

**STUDENTS WITH MENTAL HEALTH ISSUES:
WHAT ARE THE LEGAL ISSUES AND WHAT ARE SCHOOLS REQUIRED TO DO?**

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I. INTRODUCTION

The noticeable increase in student mental health concerns in our schools is staggering, and school district personnel continue to struggle with the provision of appropriate services to assist their troubled students. While some members of Congress have tried to address this important topic at a federal level, it may take quite some time, if ever, to get sufficient services and assistance in place.¹

In the meantime, there are legal requirements for educating students with mental health issues about which all educators should be aware. This presentation will provide an overview of the legal obligations on the part of schools when presented with a student who is displaying emotional, behavioral, social and/or academic difficulties and who, as a result, may be suspected of having mental health issues that could constitute a disability under certain education laws.

II. RELEVANT FEDERAL LAWS THAT APPLY TO THIS DISCUSSION

Of course, there are a number of legal responsibilities related to students with mental health issues attending public schools. These materials are primarily devoted to school district responsibilities to students with disabilities, since the probability is that most students with significant mental health issues will be considered “students with disabilities” under applicable federal laws (and under many state laws, which often incorporate federal provisions and may even add to them).

A. The Individuals with Disabilities Education Act (IDEA)

¹ In the Fall of 2015, the “Mental Health Awareness and Improvement Act of 2015,” S. 1893, was passed by the Senate, but it was never passed by the House. Among other things, the bill sought to reauthorize and improve programs related to mental health and substance abuse disorders and focused on suicide prevention, helping children recover from traumatic events, mental health awareness for teachers and others, and assessing barriers to integrating behavioral health and primary care. Specifically, the bill would have reauthorized grants to states to train teachers, appropriate school personnel, emergency services personnel and others to recognize the signs and symptoms of mental illness; become familiar with resources in the community for individuals with mental illness; and safely de-escalate crisis situations involving individuals with mental illness. A few (very few) parts of the bill were included in the 21st Century Cures Act, which was enacted and signed by President Obama on December 13, 2016. What happens next, if anything, remains to be seen.

The IDEA is the most specific and comprehensive of the laws applicable to schools and their obligation to make free appropriate public education (FAPE) available to students with disabilities. More than likely, most students with significant mental health problems, whether outwardly or inwardly manifested, will be covered by the IDEA's definition of a "child with a disability," particularly where the student's mental health issues adversely affect educational performance to the degree that the student needs special education and related services.

1. Definition of "child with a disability"

Under the IDEA, a "child with a disability" means a child with:

- a. mental retardation;
- b. hearing impairments, including deafness;
- c. speech or language impairments;
- d. visual impairments, including blindness;
- e. serious emotional disturbance (referred to as "emotional disturbance");
- f. orthopedic impairments;
- g. autism;
- h. traumatic brain injury;
- i. other health impairments;
- j. specific learning disabilities; or
- k. developmental delays for children aged 3 through 9, at the discretion of the State and the local educational agency

who, by reason thereof, needs special education and related services. 20 U.S.C. § 1402(3). It is notable that the statute itself does not provide any definitions of the individual conditions listed, except for specific learning disability. 20 U.S.C. § 1402(30). However, the IDEA's regulations do provide such definitions and even add to the categories with deaf-blindness and multiple disabilities. 34 C.F.R. § 300.8(c).

2. Definitions of specific conditions under the IDEA

Many students who meet the definition of "child with a disability" under the IDEA may also have a medical diagnosis as defined by the American Psychiatric Association's "Diagnostic and Statistical Manual of Mental Disorders – Fifth Edition" (DSM-5). It should be noted, however, that the definitions of certain disorders recognized under the DSM-5 are not the same as those under the IDEA.

Clearly, the fact that a student has received a DSM-5 diagnosis does not mean that the student is automatically eligible under the IDEA for special education and related services. Rather, the IDEA's regulatory definitions of the above-stated conditions, along with state-specified criteria for eligibility, must be used by schools in the identification of students who are disabled and in need special education services, whether they have mental health issues and a DSM-5 diagnosis or not.

Perhaps the IDEA condition most often associated with mental health issues is that of serious emotional disturbance (ED). Under the IDEA regulations, "emotional disturbance" is defined as a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

The term includes schizophrenia but does not apply to children who are socially maladjusted, unless it is determined that they also have an emotional disturbance under the IDEA's definition. 34 C.F.R. § 300.8(4).

Although emotional disabilities may come to mind most frequently when discussing students with mental health issues, a student with mental health issues could be found eligible for IDEA services under any of the other listed conditions as well, such as autism (ASD), specific learning disabilities (SLD), other health impairment (OHI) or, for that matter, developmental delays (DD). Therefore, the discussion cannot be limited to only those who meet the eligibility criteria for emotional disturbance.

3. Action and services required for IDEA eligible students

When a student meets the criteria for one of the conditions specified in the IDEA, the next question is whether the student needs special education and related services. These terms are specifically defined under the IDEA as well.

i. Definition of special education

The IDEA defines "special education" as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions and in other settings...." 20 U.S.C. § 1402(29) and 34 C.F.R. § 300.39. In turn, "specially designed instruction" is defined as adapting, as appropriate to the needs of the eligible child...the content, methodology, or delivery of instruction (i) to address the unique needs of the child that result from the child's disability; and (ii) to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. § 300.39(3).

ii. Definition of related services

The IDEA defines "related services" to include:

transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individual education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, (except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1402(26). The IDEA regulations add early identification and assessment of disabilities in children, as well as school health services and parent counseling and training to the list of examples of related services.

34 C.F.R. § 300.34. Obviously, this list is not an exhaustive list and could include virtually any service that “may be required to assist the child to benefit from special education.”

iii. **The Individualized Education Program (IEP)**

The vehicle for the delivery of special education and related services under the IDEA is the written Individualized Education Program, which is to be reviewed and revised at least annually. 34 C.F.R. § 300.320. The IDEA contains many requirements related to the IEP, including numerous procedural and content requirements. As a result, there has been extensive litigation since the IDEA’s enactment in 1975 regarding the appropriateness of a school district’s proposed IEP for a student with mental health issues.

B. Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities Act (ADA)

There are two other federal statutes that must be considered with respect to the provision of public educational services to students with mental health issues—that is, Section 504 of the Rehabilitation Act of 1973 (“Section 504”) and 504’s “sister statute,” Title II of the Americans with Disabilities Act (ADA). Section 504 and the ADA both prohibit discrimination solely on the basis of disability by federal fund recipients or governmental entities (such as public schools).

While the current ADA Title II regulations do not specifically address the provision of educational services or “FAPE,” Section 504’s accompanying regulations--specifically Part D of those regulations--provide the requirements for the provision of “FAPE” to students with disabilities under Section 504. Thus, should a student with mental health issues not meet the definition of a “child with a disability” under the IDEA, the student may very likely meet the definition of an “individual with a disability” under Section 504 (and the ADA), particularly in light of the expansive view that the Office for Civil Rights (OCR) and the Department of Justice (DOJ) have taken with respect to the definition of an “individual with a disability.”²

1. Definition of “individual with a disability” under Section 504 and ADA regulations

Unfortunately, the 504 regulations have not been updated since 1977 and, as a result, are politically incorrect in their use of the outdated word “handicap,” rather than persons-first language terminology-- “individual with a disability.” The 504 regulations provide that a person is "handicapped" under Section 504 if he or she:

- a. Has a physical or mental impairment which substantially limits one or more major life activities;

² The Office for Civil Rights (OCR) is the federal agency that enforces the provisions of Section 504 in schools, as well as the provisions of the Americans with Disabilities Act (ADA). In 2012, OCR made it clear that the definition of “individual with a disability” was expanded by the ADA Amendments enacted by Congress in 2008 and that the definition must be broadly construed, as has been recently confirmed in the new ADA Title II regulations that went into effect on October 11, 2016. Specifically, OCR said that the determination of whether an individual is disabled under Section 504 should not require an extensive analysis by school personnel and that “the nature of many impairments is such that, in virtually every case, a determination in favor of disability will be made. Thus, for example, a school district should not need or require extensive documentation or analysis to determine that a child with diabetes, epilepsy, bipolar disorder, or autism has a disability under Section 504 and Title II of the ADA. Dear Colleague Letter, 58 IDELR 79 (OCR 2012), Question 4.

- b. Has a record of such an impairment; or
- c. Is regarded as having such an impairment. 34 C.F.R. § 104.3(j)(1).

The definition of “physical or mental impairment” includes:

- a. Any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or
- b. Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 34 C.F.R. § 104.3(j)(2).

The definition of “major life activities” under the 504 regulations includes functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

In 2008, the ADA Amendments revealed, in general, that the definition of “disability” is to be construed broadly in favor of expansive coverage. As a result, the 2016 ADA Title II regulations provide that when determining whether a student has a “physical or mental impairment” that could constitute a disability, the ADA regulations set forth an updated list of conditions that presumptively constitute a “physical or mental impairment” under the ADA (and, by analogy, under Section 504). This list specifically includes, but is not limited to, things such as emotional illness and Attention Deficit Hyperactivity Disorder.

