunities to his parents, and developing a social skills IEP. The evidence firmly established that Respondent had no indication from Petitioner, his parents, Respondent's educators, or even Petitioner's peers, that Petitioner expressed any problems with his peer interaction or that he was the recipient of unwanted bullying behavior during his [ ] and [ ] grade years. Other than Petitioner's statements after April 2007 to his parents, and his psychologist, Petitioner was not able to establish independent corroboration that bullying incidents actually occurred or that Petitioner, in fact, had suffered mistreatment by his peers at school. Nonetheless, even if these incidents of alleged bullying or other peer harassment occurred to Petitioner, Respondent did not have any information to alert the school district for intervention before April 26, 2007.

Finally, when Petitioner's alleged conduct towards his peers indicated the need for review and revision of Petitioner's IEP, Respondent promptly responded -- with the input of his parents. Petitioner's parents chose not to avail themselves of parenting resources offered by Respondent prior to Petitioner's arrest in April 2007. Without notice to Respondent, Petitioner's parents chose to exit the public school system and proceed with homeschooling services in the more restrictive setting of their home rather than the public school setting.

Based on the foregoing, I conclude that Respondent's program meets the standards enunciated under the four-part test of *Michael F.*, resulting in progress under his program. *Michael F., supra*. Under this program, Petitioner made progress toward his IEP goals and made academic progress

> through the 2006-2007 school year. When Petitioner's needs changed, without previous indicators to his parents and educators, Respondent promptly acted to revise Petitioner's program to address new concerns. *Karnes City Indep. School Dist.*, 108 LRP 67639 (SEA TX 2008).

The bottom line is that FAPE is required to all eligible students under the IDEA, whether or not they present a risk of school violence. There are no exceptions.

CONFIDENTIALITY AND STUDENT VIOLENCE IN THE SCHOOL

17. The *Threat Assessment Guide* discussed above seems to encourage sharing information when it comes to a threat assessment inquiry and students who may pose a risk to targeted school violence. Does FERPA remain applicable?

Absolutely. The Family Education Rights and Privacy Act is the federal law designed to protect the privacy of student education records and other personally identifiable student information by preventing unauthorized access by third parties except in certain limited circumstances. (The FERPA provisions can be found at Board Policies FL (Legal) and FL (Local)). Former Secretary of Education Margaret Spellings stated that, "Nothing is more important to Americans than the safety of their children, FERPA is not intended to be an obstacle in achieving that goal."

The Family Policy Compliance Office (FPCO) issued a memo in June 2011 addressing the applicability of FERPA in safety emergency situations such as a campus shooting. Although FERPA generally requires the consent of the eligible student or parent of eligible student before personally identifying information is released, there is a health and safety emergency exception. *See* 34 C.F.R. §§ 99.31(a)(10); 99.36. Information from a student's education records may be disclosed when there is a threat to the health and safety of others, as determined by the educational institution. Under this exception, the threat must be "articulable" and "significant." According to the FPCO guidance, disclosure can be made to members of the threat assessment team if they are designated as "school officials."

18. What constitutes an "education record"?

Student education records are not limited to documents regarding a student's academic performance. FERPA defines education records as those records that are: 1) directly related to a student; and 2) maintained by an educational agency or institution or by a party acting for the agency or institution. Under this definition, student records could include report cards, discipline referral forms, student homework or other papers, immunization documents, witness statements, permission slips, transcripts, surveillance videos, and many, many more items maintained in the day-to-day operation of a school district. Education records can be maintained in almost any format, including handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.

19. What <u>is not</u> an "education record"?

As a result of FERPA's broad definition of "education records," a lot of school district documents and other items are potentially protected from disclosure by FERPA. But not everything. Some things we might normally think of as student education records may NOT be an education record. Under the FERPA rules, an "education record" DOES NOT include: a) records kept in the sole possession of the maker; b) records of a school district's law enforcement unit; c) records about an individual after he is no longer a student; and d) peer-graded papers before they are collected by the teacher and recorded by the teacher.

As noted in the FPCO memo, while FERPA prohibits the disclosure of students' education records or information gleaned from a student's education records, there is not a prohibition for school administrators to disclose information they have learned from personal observation or personal knowledge. This exception does not apply to information the administrator has learned while acting within his official capacity.

20. What is personally identifiable information?

Another key FERPA term is "personally identifiable student information." Most, but not all, education records will identify a student by name. Even so, those records will still be protected from disclosure under FERPA if they contain "personally identifiable student information." Such student information includes, but is not limited to:

- The name of the student's parent or other family member;
- The address of the student or student's family;
- A personal identifier, such as the student's Social Security number or student number;
- Biometric records such as fingerprints, handwriting and facial characteristics; and
- Indirect identifiers such as date of birth, place of birth, and mother's maiden name.
- Other information that, alone or in combination, would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student; or

- Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the educational record relates.

21. What constitutes permissible disclosure?

FERPA is designed to protect the privacy of student education records by preventing unauthorized access by third parties except in certain limited circumstances. "Disclosure" does not just include the physical transfer of a document; it also includes permitting "access to or the release, transfer, or other communication of personally identifiable information contained in education records **by any means, including oral, written, or electronic means,** to any party except the party identified as the party that provided or created the record."

Thus, disclosure of an education record can occur by summarizing, describing or revealing the nature of an education record's content without actually releasing a copy of the record itself.

22. What are some common permissible disclosures without parent consent?

Before a school district can disclose a student's education record to a third party, it must either have written parental consent, or the disclosure must fall within one of the limited exceptions listed in the FERPA regulations. These five exceptions to the requirement of parent consent are the most common:

- Disclosure to other school officials, including teachers, within the district that have a legitimate educational interest in the information.
- Disclosure to comply with a judicial order or lawfully issued subpoena.
- Disclosure in connection with a health or safety emergency.
- Disclosure of information the school district has designated as directory information.
- Disclosure to officials in another school system or institution of postsecondary education where the student seeks or intends to enroll.

23. In the context of school violence, does the health and safety exception automatically allow for disclosure of confidential student records to third parties?

No. The health and safety exception provides that if information is needed to protect the health and safety of the student or others, the school district may disclose personally identifiable information from an educational record to appropriate parties in connection with an emergency. In emergency cases, the district must record the articulable and significant threat that formed the basis of the disclosure and the parties to whom the information was disclosed. A bomb threat or threat of targeted school violence would be an example of a safety emergency.

24. Is a psychological report maintained by the school district treated under the law as any other education record?

Yes. FERPA does not impose greater protections for disclosure of special education records, including psychological reports.[5]

25. Does FERPA prohibit a school official from disclosing information obtained through personal knowledge or observation and not a student's educational records?

No. FERPA applies to the disclosure of education records and from information derived from education records. For example, if a teacher observes a student making threats to other students, FERPA does not protect that information from disclosure. Therefore, a school official may disclose what he overheard to appropriate law enforcement authorities. However, this general rule does not apply where a school official personally learns of the information about a student through his role in making a determination about the student and the determination is maintained in an education record. For example, if a principal imposed a disciplinary consequence for certain conduct, the principal may not disclose that information absent consent or an exception under FERPA.

26. As the LSSP, I conducted a psychological evaluation of a student. This included a number of projective measures, an MMPI, and the results indicated the student had homicidal thoughts and ideations. The assessments indicated he was clinically significant in related areas. The personality traits in the report fall clearly in line with the FBI Threat Assessment Inventory referenced above and those in the *Threat Assessment Guide* developed by the Secret Service. Can I disclose this report to local law enforcement?

It depends. This information may be disclosed to school officials as discussed above. With regard to local law enforcement, the information would have to satisfy the health and safety exception under FERPA.

27. During the course of this psychological evaluation, the student gave me the names of students he wished were dead. Should I notify the parents of those students?

The first step would be to determine whether the health and safety exception was satisfied under FERPA. If so, share the information with law enforcement and allow those officials to proceed with measures to protect the public. Nonetheless, it would be both prudent and consistent with FERPA to disclose that specific information to school officials so that internal protections could be put in place.

28. As a school counselor, isn't it true that student communications in the context of counseling are confidential and cannot be disclosed to other parties, including other school officials?

---

[5] In the Rules of Practice, promulgated by the Texas State Board of Examiners of Psychologists, Licensed Specialist in School Psychology (LSSPs) are required to comply with FERPA. 22 TAC §465.38(6) & (7)

Not necessarily. The Code of Ethics and Standard Practices of the American Counseling Association (ACA) and the Ethical Standards for School Counselors of the American School Counselor Association (ASCA) are two resources available to help school counselors manage privacy and confidentiality in their counseling relationships. The ASCA Code of Ethics recognizes that FERPA provisions govern the disclosure of students' education records, including a school counselor's disclosure of student information. While school counselors should remain diligent to preserve the confidentiality inherent to the counseling relationship, they are also district employees responsible for determining when to disclose information to parents or school officials and to comply with mandatory reporting requirements. Counselors also need to know when certain exceptions apply to the confidentiality rules, such as in emergencies.