In addition, the 2008 ADA Amendments expanded the list of examples of functions that are considered to be major life activities to include eating, standing, lifting, bending, reading, concentrating, thinking and sleeping and, the 2016 ADA regulations added sitting, reaching, writing and interacting with others to the list of examples. These “major life activities” are specifically listed as examples only, and the list is clearly not exhaustive.³

Unfortunately, there is no definition of “substantially limits” in the 504 regulations. However, OCR has attempted to define “substantially limits” on several occasions, but such attempts have not been of much help to school teams. See e.g., Letter to McKethan, 23 IDELR 504 (OCR 1995) [neither the regulations nor OCR have defined the word “substantially” and the decision as to whether a particular impairment “substantially limits” a major life activity for a child is a determination to be made by a school district, and not OCR]; Pinellas Co. Sch. Dist., 20 IDELR 561 (OCR 1993) [the term “substantially limits” has been interpreted to require an “important and material” limitation. One of the purposes of Section 504 and Title II of the ADA is to improve opportunities for individuals with disabilities, who because of a generally acknowledged disabling condition, have been excluded from or experienced significant difficulty in obtaining the necessary education to be self-sufficient. The term “substantially limits” must be interpreted within that context].

In some “rules of construction,” the 2016 ADA regulations note that the primary object of attention in cases brought under Title II of the ADA should be upon whether public entities have complied with their

³ Importantly, and in the context of providing educational services to students under Section 504, OCR has clarified that the major life activity of “learning” is not the only major life activity that a school district must consider in determining whether a student has a disability under Section 504. Dear Colleague Letter, 58 IDELR 79 (OCR 2012), Question 7.

obligations and whether discrimination has occurred, not upon the extent to which an individual’s impairment substantially limits a major life activity. Accordingly, the “threshold issue” of whether an impairment substantially limits a major life activity should not demand “extensive analysis.”

The 2016 ADA regulations provide further that an impairment that substantially limits one major life activity does not need to limit other major life activities in order to be considered a substantially limiting impairment. 28 C.F.R. § 35.108(d)(1)(i)-(iii). In applying this principle, the DOJ in its commentary to the regulations provides the specific example of an individual seeking to establish coverage under the ADA who does not need to show a substantial limitation in the ability to learn if that individual is substantially limited in another major life activity, such as walking. 81 FR 53229 (2016). Therefore, a student diagnosed with Bipolar Disorder would not have to demonstrate a substantial limitation in the ability to learn to be considered an individual with a disability if that student is substantially limited in, for example, the ability to interact with others.

It is important for school teams to remember that when determining whether a student with mental health concerns is an individual with a disability under Section 504, the team cannot consider the ameliorative effects of any mitigating measures that the student may be using or receiving. Since the passage of the ADA Amendments in 2008, OCR has made it clear that for purposes of determining whether a student is disabled—that is, whether he/she has a physical or mental impairment that substantially limits a major life activity—school districts may not consider the ameliorative effects of any mitigating measures that the student may be using. FAQs about Section 504 and the Education of Children with Disabilities (2009), Question 21. Thus, when a school team is deciding whether a student is disabled under Section 504, the team must determine whether there is a physical or mental impairment that substantially limits a major life activity without consideration of or regard to the ameliorative effects of any mitigating measures. For example, where a student is taking medication to address Post-Traumatic Stress Disorder, the determination of “substantial limitation” and whether the student is disabled would need to be made based upon evidence (if it exists) of how the student performs major life activities when not on medication. Thus, a school team cannot take the position that the student is not an individual with a disability under Section 504 because the student has a “correctable” condition or one that can be resolved through the use of mitigating measures.

2. Action and services required for students with disabilities under Section 504

a. Providing 504 “FAPE” services

There is a provision for the provision of “504 FAPE” services contained in the 504 regulations. Specifically, the 504 regulations define “appropriate education” as the provision of regular or special education and related services that:

- i. are designed to meet *the individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met* and
- ii. are based upon adherence to procedures that satisfy the requirements of [other regulatory sections—such as LRE, etc.].

34 C.F.R. § 104.33(b) (emphasis added).

b. The 504 accommodation plan

While a written “IEP” is not necessarily required under the 504 regulations except for those students who are in need of one under the IDEA, it has become “best practice” for districts to document educational services for a student who is disabled only under Section 504 via a “Section 504 Accommodation Plan.”⁴ 504 Plans typically include “reasonable accommodations” or related services in the regular education program that are needed based upon disability. For example, a student with Bipolar Disorder may perform well academically and behaviorally and, therefore, does not need special education services from the district. However, she may need some related services in the form of counseling or other support services in order to continue to be successful in the regular education setting based upon her mental health issues. If the student were to need services under the IDEA, however, the IEP would become the vehicle through which they are provided and will satisfy 504’s FAPE requirements in that regard. See, 34 C.F.R. § 104.33(c)(2).

c. Prohibiting discrimination on the basis of disability

It is important to note that not every “individual with a disability” under Section 504 is going to need services or a “504 Plan” because their educational needs are met as adequately as those of non-disabled students. However, all students who are recognized as disabled under Section 504 (and the ADA) cannot be discriminated against on the basis of their disability, whether they actually need FAPE services or not. For example, a student with ADHD (or any other mental disorder diagnosis) who is taking medication may not need any special services under Section 504 but could not be excluded from an over-night field trip or other activity based on a school’s policy that does not allow students with medical diagnoses or who are taking medication to participate in such activities.

Similarly, allowing a student to make up assignments missed during a therapy session with his/her psychiatrist could be a reasonable accommodation for his/her disability. To fail to allow for that could constitute discrimination solely on the basis of disability that is prohibited generally by Section 504 and the ADA.

III. THE “CHILD-FIND” DUTY UNDER IDEA AND SECTION 504

A. Introduction

Both the IDEA and Section 504 contain a requirement known as the “child-find” duty. This refers to a school district’s duty to locate, evaluate and identify students with disabilities and those students for whom a district has sufficient “reason to suspect” or “reason to believe” are students with disabilities who are in need of special services. See, 34 C.F.R. § 300.111(c) and 34 C.F.R. § 104.35(a). Pursuant to this child-find duty, school personnel must be diligent in looking out for students with mental health issues that may constitute a “reason to suspect” or “reason to believe” that there is a disability present for which an evaluation under Section 504 or the IDEA is required.

⁴ In July 26, 2016, OCR issued another Dear Colleague Letter (DCL), which was accompanied by an extensive Resource Guide regarding educational services for students diagnosed with ADHD. This DCL and ADHD Resource Guide can be found at 68 IDELR 52 (OCR 2016) and is very instructive as it relates to OCR’s position on ADHD and, by analogy, to other diagnosed mental disorders or illnesses. It is important to note that OCR states in its guidance that a diagnosis of ADHD (which requires a comprehensive evaluation by a licensed clinician, such as a pediatrician, psychologist, or psychiatrist with expertise in ADHD) is evidence that a student may have a disability. Notably, OCR states that it “will presume, unless there is evidence to the contrary, that a student with a diagnosis of ADHD is substantially limited in one or more major life activities.” Resource Guide, p. 10. One can presume, then, that OCR would feel the same way about any other DSM-5 diagnosis.

B. Referral Red Flags

In summary, then, what does it take for there to be a sufficient “reason to suspect” or “reason to believe” that a student is disabled and may be in need of special education, related services or accommodations? Based upon substantial existing case law, I have developed a running checklist of “referral red flags” that courts/agencies could find, in combination, sufficient to constitute sufficient “reason to suspect a disability” that would trigger the IDEA’s or 504’s child-find duty to refer a student for an evaluation.

Important Note: When referring to this checklist, it is very important to remember that not one of these “red flags” alone (or even several together) would typically be sufficient to trigger the child-find duty under Section 504 or IDEA. However, the more of them that exist in a particular situation, the more likely it is that the duty would be triggered, especially if the student has significant mental health issues.

It is also important to note that it is more likely that the child-find duty will be triggered under Section 504 before it would be under the IDEA because the definition of disability is much broader and all-encompassing under Section 504 than it is under IDEA. Under the IDEA, it is rare that a court would find it sufficient to trigger the duty to evaluate if there are no referral red flags in the area of academic concerns. However, OCR is likely to find the 504 duty to evaluate has been triggered, even in the absence of any academic concerns.

Referral red flags to look out for include the following:

1. Academic Concerns in School

- Failing or noticeably declining grades
- Retention
- Poor or noticeably declining progress on standardized assessments
- Student negatively “stands out” academically from his/her same-age peers
- Student has been in the Problem Solving/RtI process and progress monitoring data indicate little academic progress or positive response to interventions
- Student already has a 504 Plan and accommodations have provided little academic benefit

2. Emotional/Behavioral Concerns in School

- Numerous or increasing disciplinary referrals for violations of the code of conduct
- Signs of depression or other emotional issues, withdrawal, inattention
- Truancy problems, increased/chronic absences or skipping class
- Student negatively “stands out” behaviorally from his/her same-age peers
- Student has been in the Problem Solving/RtI process and the implementation of a BIP and progress monitoring data indicate little behavioral progress or positive response to interventions
- Student already has a 504 Plan and accommodations have provided little behavioral benefit

3. Outside Information Provided

- Information that the child has been hospitalized (particularly for mental health reasons, chronic health issues, etc.)