29. For students who commit acts of school violence, are their records protected by FERPA when sought through discovery by a plaintiff (parent of a student) who pursues litigation against the perpetrator or school?

No. In a recent case out of Michigan, parents of a 10-year-old special needs student brought action against school district for failure to turn over an emergency suspension subject to a request for discovery. *Edmonds v. Detroit Public School Systems*, 60 IDELR 73 (E.D. Mich. 2012). The parents made the request following two alleged instances of sexual abuse, where their child was assaulted by another student in the bathroom. All documents related to the perpetrator's suspensions were requested, which included an emergency suspension form for a suspension that took place following the bathroom incident in question. The school objected to disclosing the suspension form, on the basis of privilege under FERPA. The court recognized, however, that FERPA allows for production of otherwise confidential documents to comply with a court order. Further, simply because records are considered confidential according to a statute does not mean they are privileged when it comes to discovery. The court held that FERPA did not prohibit the release of the emergency suspension form to the plaintiffs if it was otherwise discoverable. In an effort to comply with FERPA and protect the educational records as much as possible, the court also ordered that the parents of the perpetrators must be notified and that the information only be revealed to those connected to the litigation and destroyed when no longer needed.

30. What remedies are available to parents or eligible students for violation of FERPA or a wrongful disclosure of educational records?

To date the courts indicate that parents cannot bring private actions. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 37 IDELR 32 (2002).

When a school violates FERPA, it not only breaks the law, but exposes itself to the risk of losing federal funds. 20 U.S.C. 1232g(a)(1); 34 C.F.R. §§ 99.66-67. If the Family Policy Compliance Office (FPCO) concludes that a school district violated FERPA, the standard procedure is to advise the school of what actions it must take to meet the requirements of the law in the future and afford the school a reasonable amount of time to come into compliance with FERPA. If the school takes the suggested action within the time frame established by the FPCO, typically no further action is taken. *Letter re: Concrete Sch. Dist*.,

9 FAB 21 (FPCO 2005). In extreme cases where a pattern or policy of violations exists, the FPCO has several options. It may withhold further payments under any applicable federal program, or it may initiate proceedings to withdraw funds from the school district. 20 U.S.C. § 1232g(b)(2), (f); 34 C.F.R. § 99.67. There are, however, no reported cases where funds were withheld. Another possibility is the issuance of a complaint to compel compliance through a cease and desist order. Considering the substantial amount of federal dollars on the line, most school districts comply before the issue escalates to that level. By providing schools with a chance to remedy the error, loss of federal funding is rare if non-existent.

DISCIPLINARY OPTIONS UNDER IDEA IN THE CONTEXT OF STUDENT VIOLENCE

31. Since the rise of school violence in recent years, has the IDEA been amended to afford schools more flexibility in the area of disciplining students with mental health challenges?

Not really.

The original version of the law (the Education for All Handicapped Children Act of 1975) did not provide specific guidance regarding student discipline. Consequently, courts had to interpret what the law required in practice. In 1981, the 5th Circuit decided the case of *S-1 v. Turlington*, 552 IDELR 267, 635 F.2d 342 (5th Cir. 1981). This case began when several students were expelled from a public school in Florida for almost two years, the maximum penalty allowed under state law. The behavior of the students included the use of profane language, masturbation, sexual acts against other students, vandalism, and willful defiance of authority. All of the students were identified as having "mental retardation," a term now being phased out by the law. None were identified as having an emotional disturbance.

The parties to the *Turlington* lawsuit agreed that it would be illegal for the school to expel a student for behavior that directly resulted from the student's disability. All parties agreed that an expulsion under such circumstances would amount to discrimination on the basis of disability. School officials assured the court that they had taken this factor into account with regard to the one student who had raised the issue, identified as "S-1." Both the school superintendent and the school board determined that S-1 did not have an emotional disability, and therefore, his behavior could not be a result of his disability.

The 5th Circuit found fault with the school's procedure in three respects.

*First, the court held that school officials should have made a determination as to whether or not there was a link between disability and behavior with all of the students, not just the one who had raised it. In other words, it was the school's responsibility to consider this issue, whether the parents thought to do so or not.

**Second, the court rejected the idea that the determination hinges on whether or not the

student was identified as having an emotional disturbance. “Seriously emotionally disturbed” is just one of many classifications that may be applied to students with disabilities, and the court found no reason why only that one group would be protected from discrimination.

***Third, the court found fault with this determination being made by the school superintendent and school board. Instead, the court ruled that a termination of services brought about by an expulsion amounted to a “change in educational placement.” Thus, it should have been done by a specially trained and knowledgeable group, rather than simply by the superintendent or school board.