- Information that the child has received a DSM-5 diagnosis (ADHD, ODD, OCD, etc.)
- Information that the child is taking medication
- Information that the child is seeing an outside counselor, therapist, physician, etc.
- Private evaluator/therapist/service provider suggests the need for an evaluation or services

4. Information from School Personnel

- Teacher/other service provider suggests a need for an evaluation under 504 or IDEA or suggests counseling, other support services, etc.

5. Parent Request for an Evaluation

- Parent requests an evaluation and other listed items above are present

C. Relevant Recent Court and Agency Decisions on the Child-Find Duty

Jana K. v. Annville Cleona Sch. Dist., 63 IDELR 278, 39 F.Supp.3d 584 (M.D. Pa. 2014). The parent’s failure to notify the district that a physician had diagnosed his daughter with depression did not excuse the district’s failure to conduct an IDEA evaluation. The duty to conduct an evaluation exists regardless of whether a parent requests an evaluation or shares information about a private assessment. Here, the district had sufficient information to suspect that the student had an emotional disturbance and might be in need of special education services. The student had poor relationships with peers and a tendency to report inoffensive conduct as “bullying;” she visited the school nurse on at least 54 occasions for injuries, hunger; anxiety or a need for “moral support;” the student’s grades, which has been poor to average in previous school years, plummeted when she began 7th grade; and the district was aware of at least one on-campus act of self-harm where she swallowed a metal instrument after using it to cut herself. This “mosaic of evidence” clearly portrayed a student who was in need of a special education evaluation.

Rodriguez v. Independent Sch. Dist. of Boise City, 63 IDELR 36 (D. Idaho 2014). Where the district requested documentation of an illness or accident in response to a parental request for homebound services based upon his increased anxiety about interactions with his classroom teacher and bus driver, it violated the IDEA. It was not the parents’ responsibility to prove the student’s anxiety was more severe than usual. Rather, it was the district’s duty to evaluate the student in light of the parents’ legitimate concerns and the student’s physician’s recommendation. Where the student went without services for 8 months, the district’s summary rejection of the parents’ request for homebound services resulted in a denial of FAPE.

Demarcus L. v. Board of Educ. of the City of Chicago, 63 IDELR 13 (N.D. Ill. 2014). District court did not err in finding that there was no child find violation. A parent seeking relief for a child-find violation must show that the district 1) overlooked clear signs of disability and negligently failed to order an evaluation; and 2) had no rational justification for its decision not to evaluate. Here, the parent failed to meet either standard. While the child was rude and discourteous, had disrupted classroom activities and engaged in behaviors such as fighting and yelling when he did not get his way, there was no fault in the district’s belief that it could manage the child’s behaviors using classroom-level interventions. District personnel managed and de-escalated the child’s behavior through the first semester of 2011 while he was in second grade and the district conducted an IDEA evaluation in late 2011, after it suspended him twice for disrupting classroom activities and learned of his subsequent psychiatric hospitalization.

Tracy (CA) Unif. Sch. Dist., 115 LRP 17619 (OCR 2015). Although the student was diagnosed with ADHD and had problems finishing his work, the district refused to evaluate him for approximately four months. Under Section 504 and ADA, a district has an affirmative obligation to evaluate all students who may need special education or related aids and services due to a suspected disability. Here, since the beginning of the school year, the student received low test scores in math, English and Language Arts. His teachers also reported that he had problems focusing in class, had academic troubles for years and needed extra time to complete assignments and other informal classroom accommodations. However, the district declined to initiate the evaluation process, arguing that it could only refer students for an evaluation after they received six to eight weeks of academic interventions. Such a blanket policy is inappropriate. “Although attempting other interventions ... may be appropriate in other circumstances, here, the District had specific information about this individual student to suspect a disability.” In fact, by the time the district evaluated the student and found him eligible for an IEP, his test scores were worse. Thus, the district is to provide the student with compensatory education and issue a memorandum to all staff explaining appropriate evaluation procedures.

Oxnard (CA) Elem. Sch. Dist., 56 IDELR 274 (OCR 2011). School district discriminated against a first-grader diagnosed with ADHD, a seizure disorder and a mood disorder by delaying his IDEA evaluation and failing to evaluate for Section 504 services. The district violated 504 by referring the student to its student support team before conducting an evaluation, even when there was reason to suspect a need for special education services. Where the district placed the child on a half-day schedule and later excluded him from summer school due to his disruptive behavior, coupled with the knowledge of the medical diagnoses, there was enough there to have suspected a need for special education services.

Compton Unified Sch. Dist. v. Addison, 54 IDELR 71, 598 F.3d 1181 (9th Cir. 2010), cert. denied, (2012). Where failing 10th grade student was referred by the school to a mental health counselor (who ultimately recommended an evaluation), her teachers indicated that her work was “gibberish and incomprehensible,” she played with dolls in class and urinated on herself, district cannot avoid a child find claim based upon an argument that it did not take any affirmative action in response to high schooler’s academic and emotional difficulties because the parent did not request an evaluation. Where the district argued that the IDEA’s written notice requirement applies only to proposals or refusals to initiate a change in a student’s identification, evaluation or placement and its decision to do nothing did not qualify as an affirmative refusal to act, the argument is rejected. The Court will not interpret a statute in a manner that produces “absurd” results and the IDEA’s provision addressing the right to file a due process complaint is separate from the written notice requirement. “Section 1415(b)(6)(A) states that a party may present a complaint ‘with respect to any matter relating to the identification, evaluation, or educational placement of the child,’” and the IDEA’s written notice requirement does not limit the scope of the due process complaint provision. By alleging that the district failed to take any action with regard to the student’s disabilities, the parent pleaded a viable IDEA claim. (Note: The dissent in this case noted that determining that a “refusal” to identify or evaluate requires purposeful action by the district and the parent did not have the right to bring a child find claim without a request and a “refusal” on the part of the district).

Polk Co. (FL) Sch. Dist., 56 IDELR 179 (OCR 2010). Where district’s policies indicated that completing the RtI process was a prerequisite to qualifying for special education services and the district told the parent that the student first had to complete general education interventions before an evaluation could be conducted, district violated Section 504’s evaluation requirements. By September of 2009, the district had sufficient evidence, based upon parent input, the student’s academic performance and medical documentation that the student might need special education and related services because of his ADHD, but waited until March 2010 to conduct an evaluation.

Jackson v. Northwest Local Sch. Dist., 55 IDELR 104, 2010 WL 3452333 (S.D. Ohio 2010). The failure to conduct an MD review prior to suspending and ultimately expelling a third-grade student with ADHD for threatening behavior violated the IDEA's procedural safeguards. Clearly, the district should have known that the student had a disability at the time it expelled her because it had provided her with RTI services for approximately two years but she had made few gains. In addition, there were behavioral concerns expressed by her teacher and others that resulted in a referral by her RtI team to an outside mental health agency for an evaluation, but the district did not initiate its own evaluation at that time.

Regional Sch. Dist. No. 9 Bd. of Educ. v. Mr. and Mrs. M., 53 IDELR 8 (D. Conn. 2009). Where district violated its child find obligation, it must reimburse the parents for the student's therapeutic placements. Although the student's hospitalization did not in itself qualify her as a child with an emotional disturbance, "[t]he standard for triggering the child find duty is suspicion of a disability rather than factual knowledge of a qualifying disability." The parent completed a health assessment form just one week before the student's hospitalization, when she enrolled the student in her local high school. The form stated that the student had been diagnosed with depression the previous year and was taking an antidepressant. Those statements, combined with the student's subsequent hospitalization, should have raised a suspicion that the student suffered from an emotional disturbance over a long period of time. Based upon private evaluations, the student is eligible for IDEA services and her parents are entitled to reimbursement.

N.G. v. District of Columbia, 50 IDELR 7 (D. D.C. 2008). Where student exhibited at least two of the five characteristics of SED (pervasive depression and inappropriate types of behaviors), her academic performance was adversely affected as a result, and DCPS knew it, the school district should have evaluated her, particularly after being informed of her ADHD diagnosis. In addition, she failed four of her seven classes when she had previously been an A/B student.

Wilson Co. (NC) Pub. Schs., 51 IDELR 137 (OCR 2008). District could not avoid liability for its child find violation merely by pointing out that the 7th-grader's parents never requested a special education assessment. The student's poor grades, inappropriate behaviors and ADHD tendencies should have given the district reason to suspect the existence of a disability. Along with poor academic performance, the student was suspended from the school bus on several occasions for offenses that included throwing objects, moving from seat to seat, and hitting fellow classmates. In addition, the student failed math and social studies and will repeat 7th grade. Furthermore, an evaluation conducted in 2005 showed that the student tested in the "at-risk to clinically significant" range for ADHD. All of these factors should have put the district on notice of potential disability.

IV. SPECIFIC CONCERNS FOR SCHOOLS

There are many specific concerns that schools need to keep in mind as they encounter more and more students with significant mental health issues and assess their responsibilities for providing services to them. Overall, school districts must work in conjunction with mental health professionals to jointly ensure that appropriate interventions for students with mental health issues are in place and implemented, especially those services required of schools under Section 504 and the IDEA.

System-wide initiatives should be put in place to include things such as staff training, cooperative arrangements with local mental health professionals, appropriate evaluations for students who have mental health issues or have been exposed to traumatic events, appropriate interventions and strategies for problem-solving teams to utilize and creation of effective policies and procedures for responding to the mental health needs of students and limiting system liability for the failure to do so. A couple areas of focus or "hot topics" are worthy of highlighting here:

A. Related Services for Students with Mental Health Issues

As discussed above, services such as counseling services, psychological services, social work services and parent counseling and training are included in the definition of related services under the IDEA. Each has its specific definition under the IDEA and could be required to be provided by the school district if necessary for a student to receive FAPE under the IDEA. Even though Section 504 does not specifically list examples of related services or otherwise define them, it is certain that OCR would view these same types of services as related services under Section 504 as well. It is important to note that the definition of “related services” is not all-inclusive and that many services could be requested as related services.

B. Private School/Residential Placement Services

While medical services are specifically excluded from the definition of “related services” and are, therefore, not an educational service for which school districts would be responsible, there has been a great deal of litigation over a span of many years seeking school board funding for the placement of a student with a disability in a private facility, including a residential treatment facility. Indeed, the IDEA regulations provide that if placement in a public or private residential facility is necessary to provide special education and related services to a child with a disability, nonmedical care and room and board must be provided. 34 C.F.R. § 300.104.

In general and pursuant to Supreme Court authority, in order to obtain such funding, the parents of a student with a disability must demonstrate that the school district at issue did not make FAPE available to the disabled student and that the private placement chosen by the parents is appropriate for the student and necessary for FAPE. School Comm. of the Town of Burlington v. Department of Educ. of Massachusetts, 471 U.S. 359 (1985). Many cases involving students with significant mental health issues attempt to separate educational versus non-educational services in determining school board responsibility, but some are unable to do so:

North v. District of Columbia Bd. of Educ., 551 IDELR 157 (D. D.C. 1979). While it may be possible in some situations to ascertain and determine whether the social, emotional, medical, or educational problems are dominant and to assign responsibility for placement and treatment to the agency operating in the area of that problem, in this case, all of these needs are so intimately intertwined that realistically it is not possible for the Court to perform the “Solomon-like task of separating them.”

Kruelle v. New Castle County Sch. Dist., 552 IDELR 350, 642 F.2d 687 (3d Cir. 1981). The analysis “must focus...on whether full-time placement may be considered necessary for educational purposes, or whether the residential placement is in response to medical, social or emotional problems that are segregable from the learning process.” If the needs are “inextricably intertwined” with the learning process and a court cannot segregate a child’s medical, social or emotional problems from the learning process, the school district must reimburse the parents for the private residential placement. “[H]ere, consistency of programming and environment is critical to Paul’s ability to learn, for the absence of a structured environment contributes to Paul’s choking and vomiting which, in turn interferes fundamentally with his ability to learn.”

Clovis Unified Sch. Dist. v. California Office of Administrative Hearings, 16 IDELR 944, 903 F.2d 635 (9th Cir. 1990). Hospitalization to treat psychiatric illness is not educational and, therefore, is not a “related service.” Medically excluded services are not only those services provided by a physician, but also those services provided in a psychiatric hospital. Thus, the psychotherapeutic services provided by the acute care facility, which were

intended to treat the child's current medical crisis, did not become related services simply because the providers were not always licensed physicians. While the child's hospitalization may have been necessary for her continued mental health, such a confinement was not essential for the child to receive an educational benefit. The district, therefore, was not obligated to fund the placement at the acute care facility.

Taylor v. Honig, 16 IDELR 1138, 910 F.2d 627 (9th Cir. 1990). Private treatment facility is accredited as an education institution and it operates a full-time school. Thus, it is educational and should be funded by the school district, particularly where the student's IEP called for long-term residential treatment, but the school district had been unable to locate an available, in-state facility.

Field v. Haddonfield Bd. of Educ., 18 IDELR 253, 769 F. Supp. 1313 (D. N.J. 1991). School district is not responsible for funding placement in drug treatment program. The drug treatment program was designed to cure an illness and not to assist the student in deriving an benefit from his educational program. Thus, therefore, the drug treatment program is excludable as a medical service under the EHA, and the district is not obligated to provide such a program as a related service.

Dale M. v. Board of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307, 33 IDELR 266, 237 F.3d 813 (7th Cir. 2001). The test for determining when private residential placement is required under the IDEA is whether the services are "primarily oriented toward enabling a disabled child to obtain an education" or whether they are "oriented more toward enabling the child to engage in noneducational activities. The former are 'related services' within the meaning of the statute, the latter are not." Thus, the proper inquiry is whether the residential placement is "primarily educational." Under this inquiry, though the student has "the intelligence to perform well as a student," he suffers from a "lack of socialization," and the purpose of the private treatment is keeping him out of jail, not to educate him. Here, the placement is simply a "jail substitute."

Independent Sch. Dist. No. 284 v. A.C., 35 IDELR 59, 258 F.3d 769 (8th Cir. 2001). The results of an IEE, which concluded that the student could not receive educational benefit until her emotional and behavioral issues were resolved, are accepted. The residential placement offered the high degree of structure and support the student needed, as her previous truancy and disruptiveness prevented her from making progress in the district's self-contained classroom. There was a consensus that the student would be unable to obtain any educational benefit in a setting other than a residential program. However, the case is remanded to the district court for further findings of fact and for an appropriate remedy, as it is unclear whether the student continues to reside in the district and whether the out-of-state facility suggested by her parent is an appropriate residential placement.

Kings Local Sch. Dist. Bd. of Educ. v. Zelazny, 38 IDELR 236, 325 F.3d 724 (6th Cir. 2003). Parents are denied residential placement reimbursement for placement of a high-schooler with Tourette's syndrome, Asperger's disorder and ODD because the district offered the child an appropriate program during his freshman year. Although the student exhibited increased behavior problems at home, they did not prevent him from succeeding at school. To assess whether a public funding of a residential placement is appropriate, a court or administrative officer must determine whether the setting is necessary for educational purposes, as opposed to medical, social or emotional problems that can be separated from the learning process. While the student's mother felt her son's behavior at home was making her life "a living hell," she indicated she was satisfied with his school situation.

Ms. K. v. Maine Sch. Admin. Dist. No. 40, 46 IDELR 247 (D. Me. 2006). In a case seeking, among other things, reimbursement for placement of a student in a residential wilderness camp program, parents are denied their request where "a contrary ruling under the circumstances of this case would essentially put the Court in the position of establishing as an education policy that children with depression stemming from family conflict

must be provided an IEP having a residential component whenever a treatment provider identifies a link between clinical depression and the home environment and that child's depression merely has some impact on academic performance." The evidence was clear that the student could receive educational benefit without being in a residential placement.

P.K. v. Bedford Cent. Sch. Dist., 50 IDELR 251, 569 F. Supp. 2d 371 (S.D.N.Y. 2008). Because teenager can receive FAPE in district's therapeutic program, the district had no obligation to reimburse the parents for the child's unilateral residential placement. Clearly, the student's difficulties in the district's program resulted from substance abuse rather than an inappropriate placement. Where the parents contended that the student's drug and alcohol problems were "inextricably intertwined" with his emotional disturbance and, as such, the IEP team should have offered a placement that addressed the student's emotional needs and his substance abuse issues, such arguments are rejected. The student made significant progress in the district's therapeutic program during the 2004-05 school year, and the IEP team decided to continue that placement for the 2005-06 school year. Clearly, the student's performance deteriorated after he began abusing drugs and alcohol and "[i]t was...reasonable for the district to attribute [the student's] difficulties during the 2005-06 school year to his substance abuse, and not to his disability or any shortcomings of the [therapeutic] program." Districts have no obligation to fund private substance abuse programs and because the therapeutic program met the student's needs when he did not abuse drugs and alcohol, the student does not need a residential placement to receive FAPE.

Christopher B. v. Hamamoto, 50 IDELR 195 (D. Haw. 2008). Although the Hawaii ED might have denied FAPE to a student with an undisclosed disability, that did not require it to pay for all of the student's privately obtained services. Thus, \$42,564 worth of hospital, pharmaceutical and post-school year expenses will be deducted from the parents' reimbursement request. Although the student is entitled to a residential placement, he does not require a hospital placement. Placement in a mental health center does not qualify as a residential placement and "[b]ecause the [mental health center]...served as a hospital rather than a residential placement, [the parents] cannot recover these costs from [the ED]." Moreover, medical services qualify as related services only to the extent that they are used for diagnostic and evaluation purposes. As such, the parents cannot recover the cost of prescription medications that were part of the student's regular treatment.