The court did not use the term “manifestation determination.” That came later. But that was clearly what the court was requiring — an individualized analysis and determination as to whether or not a student’s misconduct in school arose directly from the student’s disability. The school would have the duty to raise this issue on its own and would have to present the issue to a specially trained and knowledgeable group — the IEP team, or, as we call it in Texas, The Admission, Review and Dismissal Committee (ARDC).

The issue of safety came before the U.S. Supreme Court in 1988 when the court heard *Honig v. Doe*, 484 U.S. 305 (1988). This case concerned disciplinary action taken by the San Francisco Unified School District against John Doe and Jack White. Both boys were identified by the district as having emotional disabilities. They were both known to be explosive and occasionally violent. While the behaviors of these two boys were troubling, to say the least, they were also directly related to their disabilities.

What kind of behaviors? According to the Supreme Court’s opinion in the case, John Doe was a socially and physically awkward 17-year-old. In today’s parlance, Doe was the target of bullying. The court noted that “physical abnormalities, speech difficulties, and poor grooming habits had made him the target of teasing and ridicule as early as the first grade.” His IEP noted that his social skills had deteriorated, and he could tolerate only minor frustration before exploding.

He exploded on November 6, 1980, after being taunted by a fellow student: “He choked the student with sufficient force to leave abrasions on the child’s neck, and kicked out a school window while being escorted to the principal’s office afterwards.” The school suspended Doe for five days and began expulsion proceedings.

Jack Smith’s conduct was not as violent but still very disruptive in the school setting. Like Doe, Smith was identified as having an emotional disturbance. He had been physically and emotionally abused as a young child and grew up to be an adolescent with average intelligence, extreme hyperactivity, and low self-esteem. One evaluator noted that he reacted to stress by “attempting to cover his feelings of low self-worth through aggressive behavior … primarily verbal provocations.” His misconduct included stealing, extortion, and inappropriate sexual comments to girls in school. The district suspended Smith and sought his expulsion.

Parents of both students sued, seeking to stop the expulsion proceedings until the proper "change of placement' procedures were handled. In support, they cited the "stay-put" provision in the law, which guarantees that a student is to stay in the current placement while disputes over that placement are being resolved.

Mr. Honig, the California Commissioner of Education, argued that the "stay-put" rule was not intended to apply in a case like this, where student and staff safety were at risk. Surely, Honig asserted, Congress did not intend to take away the authority of local school officials to maintain safety.

The Supreme Court flatly rejected the school's argument, and the opinion is worth quoting at length:

> The language of 1415(e)(3) is unequivocal. It states plainly that during the pendency of any proceedings initiated under the Act, unless the state or local educational agency and the parents or guardian of a disabled child otherwise agree, "the child SHALL remain in the then current educational placement." 1415(e)(3) (emphasis added [by Supreme Court]). Faced with this clear directive, petitioner asks us to read a "dangerousness" exception into the stay-put provision on the basis of either of two essentially inconsistent assumptions: first, that Congress thought the residual authority of school officials to exclude dangerous students from the classroom too obvious for comment; or second, that Congress inadvertently failed to provide such authority and this Court must therefore remedy the oversight. Because we cannot accept either premise, we decline petitioner's invitation to re-write the statute.
>
> [Mr. Honig's] arguments proceed, he suggests, from a simple, common-sense proposition: Congress could not have intended the stay-put provision to be read literally, for such a construction leads to the clearly unintended, and untenable, result that school districts must return violent or dangerous students to school while the often lengthy EHA proceedings run their course. We think it clear, however, that Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school. In so doing, Congress did not leave school administrators powerless to deal with dangerous students; it did, however, deny school officials their former right to "self-help," and directed that in the future the removal of disabled students could be accomplished only with the permission of the parents, or, as a last resort, the courts.

That certainly put it clearly. Congress "very much meant to strip schools" of the authority they historically enjoyed. The court did not think that its decision was leaving school officials powerless. If the principal believed that a student was dangerous, she could suspend the student for up to 10 school days. The "stay-put" rule did not apply to such short-term actions. If a principal believed that a suspension of more than 10 days was called

for, he could seek relief from a court.

Much has happened since then, but the basic tension between two competing duties remains. Schools must simultaneously maintain a safe and orderly school while appropriately serving students like John Doe and Jack Smith in the least restrictive environment.