Richardson Indep. Sch. Dist. v. Michael Z., 52 IDELR 277, 580 F.3d 286 (5th Cir. 2009). The following test is applicable in determining whether residential placement is required: "In order for a residential placement to be appropriate under the IDEA, the placement must be 1) essential in order for the disabled child to receive a meaningful educational benefit; and 2) primarily oriented toward enabling the child to obtain an education." Unlike *Kruelle*, "this test does not make the reimbursement determination contingent on a court's ability to conduct the arguably impossible task of segregating a child's medical, social, emotional, and educational problems." "IDEA, though broad in scope, does not require school districts to bear the costs of private residential services that are primarily aimed at treating a child's medical difficulties or enabling the child to participate in non-educational activities....This is made clear in IDEA's definition of 'related services,' which limit reimbursable medical services to those 'for diagnostic and evaluation purposes only.'" While the district court did make the factual finding that residential placement was necessary for this student to receive a meaningful educational benefit and that she could achieve no educational progress short of residential placement, the case is remanded for the district court to make factual findings as to whether treatment at the particular residential facility was primarily designed for, and directed to, enabling her to receive a meaningful educational benefit.

Linda E. v. Bristol Warren Regional Sch. Dist., 55 IDELR 218 (D. R.I. 2010). Hearing officer's award of residential placement for a 17-year-old emotionally disturbed student is upheld. School district's argument that the student's difficulties were segregable from the learning process because her behavioral problems occurred in the

home is rejected. It is clear that the student's teacher reported behavioral issues as early as second grade and sixth-grade disciplinary records reported incidents of rudeness, disruptive behavior and theft. In addition, she had threatened to harm another student. In addition, the school system's suggestion that there was no evidence that the residential placement was for the purpose of making educational progress is rejected, where at least one of her treating psychiatrists wrote in a report and stated unequivocally that "if [S.E.] is to make reasonable educational progress, [she] needs a highly structured therapeutic residential placement."

Shaw v. Weast, 53 IDELR 313, 364 F. App'x 47 (4th Cir. 2010) (unpublished). 20 year-old ED student with post-traumatic stress disorder did not require residential placement in order to receive FAPE. Rather, her parents placed her in a residential facility because they were concerned about her safety and medication compliance. Where residential placement is necessitated by medical, social or emotional problems that are segregable from the learning process, a district need not fund it. Clearly, this is not a situation where the student required around-the-clock assistance with basic self-help and social skills. While her progress slowed in the district's special day school placement during psychiatric episodes, she made educational progress when those issues stabilized and the school continued to offer the services necessary to implement her IEP. "That [student's] emotional and mental needs required a certain level of care beyond that provide at [the district's day school] does not necessitate a finding that the state should fund that extra care when it can adequately address her educational needs separately."

T.R. v. Cherry Hill Township Bd. of Educ., 58 IDELR 260 (D. N.J. 2012). Autistic student could not be satisfactorily educated in a special day class, where the student's behaviors included hitting others, screaming 100 or more times during the school day, noncompliance, such as throwing instructional materials and self-stimulatory behaviors. This conduct prevented him from learning academics or daily living skills, despite 1:1 attention provided. In addition, the student's behaviors persisted and even got worse. Because the student will only acquire life skills and academic progress with the consistency of instruction that a residential placement can provide, a residential placement is ordered. An educational program does not simply include the material taught in lessons "but necessary life skills such as toileting are considered part of the child's educational needs."

Coventry Pub. Schs. v. Rachel J., 59 IDELR 277, 893 F.Supp.2d 322 (D. R.I. 2012). District is required to reimburse the parents for an out-of-state therapeutic residential program for a teenager with ADHD and ODD because the proposed IEP did not include social and behavioral goals. Although the student's special day class teacher reportedly noted that the student's difficulties with focus and "unrelenting" oppositional behaviors prevented him from acquiring essential skills, the district did not address his social or behavioral needs in the 6th grade IEP. Instead, the Team developed four goals relating to reading, writing and math. "The record is abundantly clear that [the student's] behavioral disabilities act like a boulder that blocks his way from making academic and educational advancements." In addition, the student requires the around-the-clock support of a residential program to make educational progress.

Jefferson Co. Sch. Dist. R-1 v. Elizabeth E., 60 IDELR 31, 702 F.3d 1227 (10th Cir. 2012), cert. denied, (2013). Parents of an emotionally disturbed teenager can recover the cost of her out-of-state residential placement from the school district. While the 1st, 2nd, 3rd, 4th, 6th, 8th, 9th, 11th and D.C. circuit courts use the "educationally necessary" test for determining whether residential placement should be provided by a school district (which focuses upon the segregability of the student's academic, medical and emotional needs), the 5th and 7th circuits have used a standard that requires consideration of whether the services provided in the residential program are "primarily oriented" toward allowing the student to be educated. This court will settle upon a third option using a straightforward application of the statute's text providing that parents may recover the cost of a student's residential placement if 1) the district denied FAPE to the student; 2) the residential facility is a state-accredited elementary or secondary school; 3) the facility provides specially designed instruction to meet the student's unique needs; and 4) any nonacademic services the student receives meet the IDEA's definition of "related

services.” Importantly, the district never challenged the administrative or judicial findings that it denied FAPE to the student. In addition, because the residential placement is an accredited educational institution under Idaho law, it falls within the IDEA’s definition of a secondary school. Further, the facility provided the student both specially designed instruction and related services. Thus, in this case, the application of the IDEA’s plain language entitles the parents to reimbursement.

Munir v. Pottsville Area Sch. Dist., 61 IDELR 152, 723 F.3d 423 (3d Cir. 2013). Whether the parent of an ED teenager was entitled to funding for a residential placement depends upon whether the student needed to attend the residential program because of his educational needs. Because the parents testified that they “feared for [student’s] personal safety” when placing him in the residential facility, the placement resulted from the student’s mental health needs, rather than his educational needs. “Indeed, [student] was an above-average student...who had no serious problem with attendance and socialized well with other students” prior to being placed in residential. Because the parents could not show that they placed the student in the residential program for educational reasons, the lower court’s decision is affirmed.

E.K. v. Warwick Sch. Dist., 62 IDELR 289 (E.D. Pa. 2014). School district cannot be held responsible for treating a student’s long-term drug addiction, familial problems or delinquent behavior and, therefore, is not responsible for paying for her placement in a residential drug and alcohol treatment facility. The district’s offered program included an IEP with organizational and behavioral goals, calling for the student to receive regularly scheduled counseling and social skills instruction. Further, the program’s staff included a social worker, a psychologist, a job trainer, a nurse, and a private therapist—all of whom were trained to be aware of and intervene with any drug or alcohol issues. The district’s program offers FAPE.

Fort Bend Indep. Sch. Dist. v. Douglas A., 64 IDELR 1 (5th Cir. 2015) (unpublished). Reimbursement to parents for placement of their child in a \$7,000-per-month residential treatment facility is reversed. When determining whether a residential placement is appropriate, the court will determine 1) whether the parents placed the student in the facility for educational reasons; and 2) whether the facility evaluates the student’s progress primarily by educational achievement. Here, there was no evidence that the parents placed their son in the facility for educational purposes versus his emotional and mental health needs. Further, the facility’s founder “expressly disclaimed” that education was the primary purpose of the facility. Rather, the founder testified that a student’s discharge from the facility is based upon progress made with respect to Reactive Attachment Disorder and not educational achievement. The parents’ notion that educational progress made as a result of receiving mental health treatment makes the placement appropriate is rejected. “[M]easuring progress by success in treating the underlying condition, on the theory that such progress will eventually yield educational benefits as well, is insufficient.” Because the placement was not appropriate, the court will not consider whether the district offered FAPE.

N.G. v. ABC Unif. Sch. Dist., 68 IDELR 270 (9th Cir. 2016) (unpublished). Under the California Education Code, the school district where a psychiatric hospital is located is responsible for providing FAPE to a student hospitalized there. However, upon discharge, the school district of residence is responsible for FAPE and that would be the LEA where the student’s guardian resides, not where the hospital is located.

R.C. v. Board of Educ. of the Wappingers Cent. Sch. Dist., 68 IDELR 187 (S.D. N.Y. 2016). School district’s proposed therapeutic day school offered FAPE. Thus, the parents’ request for reimbursement for the unilateral placement of their child with autism in a residential placement is denied. It was not unreasonable for the hearing officer to determine that the student’s treating psychiatrist’s concerns could be addressed in the district’s day school program because of its small structured classes, therapeutically trained staff, school psychologists and counselors. The district’s day school was also capable of implementing the psychiatrist’s

recommendation that the student check in with a counselor or psychologist every day at the same time. While the school might not be perfect, the IDEA only requires a placement capable of conferring educational benefit in the LRE.

Zachary G. v. School Dist. No. 1, 68 IDELR 222 (D. Co. 2016). Parents may not recover the cost of placement of their ninth-grade student with Prader-Willi syndrome in a residential facility. While food security was vital to the student's ability to receive FAPE, the parents' claim that the district failed to provide "total food security" that their experts deemed necessary is rejected. Rather, the IEP team worked closely with the student's treating psychiatrists in developing its proposed food security plan and took steps to limit the student's unsupervised access and unnecessary exposure to food. These steps included educating the student in a smaller section of the school that could be monitored for food, assigning two paraprofessionals to accompany the student and clear hallways of food in advance, and training all relevant staff on how to support the student in the event of a food security breach. The fact that the IEP does not use the terms "total food security" does not mean that the district did not take it seriously and did not take reasonable steps to implement what was needed.