32. J.W., a student with an emotional disturbance, has homicidal ideations, as revealed by his psychological evaluation. He is aggressive and has assaulted teachers and peers. During a counseling session, he reveals his fantasy to cause significant harm, including fatalities. As the counselor, you are concerned about his presence in the school setting, and believe he has the propensity and capacity to carry out his intent. Can he be disciplined for these comments? Can he be removed from the classroom in the interest of safety? What disciplinary options are available?

Keep in mind as a student eligible under the IDEA, he is entitled to the protections set forth in 34 C.F.R. § 300.530, which outlines the limitations on a disciplinary change of placement. It is clear from the regulations that we still have a 10-day rule. School officials have the authority to take disciplinary action in the same manner that they would do so for general education students for a total of 10 school days during the school year. This 10-day provision is a cumulative rule, meaning that schools will still have to "count the days." A disciplinary change of placement (days of removal that exceed 10 consecutive days or cumulative removals that constitute a change of placement) can only occur if the outcome of the manifestation determination indicates that the behavior at issue was not directly and substantially related to the student's disability. In *Mason v. Board of Education Howard County Public School System*, the court dismissed claims under ADA and 504 arising from a five-day suspension and one-day detention, noting that any suspension of less than ten days was, as a matter of law, not a denial of FAPE or a change of placement. 56 IDELR 14 (D. Md. 2011).

33. So, if the district has information that clearly shows that J.W., a student with an emotional disturbance (and exhibits all the characteristics of an emotional disturbance outlined in the federal regulations), poses a threat to himself or others, engages in aggressive acts, and makes threatening comments, then he is not subject to a disciplinary change of placement?

Again, this depends upon whether the conduct at issue is directly and substantially related to the student's disability. Based upon the circumstances above, it appears it would be related. Therefore, the student would not be subject to a disciplinary change of placement. Also, remember that when the conduct at issue is a manifestation of a child's disability, then a functional behavioral assessment should be conducted unless an FBA had previously been completed. A behavior intervention plan should be implemented unless a BIP has already been developed. If so, it should be reviewed and modified as necessary. Finally, the student must be returned to the placement from which the student was removed unless the parent and school agree to a change of placement as part of his behavioral intervention plan, as per 34 C.F.R. § 300.530(f).

34. But what about the special circumstances?

School personnel may remove a student to an interim alternative educational setting for up to 45 school days without regard to whether the behavior is a manifestation of the disability or not for drug and weapon offenses or if the student has inflicted serious bodily injury upon another person while at school, on school premises, or while at a school function. Remember that serious bodily injury is defined as bodily injury that involves 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. 20 U.S.C. 1415(k)(7)(D) and 18 U.S.C. 1365(h)(3).

Based upon J.W.'s profile, it does not appear that he has met any of those exceptions. Just posing a threat based upon a psychological evaluation does not constitute committing an offense. Finally, unless his aggressive acts cause serious bodily harm, as discussed above, he would be returned to the placement from which he was removed due to the outcome of the manifestation determination.

35. How has "serious bodily injury" been interpreted?

In *Moon Township Area School District*, 113 LRP 3142 (SEA PA 2012), a Pennsylvania hearing officer found that the district exceeded its authority by removing a student, not yet identified as a student with a disability, during the pendency of an evaluation. Specifically, the student was removed by the district for 45 school days as a result of behavior that according to the district led to serious bodily injury of a teacher and was therefore permitted by 34 C.F.R. § 300.530. The student, who was engaging in disruptive behavior, had hit the teacher in the arm, resulting in bruising, as the teacher was escorting the student from class. The teacher sought medical treatment and completed workers' compensation documents but declined pain medication. The teacher, as a result of the wound, got a tetanus shot. The hearing officer ruled that the wound did not rise to the level of a statutorily defined "seriously bodily injury" under the IDEA, and therefore, the district wrongfully implicated the 45-school-day removal. The hearing officer noted that the decision should not be read as minimizing the physical pain the teacher endured from the student's behavior.

36. **If the district has used the 10 days and a disciplinary change of placement cannot be imposed due to the outcome of the manifestation determination, what placement options are available in the interest of safety?**

First of all, least restrictive environment considerations are foremost when making placement determinations, even for students posing a threat of school violence. Therapeutic measures and not just the imposition of disciplinary strategies should be reviewed. At this juncture, J.W. has the presence of a severe emotional disturbance, which may compromise his safety and that of others. Depending upon his evaluation and other data available, it may be time for the ARD Committee or IEP team to consider a more restrictive setting, such as a behavioral classroom or other therapeutic setting. However, prior to recommending a more restrictive setting, it is important that the school utilize other positive behavioral strategies, such as a behavior intervention plan or supplemental aides and services designed to support the student's success in the general education setting. In the event these documented efforts prove unsuccessful and the aggressive/threatening behaviors continue to compromise the student's safety and that of others, an application for residential placement may be considered appropriate.

37. So what are some positive behavior strategies suggested to address the needs of students who exhibit violent behaviors?

While this is not an exhaustive list, you may want to consider the following:

- Updated FIE, including a psychological evaluation;
- A release to exchange confidential information with the student's private providers;
- FBA, BIP;
- Counseling evaluation and counseling services;
- Teacher training on the unique nature of child's disability and the functional implications of the child's disability in the school setting;
- Engaging a behavior specialist;
- Collection of data on behaviors; and
- Significant monitoring.

38. The ARD Committee or IEP team has determined that a behavioral classroom is appropriate for a student who has committed aggressive acts toward peers and staff, and the assessment data clearly support the appropriateness of the behavioral classroom placement. What happens if the parent disagrees?

In Texas, the ARD Committee would proceed with the 10-day disagreement ARD process set forth in 19 TAC §89.1050 (h). Remember, however, that a 10-day recess is not required when the student's presence on the campus presents a danger of physical harm to the student or others or when the student has committed an expellable offense or an offense which may lead to a placement in the DAEP.

The district would proceed with implementing the IEP or placement with which the parent or the adult student disagrees. Prior written notice shall be provided prior to the implementation.

39. What are some recent interpretations regarding a parent challenging the IEP team's decision for a more restrictive setting in response to violent behavior?

In *Rialto Unified School District*, 114 LRP 1023 (SEA CA 2013), the district requested an expedited due process hearing to change an 8-year-old student's placement for 45 days to a more appropriate facility, asserting that maintaining the student's current placement was substantially likely to result in injury to the student or others. The student was eligible as a student with an Other Health Impairment due to ADHD. The ALJ agreed with the district, noting that the student's violent behavior escalated each year, other children had to be evacuated from the class, and the child required restraint. Other behaviors noted by the ALJ included hitting, slapping, and kicking other children; hitting, biting, and spitting on aides and teachers; throwing chairs and books; being habitually defiant; yelling obscenities at teachers and other children; waving a box cutter and threatening other children on the playground; pushing a child off of a 6-foot-high climbing structure, as well as three other children; and mule-kicking his one-to-one aide above the ankle, resulting in a hard fall and injury to her knee. The ALJ outlined the district's substantial efforts to address the behavior in reaching the decision, including assigning additional one-on-one staff. The parent believed the student should be in public school but that he needed different staff.

In *San Leandro Unified School District*, 114 LRP 550 (SEA CA 2013), an 8-year-old child's escalating aggression led to the District's request for an expedited hearing, and an ALJ approved an interim alternative educational setting. The student was a student with an emotional disturbance who engaged in violent outbursts including throwing computers and chairs; attempting to punch a classmate; kicking his aid and twisting her fingers; eloping; punching and kicking a teacher; attempting to stab a child in the back with a pencil; hitting a girl in the face with a metal lunch pail; throwing a basketball in another child's face and knocking the child down; and threatening to stab a teacher with four lead pencils. The parent believed that the school did not provide adequate services and felt the other children bullied her son. Contrary to the parent's belief, the ALJ cited numerous strategies and behavioral programs attempted by the school and described the staff as skilled, even though the child did not respond to redirection or restraint.

In *White Bear Lake Area Schools*, 113 LRP 28309 (SEA MN 2013), the district requested an expedited due process hearing seeking a Minnesota ALJ's order to have a student, a child with ADHD, an unidentified mental health condition, and a seizure disorder, placed in a therapeutic program. The ALJ granted the district's request. Such placement was consistent with the recommendations of the child's doctors. The parent objected to the placement and stated, "It doesn't matter. I'm his Mom and I know what he needs." The therapeutic program was sought in response the child's history of violent outbursts including dangerous behaviors, punching staff members in the face with a closed fist, punching himself in the face, biting staff members, head-butting others, climbing on a book shelf and then jumping off head first, and kicking a second-story window with the intent

of breaking it. The ALJ noted that despite the district's efforts, it was unable to address the behaviors and that a controlled therapeutic environment was warranted.