Sacramento City Unif. Sch. Dist., 68 IDELR 220 (E.D. Cal. 2016). Parents are entitled to reimbursement for placement of their 11th-grade child in a residential placement based upon the district's inadequate offer of mental health services, which required the student to split her time between two schools and receive services from two school-based therapists. While not finding that the student needed residential placement in order to receive FAPE, by making the student's social and emotional development part of her IEP, the district committed itself to providing the services she needed to make progress on goals related to improving her self-esteem, helping her to manage feelings of hopelessness and assisting with interpersonal communication.

C. Medication Issues

Many students with mental health issues are prescribed medication, and many of those students take medication during the school day. A general policy of refusing to administer medication will not pass muster for students with disabilities who may need it. If a student with a disability must take medication during the school day to participate effectively in his educational program, then administration of that medication may be a related service. See, e.g., Birmingham City Bd. of Educ., 33 IDELR 236 (SEA AL 2000) [district ordered to devise a strategy to ensure that a student with ADHD receives medication at the proper intervals and dosages].

It is also important for school personnel to be aware of the law's prohibition on mandatory medication. State and local school personnel cannot require a parent to obtain a prescription for a controlled substance for a child as a condition of attending school, receiving an evaluation under the IDEA, or receiving special education and related services. 34 C.F.R. § 300.174(a). However, this provision does not prevent teachers or other personnel from consulting or sharing classroom-based observations with parents regarding the child's academic or functional performance, behavior, or need for an evaluation under the IDEA. 34 C.F.R. § 300.174(b). It should be noted that the U.S. DOE has indicated that the IDEA's prohibition on mandatory medication applies to all students, regardless of their eligibility for special education and related services. Letter to Inhofe, 49 IDELR 286 (OSERS 2007).

An important case in this regard is as follows:

Valerie J. v. Derry Cooperative Sch. Dist., 771 F. Supp. 483 (D. N.H. 1991). School district acted unreasonably in insisting that student's IEP include requirement that student take Ritalin or similar drug as condition to receipt of services.

D. Violations of the Code of Conduct and Discipline

As every school administrator knows, a student identified as disabled either under IDEA or Section 504 cannot be disciplined for violations of the student code of conduct in the same way as nondisabled students are. This is because it is considered a form of discrimination if educational services are taken away based upon behavior that is caused by (or a manifestation of) the student's disability, including a mental illness. As a summary, these are the top 10 general concepts that apply:

1. Discipline of students with disabilities is all about "change of placement." Thus, a school administrator or other disciplinarian should always ask whether a contemplated disciplinary removal (in the form of suspension, expulsion or other disciplinary removal for a violation of the code of student conduct) is going to constitute a "change of placement" for the student with a disability.
2. A disciplinary "change of placement" is defined as follows: For purposes of removals of a child with a disability from the child's current educational placement, a change of placement occurs if—
 - (1) The removal is for more than 10 consecutive school days; or
 - (2) The child has been subjected to a series of removals that constitute a pattern--
 - (i) Because the series of removals total more than 10 school days in a school year;
 - (ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
 - (iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.
- 34 CFR § 300.536.
3. "Current placement" is defined by the services/program set out in the student's current IEP or 504 Plan. When those services are not provided via the use of a disciplinary removal, that is counted as change of placement time. Removals such as in-school suspension and suspension from the bus need to be considered.
4. If it is contemplated that a disciplinary change of placement is going to occur due to a violation of the student code of conduct, a manifestation determination must be conducted.

With respect to making a manifestation determination, the IDEA regulations provide as follows:

Within 10 school days of any decision to change the placement of a student with a disability because of a violation of a code of student conduct, the LEA, the parent and relevant members of the IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the IEP, any teacher observations, and any relevant information provided by the parents to determine--

- (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or

(ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

The conduct must be determined to be a manifestation of the student's disability if the LEA, the parent and relevant members of the IEP Team determine that condition (i) or (ii) above was met. In addition, if it is determined that condition (ii) was met, the LEA must take immediate steps to remedy those deficiencies.

34 CFR § 300.530(e).

5. If it is determined that the violation of the student code of conduct was a manifestation of the student's disability, the IEP Team must either—

(i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the student; or

(ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(iii) Return the student to the placement from which he/she was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

34 CFR § 300.530(f).

6. If it is determined that the violation of the student code of conduct was not a manifestation of the student's disability, school personnel may apply the relevant disciplinary procedures to students with disabilities in the same manner and for the same duration as the procedures would be applied to students without disabilities. However, under the IDEA, the student must continue to receive educational services so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP and receive, as appropriate, a functional behavioral assessment and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur. Under Section 504, a 504-only student is not entitled to continued "FAPE."

34 CFR § 300.530(c).

7. After any student has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal, the school district must provide services as described in 6. Above under the IDEA.

34 CFR § 300.530(d).

8. A school district is required to provide services during periods of removal to a student with a disability who has been removed from his or her current placement for 10 school days or less in that school year, only if it provides services to a student without disabilities who is similarly removed.

34 CFR § 300.530(d)(3).

9. “Special circumstances” exist for the discipline of IDEA students with disabilities involved in weapons, drugs or serious bodily injury offenses.

School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is a manifestation of the student’s disability, if the child—

- (1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA;
- (2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or
- (3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.

Such students must also receive continued services as described in 6. above.

34 CFR § 300.530(g).

10. Regular education students not determined eligible for special education may assert these disciplinary protections if the school district had knowledge that the student was a student with a disability before the behavior that precipitated the disciplinary action occurred.

A school district will be deemed to have knowledge that a student is disabled, if before the behavior that precipitated the disciplinary action occurred—

- (1) The parent of the student expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the student, that the student is in need of special education and related services;
- (2) The parent of the student requested an evaluation under the IDEA; or
- (3) The teacher of the student, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the student directly to the director of special education of the agency or to other supervisory personnel of the agency.

A school district would not be deemed to have knowledge if--

- (1) The parent of the student--
 - (i) Has not allowed an evaluation of the student; or
 - (ii) Has refused services offered under the IDEA; or
- (2) The student has been evaluated and determined not to be a student with a disability under the IDEA.

34 CFR § 300.534.

E. Dealing with Students with Mental Health Concerns who are a Danger to Self or Others

1. Proposing a change of placement rather than use of traditional disciplinary sanctions

With the rules of discipline and “change of placement” as complicated as they are for students with disabilities, school districts find themselves dealing with extremely dangerous behaviors on the part of students with mental illness. Rather than attempting to impose suspension or expulsion that triggers the manifestation determination and other procedural requirements, a school district should consider first seeking to propose a change of placement to a more restrictive setting (even, in some cases, a residential placement) via the IEP team process, particularly if the behaviors are obviously a manifestation of the student’s disability. If the parent challenges the proposed change of placement, a school district may need to resort to seeking court assistance via injunctive relief, as originally set forth by the U.S. Supreme Court back in 1988. Honig v. Doe, 484 U.S. 305 (1988).

Wayne-Westland Comm. Schs. v. V.S., 64 IDELR 139 (E.D. Mich. 2014) and 115 LRP 5164 (2015). District’s motion for an injunction temporarily prohibiting a teenager with a disability from entering the high school grounds is granted where an administrator’s statement indicates that the student has become physically violent on multiple occasions. A court may, in appropriate situations, temporarily enjoin a dangerous student from attending school when the student poses an immediate threat to the safety of others. Here, the district’s complaint showed that the 6-foot, 250-pound student kicked, punched and spit on students and staff; threatened to rape a female staff member; and threatened to stab two staff with a pen. After the IEP team reduced the student’s attendance to one hour a day, the student attacked the school’s security liaison. When told to leave the school building, the student tried to force his way back into the building and four staff members were required to hold the school doors shut to keep him out. Since then, the student had also threatened to bring guns to school, made racist comments to staff, and punched the school’s director in the face. Thus, the district may temporarily educate the student through an online charter school program. NOTE: On February 4, 2015, the court granted a permanent injunction barring the student from entering any premises owned by the district or attending school events. The district was able to prove all four factors required to obtain permanent relief: 1) that it would suffer irreparable harm; 2) the remedies available at law are inadequate to compensate for that harm; 3) the balance of hardships tip in its favor; and 4) the injunction would not be against public interest. This is so because of the student’s history of physical violence that demonstrated an “extreme risk” of imminent and irreparable injury. Remedies such as money damages would be inadequate to address any injuries to others resulting from the student’s conduct and schoolmates and staff would suffer a far greater injury than the student, who can continue his education through an online program. Protecting the safety of others is in the public’s interest.

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

Troy Sch. Dist. v. v. K.M., 64 IDELR 303 (E.D. Mich. 2015). District’s request for a temporary restraining order is denied where it was not shown that the district would suffer irreparable harm or imminent injury if the teenager returned to his public high school. The IDEA’s stay-put provision requires that a student remain in his then-current educational placement during any pending administrative proceedings. While a court can authorize

a change in placement when a student engages in violent or dangerous behavior, it cannot do so unless the district shows that maintaining the student in his current placement is substantially likely to result in injury to the student or others. Here, the district did not meet that burden where the incident that resulted in the student's most recent suspension occurred in the absence of the "safe person" required by his IEP and no serious injuries were recorded. Thus, the student is not substantially likely to injure himself or others if the district implements his IEP.

2. Contacting criminal authorities when crimes are committed

It is important to note that the IDEA specifically allows for the reporting of criminal behaviors on the part of students to criminal authorities. However, school districts should proceed with caution in doing so and refrain from over-use of school resource officers and other criminal authorities as any kind of substitute for the services it should be providing to a student.

The IDEA specifically provides that :

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

An agency reporting a crime committed by a student with a disability must ensure that copies of the special education and disciplinary records of the student are transmitted for consideration by the appropriate authorities to whom the agency reports the crime. In addition, an agency reporting a crime may transmit copies of the student's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act (FERPA) (requiring notice to the parent).

34 CFR § 300.535. Obviously, a student's records would include FBAs and BIPs that are maintained and would be transmitted.

F. The Use of Restraint/Seclusion

There may be times where a student with mental health issues becomes an imminent danger to self or others in school, necessitating the use of restraint or seclusion by school personnel.

1. Congressional Action

Since 2009, Congress has been in various stages of passing proposed legislation regarding the use of restraint and seclusion in schools. However, the process was never completed, and it is not expected that anything will pass anytime soon, if ever, at the Congressional level.

2. Federal action/guidance

a. U.S. DOE's 2012 Resource Document

On May 15, 2012, the U.S. Department of Education issued an important 40-page document entitled "Restraint and Seclusion: A Resource Document" (hereinafter "Resource Document") containing 15 guiding principles regarding restraint and seclusion that should be considered by states and school districts when developing their

policies and procedures related to the use of restraint and seclusion.⁵ While the document is clearly not law or binding authority, it has been referenced by the Office for Civil Rights (OCR) on several occasions and, for that reason, the Resource Document is important for states and school districts to consider. See, e.g., Prince William Co. (VA) Pub. Schs., 114 LRP 34872 (OCR 2014) [finding that the district’s policies were consistent with the Resource document but that district was not following it]; Tuscaloosa (AL) City Schs., 112 LRP 48841 (OCR 2012) [ordering the district to contact OCR and schedule a training on the use of restraint pursuant to the Resource document]; Johnston Co. (NC) Schs., 60 IDELR 24 (OCR 2012) [Resource document cited when finding district not following proper procedure regarding mechanical restraint]; Yuma (AZ) Elem. Sch. Dist., 114 LRP 7216 (OCR 2013) [finding that the district’s policy complies with guidance in the Resource document, except that it allows for the use of mechanical restraints].

Definitions

Before examining the 15 principles contained in the Resource Document, the definitions of terms utilized in the Resource Document are important to review. As stated in the Resource document, the definitions used by OCR in its *Civil Rights Data Collection* (CRDC) were used as follows:

“Physical restraint” is defined as:

A personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs or head freely. The term physical restraint does not include a physical escort. Physical escort means a temporary touching or holding of the hand, wrist, arm, shoulder or back for the purpose of inducing a student who is acting out to walk to a safe location.

“Mechanical restraint” is defined as:

The use of any device or equipment to restrict a student’s freedom of movement. The term does not include devices implemented by trained school personnel, or utilized by a student that have been prescribed by an appropriate medical or related services professional and are used for the specific and approved purposes for which such devices were designed, such as:

- Adaptive devices or mechanical supports used to achieve proper body position, balance or alignment to allow greater freedom of mobility than would be possible without the use of such devices or mechanical supports;
- Vehicle safety restraints when used as intended during the transport of a student in a moving vehicle;
- Restraints for medical immobilization; or
- Orthopedically prescribed devices that permit a student to participate in activities without risk of harm.

“Seclusion” is defined as:

⁵ This Resource Document can be found at www2.ed.gov/policy/seclusion.

The involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving. It does not include a timeout, which is a behavior management technique that is part of an approved program, involves the monitored separation of the student in a non-locked setting and is implemented for the purpose of calming.

Footnote 6 of the Resource documents notes that “restraint” does not include behavioral interventions used as a response to calm and comfort (e.g., proximity control, verbal soothing) an upset student and “seclusion” does not include classroom timeouts, supervised in-school detentions, or out-of-school suspensions.

The 15 Principles and U.S. DOE points

The Resource Document’s 15 principles are as follows:

1. Every effort should be made to prevent the need for the use of restraint and for the use of seclusion.
2. Schools should never use mechanical restraints to restrict a child’s freedom of movement, and schools should never use a drug or medication to control behavior or restrict freedom of movement (except as authorized by a licensed physician or other qualified health professional).
3. Physical restraint or seclusion should not be used except in situations where the child’s behavior poses imminent danger of serious physical harm to self or others and other interventions are ineffective and should be discontinued as soon as imminent danger of serious physical harm to self or others has dissipated.
4. Policies restricting the use of restraint and seclusion should apply to all children, not just children with disabilities.
5. Any behavioral intervention must be consistent with the child’s rights to be treated with dignity and to be free from abuse.
6. Restraint or seclusion should never be used as punishment or discipline (e.g., placing in seclusion for out-of-seat behavior), as a means of coercion or retaliation or as a convenience.
7. Restraint or seclusion should never be used in a manner that restricts a child’s breathing or harms the child.
8. The use of restraint or seclusion, particularly when there is repeated use for an individual child, multiple uses within the same classroom, or multiple uses by the same individual, should trigger a review and, if appropriate, revision of strategies currently in place to address dangerous behavior (defined as behavior that poses imminent danger of serious physical harm to self or others); if positive behavioral strategies are not in place, staff should consider developing them.
9. Behavioral strategies to address dangerous behavior that results in the use of restraint or seclusion should address the underlying cause or purpose of the dangerous behavior.
10. Teachers and other personnel should be trained regularly on the appropriate use of effective alternatives to physical restraint and seclusion, such as positive behavioral interventions and

supports, and, only for cases involving imminent danger of serious physical harm, on the safe use of physical restraint and seclusion.

11. Every instance in which restraint or seclusion is used should be carefully and continuously and visually monitored to ensure the appropriateness of its use and safety of the child, other children, teachers and other personnel.
12. Parents should be informed of the policies on restraint and seclusion at their child's school or other educational setting, as well as applicable Federal, State, or local laws.
13. Parents should be notified as soon as possible following each instance in which restraint or seclusion is used with their child.
14. Policies regarding the use of restraint and seclusion should be reviewed regularly and updated as appropriate.
15. Policies regarding the use of restraint and seclusion should provide that each incident involving the use of restraint or seclusion should be documented in writing and provide for the collection of specific data that would enable teachers, staff and other personnel to understand and implement the preceding principles.

b. OCR's 2016 Dear Colleague Letter

On December 28, 2016, OCR issued a Dear Colleague Letter regarding the use of Restraint and Seclusion with students with disabilities. Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities, 69 IDELR 80 (OCR 2016). In this DCL, OCR noted that although school districts are not prohibited by Section 504 or the ADA from using restraint and seclusion, they must determine whether their use is impacting on the provision of FAPE to a student with a disability. Restraint and seclusion could deny a student FAPE where it has a traumatic impact or results in the student not receiving needed services, and where use could violate Section 504 where it: 1) constitutes unnecessary different treatment; 2) is based on a policy, practice, procedure or criterion that has a discriminatory effect on students with disabilities; or 3) denies a student's right to FAPE.

OCR further notes that there are multiple ways in which restraint or seclusion may deny a student FAPE, and "[d]epending on the nature of his or her disability, a student with a disability may be especially physically or emotionally sensitive to the use of such techniques." For example, a student might develop new behavioral or academic difficulties as a result of the use of restraint or seclusion that, if not addressed, could result in a denial of FAPE. Further, a student may be denied FAPE as a result of the cumulative impact of repeated seclusion that deprives the student of educational instruction or services. If there is reason to believe that the use of seclusion or restraint has adversely affected the provision of Section 504 FAPE services to a particular student, such that the student's needs are not being met, the district must respond, according to OCR, in part, by determining what additional or different interventions or support and services the student needs, including positive behavioral interventions. The district must also determine if current interventions are being implemented, ensure that needed changes are made promptly and remedy any denial of FAPE.

Although OCR specifically notes that it has no jurisdiction regarding the use of restraint or seclusion with nondisabled students, OCR does note in its DCL that the use of restraint with a nondisabled student could be a sign that that unidentified student may have a disability and may need to be evaluated. With respect to a

student who has already been identified, it could be an indication that the student needs to be reevaluated and that the student's 504 plan needs to be revised.

3. Recent Court Decisions on Seclusion/Restraint

As would be expected, there has been a good amount of litigation brought against school districts and their personnel alleging the improper use of seclusion or restraint. Here is a sampling of a few recent ones on this topic:

D.D. v. Chilton County Bd. of Educ., 54 IDELR 157 (M.D. Ala. 2010). Where a teacher velcroed a 4-year-old student with PDD for less than 10 minutes in a toddler/Rifton chair that he chose to sit in, this did not rise to the level of "shocking the conscience," at least in a constitutional sense. As the teacher explained, she placed the student in the chair to keep him from kicking people by applying the velcro waist strap so that he would not fall and sitting him in the hallway facing the wall until his mother arrived. The child sustained no physical injury from the measure and the restraint was not a sufficient deprivation of liberty that would require advance notice and a hearing. However, this ruling does not reflect on whether the teacher's actions were lawful under state tort law.