40. What are some recent court decisions regarding challenges to MDRs pertaining to violent students?

In *Danny K. v. DOE State of Hawaii*, 57 IDELR 185 (D. Hawaii 2011), the court held that the student received FAPE, he was evaluated in all areas of suspected disability, and the manifestation determination was properly done. The student was charged with setting off a bomb in the school bathroom, thus causing extensive damage. The vice principal investigated and found the student guilty of this offense, in part, based on the student's confession. The student and mother later claimed that he did not set off the bomb but only falsely admitted it to obtain money from the real perpetrators. The student was identified as having ADHD, inattentive type. The court held that the MDR team reviewed the records and had ample support for its conclusions. Key quotes:

> Plaintiffs cite no authority, and the Court has found none, to suggest that a manifestation determination team must review the merits of a school's findings as to how a student violated the code of student conduct. Such a requirement would essentially deputize manifestation determination teams, and in turn, administrative hearings officers and federal courts as appellate deans of students. This would be inconsistent with Congress's intent in streamlining IDEA in 2004.
>
> The Court is also unpersuaded by Plaintiffs' argument at the hearing that [the vice principal] should not have led the manifestation determination meeting because he was the one who investigated the firework incident. The Court agrees with Defendant that it made sense for [the vice principal] to lead the meeting since he was the vice principal as well as the school official most familiar with the incident.

Comment: In a footnote, the court noted that the student was also identified as having Conduct Disorder, but noted that, "Defendant's position, which Plaintiffs have not challenged, is that Student's Conduct Disorder is not an eligible disability under the IDEA; and accordingly, the matter of Conduct Disorder eligibility under the IDEA is not an issue in this appeal."

Also, see *Lebanon Special School District,* 113 LRP 16893 (SEA TN 2013).

41. So, does the parent have a right to request a due process hearing?

Yes. Parents have the right to request a due process hearing at any point when they disagree with decisions of the ARD Committee or IEP team.

42. What about stay-put? Could the parent request a due process hearing, and in effect, prevent the school from securing a more restrictive setting?

Stay-put is not what it used to be. However, the regulations 34 CFR §300.518 provide that during the pendency of any administrative or judicial proceeding regarding a due process complaint notice, that unless the district and parents of the child agree otherwise, the child involved in the complaint must remain in his current educational placement. IDEA contemplates an expedited hearing process under thisscenario. 34 CFR §300.532.

Also, pursuant to this provision, if the school district believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, the district may request a hearing pursuant to 34 CFR §300.507 and 300.508(a) and (b). The hearing officer may order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others. These procedures may be repeated.

43. Could a district seek an injunction in state court to remove a dangerous student from the current placement?

According to the U.S. Supreme Court, in *Honig v. Doe*, 559 IDELR 231, 484 U.S. 305 (1988), the district has the option to seek injunctive relief in a court of competent jurisdiction.

RESTRAINT AND TIMEOUT IN THE CONTEXT OF SCHOOL VIOLENCE [6]

44. What do the federal statutes say?

While there has been a legislative movement toward addressing the issue of restraint in federal law, currently neither the IDEA nor Section 504 of the Rehabilitation Act address restraint.

45. What about the legal definition of restraint in different states? Timeout?

In Texas, restraint means the use of physical force or a mechanical device to significantly restrict the free movement of all or a portion of the student's body. Timeout means a behavior management technique in which, to provide a student with an opportunity to regain self-control, the student is separated from other students for a limited period in a setting: a) that is not locked; and b) from which the exit is not physically blocked by furniture, a closed door held shut from the outside, or another inanimate object. 19 Tex. Admin. Code §89.1053(b).

[6] For the full Commissioner's Rule regarding the use of restraint and timeout in emergency situations, see the provisions of the Texas Administrative Code, located on the TEA website at http://ritter.tea.state.tx.us/rules/tac/chapter089/ch089aa.html.

Connecticut defines restraint as “any method or device used to involuntarily limit freedom of movement, including but not limited to bodily physical force, mechanical devices, or chemicals.” Colo. Code § 26-20-102. Seclusion is “the placement of a person alone in a room from which egress is involuntarily prevented.” Colo. Code § 26-20-102.

Washington definition of “aversive interventions” includes isolation and restraint practices, but the term specifically precludes the use of reasonable force, restraint or other treatment to control unpredicted spontaneous behavior that poses “a clear and present danger of serious harm” or serious disruption to the educational process. Wash. Admin. Code § 392-172A-03120,

46. When can restraint be used?

Only in an emergency (as defined below) and *only* with the following limitations:

- Restraint shall be limited to the use of such reasonable force as is necessary to address the emergency.
- Restraint shall be discontinued at the point at which the emergency no longer exists.
- Restraint shall be implemented in such a way as to protect the health and safety of the student and others.
- Restraint shall not deprive the student of basic human necessities.

19 Tex. Admin. Code §89.1053(c).

47. What is an emergency?

A situation in which a student's behavior poses a threat of: a) imminent, serious physical harm to the student or others; or b) imminent, serious property destruction. 19 Tex. Admin. Code §89.1053(b)(1).

48. How can restraint data help us in conducting a threat assessment?

A threat assessment will necessarily include a review of all existing information and data related to a student.

49. Does federal law prohibit the use of restraint for students presenting a threat of imminent serious physical harm to self or others?

No. Neither IDEA nor Section 504 preclude the use of restraint as a means to address emergency situations with students (threat of imminent serious physical harm to self or others).

50. What is the U.S. Department of Education's position on the use of restraint?

In May of 2012, the Department of Education released a publication that discouraged the use of restraint and seclusion in public schools. The document is intended to be a resource guide and includes access to the current laws in each state, as well as 15 principles to help local stakeholders develop written policies that ban restraint and seclusion except in instances where there is an imminent threat of serious harm or injury to the student or others. Secretary of Education Arne Duncan stated, "Ultimately, the standard for educators should be the same standard that parents use for their own children." The full resource guide is attached in APPENDIX.

51. What is the Alliance to Prevent Restraint, Aversive Interventions and Seclusion?

Members from various advocacy groups have joined in an effort to eliminate the use of restraint and seclusions of children with disabilities who present challenging behaviors. The alliance initiatives are as follows:

- Raise awareness of the dangers of ARS among parents, educators, health care providers, policymakers, and the public through education, research and advocacy.
- Educate families of children with disabilities about Positive Behavior Support and help them to understand their rights and the steps they can take to protect their children from abusive practices.
- Eliminate loopholes in current legislation and regulations that permit the use of ARS in schools and treatment facilities and propose alternative language that promotes Positive Behavior Support.
- Encourage nationwide adoption of laws and regulations to strengthen school-based monitoring, reporting, and investigation into illegal and dangerous ARS practices and provide support for enforcement through the federally-mandated Protection & Advocacy Systems.

LAW ENFORCEMENT AND IDEA

52. So when a student with a disability commits a crime, does the school have the authority to make a referral to law enforcement?

Yes. Nothing in the federal law prohibits a school from reporting a crime committed by a child with a disability to a law enforcement agency 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 student with a disability.

53. When reporting a crime, can the school district release the child's educational records to the law enforcement officials?

Yes. A school district reporting a crime committed by a child with a disability must ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by law enforcement authorities. However, this disclosure is only permitted to the extent permitted under FERPA.

54. The police come to the school requesting that the records of J.W. be turned over immediately. The police disclose to the school they have reason to believe J.W. will carry out a plan to commit school violence. Does the school hand over the requested educational records to the police officers?

Again, you have to determine whether the health and safety exception is satisfied under FERPA. Otherwise, the police may be required to pursue the subpoena process.

55. Are teachers or administrators permitted to carry firearms on campus or use them in the event of a campus emergency?

After the Sandy Hook Elementary tragedy in Newtown, Conn., 33 states proposed laws that would arm teachers and administrators. Of those 33, only South Dakota, Texas, Alabama, Arizona, and Kansas have enacted laws permitting teachers and administrators to carry guns on campus.

In 2013, the Texas legislature passed a bill that created the new law enforcement position of "school marshal." Teachers in Texas were already permitted to carry concealed firearms on campus subject to district policy. School marshals are already district employees who hold concealed carry licenses who, once designated by the district, undergo official certification and training through the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE). School marshals are permitted to carry concealed handguns, except for those whose primary duty involves regular, direct contact with students.

56. Is there any provision prohibiting parents with students eligible as emotionally disturbed or autistic from possessing weapons in the home or requiring such firearms to be locked in a secured location, thereby restricting access from students with documented mental health issues?

Not at this time.

57. Are there any laws that minimize or otherwise eliminate the possibility of an eligible student with a mental illness from purchasing a gun?

Laws vary from state to state. In 2013, 17 states enacted legislation relating to mental health reporting requirements for gun ownership. New York was the first of the states to do so with its controversial Secure Ammunitions and Firearms Enforcement Act of 2013 (SAFE). Mental health professionals were concerned that lawmakers did not carefully consider implications the new law would have on the field and believed that troubled individuals planning to harm themselves or others would be less likely to fully disclose in order to keep their guns or obtain a gun license. The different state laws include a range of disqualifying factors, such as history of violent behavior, suffering from a mental disorder, having been found incompetent to stand trial, having been found guilty by reason of insanity in a criminal case, and having made a threat of bodily harm to a reasonably identifiable victim.