W.A. v. Patterson Joint Unif. Sch. Dist., 57 IDELR 38, 2011 WL 2925393 (E.D. Cal. 2011). School employees did not violate autistic student's Fourth Amendment right to be free from unreasonable seizures when it physically restrained him only when necessary. Importantly, the district's documentation of each incident of restraint showed that the employees physically restrained the student only as a last resort and only when he began hitting, kicking or swatting staff members or other students. In addition, the employees were trained in the use of restraint using district-approved standards and, although prone restraint involving pinning the student to the floor was used, the employees showed that it was necessary due to his physical strength. The employees were also seeking to protect themselves, other staff and other students with disabilities present in the classroom. Finally, the parents agreed to the use of restraint when necessary and California law expressly permits its use as an emergency intervention when a student poses a danger to self or others.

E.C. v. County of Suffolk, 58 IDELR 259, 2012 WL 1078330 (E.D. N.Y. 2012). The parents' Fourth Amendment and ADA claims alleging improper restraint by two school security guards of their 11 year-old student with cognitive impairments are dismissed against the school district and the county police department. As to the ADA discrimination claim, the court does not have jurisdiction for failure to exhaust administrative remedies. As to the Fourth Amendment claim, the restraint/seizure of the student by the officers was justified, where the student, who was large for his age, picked up a rock that was at least eight inches long and held it over his head in a threatening manner and subsequently began yelling, running and attempting to punch school staff and peers. Under the circumstances, it was reasonable for the officers to immobilize his arms and seat him to keep him from running around and hitting others. Because the officers used only the amount of force necessary to keep others safe, there was no violation of the Fourth Amendment.

Ebonie S. v. Pueblo Sch. Dist. 60, 59 IDELR 181, 695 F.3d 1051 (10th Cir. 2012), cert. denied, 133 S. Ct. 1583 (2013). Teacher's use of a U-shaped desk designed with a wooden bar across the back to prevent the student from exiting the desk by pushing the chair out did not violate the student's right against an unreasonable seizure under the Fourth Amendment or her Fourteenth Amendment due process and equal protection rights. Because the kindergartner with Down syndrome and other disabilities was able to crawl over or slide under the writing surface of the "wraparound" desk, her placement in it did not violate her constitutional rights. A limitation on

movement in the school setting amounts to a “seizure” under the Fourth Amendment only if it significantly exceeds that inherent in every-day compulsory school attendance. Although the U-shaped desk had a restraining bar across the back, the bar did not force the child to sit in any unusual manner. Instead, it merely required her to remain in her seat in the classroom setting. Coupled with the fact that district employees never attached restraint mechanisms to the child’s body, the use of the desk did not amount to a seizure under the Fourth Amendment or a violation of her 14th Amendment right to be free from bodily restraint. Similarly, the district court’s judgment in favor of the district on the parent’s Equal Protection claim is affirmed, based upon the fact that the use of the desk was a rational response to the child’s “unique pedagogical challenges.”

Muskrat v. Deer Creek Pub. Schs., 61 IDELR 1, 715 F.3d 775 (10th Cir. 2013). Even if school district employees violated district policy when placing a child with developmental disabilities in a timeout room, their conduct did not rise to the level of violating the child’s constitutional rights; thus, the parents did not establish liability under Section 1983. To establish a constitutional violation, the parents needed to show that the staff members’ conduct was so severe, so disproportionate to the need presented, and so inspired by malice or sadism that it shocked the conscience. The parents failed to show that the student’s placement in the timeout room following an incident in which he overturned chairs and knocked items from tables amounted to conscience-shocking behavior. Similarly, three alleged instances of abuse that included a “pop” on the cheek, a slap on the arm, and a few minutes of physical restraint did not amount to a brutal or inhumane abuse of power. While the court may rightly condemn this conduct, it does not rise to the level of a constitutional tort.

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

Terry v. Russell County Bd. of Educ., 66 IDELR 255 (M.D. Ala. 2015). A magistrate judge recommended that a claim under Section 1983 against a teacher for damages should not be dismissed, where the allegations pleaded in the complaint were sufficient to demonstrate a possible violation of the student’s constitutional rights based on teacher’s use of corporal punishment. According to the Complaint, the teacher pushed the student, a teenager with ADHD and SLD, out of the classroom for using profanity. The student alleged that the teacher slammed him to the floor and choked him until he was unable to breathe. “Eventually, other teachers rushed to pull [the teacher] off of [the student], at which point [the teacher] kicked [the] defenseless [student] and yelled ‘I’m going to beat you within an inch of your life!’” The magistrate judge concluded that the student’s allegations, if true, strongly suggested that the teacher violated the student’s clearly established constitutional right to be free from excessive force.

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

complaint identified only a single incident of restraint. While an allegation of harassment by a staff member “significantly raises the potential severity and pervasiveness of the interaction,” the brief duration of the incident at issue shows that the student was not subjected to a hostile educational environment.

Zdrowski v. Rieck, 66 IDELR 42 (E.D. Mich. 2015). Actions of two elementary school teachers in using the “transport position” to bring the violent second-grader with Asperger syndrome to the school office were not unreasonable in light of their need to remove the student from the classroom and to minimize any additional stress to the student that the “team control position” may have caused. While one teacher testified that she considered using the “team control position,” which is the recommended position for a student who is struggling, she decided that the student would experience greater stress if required to put his head between his legs. In the context of this case, where the student was threatening to harm himself and had a history of violent outbursts and may have been agitated by being restrained in the control hold, no reasonable jury could find that the teachers acted with bad faith or gross misjudgment. Thus, the district’s motion for judgment on the parent’s Section 504 and ADA claims is granted.

S.R. v. Kenton Co. Sheriff’s Office, 115 LRP 58577, 52 NDLR 83 (E.D. Ky. 2015). In lawsuit brought by parents of two students with ADHD and other mental disabilities against sheriff’s office and school resource officer, sheriff’s office is a proper defendant under the ADA as a “public entity” covered under Title II of the ADA. In addition, the children pled appropriate claims at this stage of the litigation, pleading intentional discrimination and failure to accommodate. The allegations that the sheriff’s office’s practice of handcuffing students with disabilities is impermissible since it bypassed less severe measures and that the sheriff’s office failed to modify its practices for students with disabilities are sufficient to survive the defendants’ motion to dismiss.

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

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

judgment motion: Miller v. Monroe Sch. Dist., 68 IDELR 69 (W.D. 2016). Technical violation of provisions in the IEP related to the use of the “quiet room” were not material violations that denied the autistic student FAPE. The purpose of requiring the district to call the parent immediately if placement of the student in the quiet room exceeded 20 minutes was to ensure that the parent was part of the decision-making process. Here, the student asked to remain in the quiet room after 20 minutes had expired so that he could have extra time to calm down. Thus, the time in the quiet room did not implicate the concerns underlying the IEP’s requirements and the failure to make the phone call to the parent would not have had an immediate impact on the situation. In addition, the use of the “quiet room” did not constitute “isolation” under Washington law.

Phipps v. Clark Co. Sch. Dist., 67 IDELR 91 (D. Nev. 2016). Parties’ motion to dismiss Section 1983 claims are denied where school district refuted the aide’s description of her classroom conduct and use of physical restraint with a nonverbal student with autism. School officials testified that the aide’s physical interactions with the student were not appropriate crisis management techniques where the aide’s testimony suggested that she was acting in accordance with district policy and training. Where sufficient evidence exists for a reasonable jury to find either that the aide restrained the student in the way she was trained or that her actions were in defiance of the district’s training and policies, motions to dismiss are denied. School districts can be held liable under Section 1983 for an employee’s violation of a student’s constitutional rights if the employee acted in accordance with district policy, custom or practice. The district here did not contest the parents’ claim that the aide violated the student’s constitutional rights when she dragged him from under a table by the wrist, pinned him to the floor with her knees and elbows, and shoved another student into him. Police arrested the aide on the date of the restraints in question after seeing her conduct on live-feed surveillance after they had installed hidden cameras in the classroom based upon 2 reports of suspected physical abuse from parents of other students.

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

G. Students in Correctional Facilities

Many students who have mental illnesses and are disabled as a result may be incarcerated. It is important that school districts remember that they are more than likely responsible for the provision of FAPE to incarcerated students and that the IDEA and 504 rights do not stop at the jailhouse steps. Depending upon applicable state and local laws, the school district where the facility is located may be required to ensure that FAPE is made available to the student.

The U.S. Department of Education has issued recent guidance in this regard:

Dear Colleague Letter, 64 IDELR 249 (OSEP/OSERS 2014). Absent a specific exception in the law, all IDEA protections apply to students with disabilities in correctional institutions. This includes the IDEA’s child-find

duty, such that agencies cannot assume that a student who enters jail or a juvenile justice facility is not a student with a disability just because he or she has not been previously identified. School districts should work with individuals who are most likely to come into contact with students in the juvenile justice system to identify students suspected of having a disability and ensure that a timely referral for evaluation is made. While it is acknowledged that child-find and proper identification of students in correctional facilities is complicated by the fact that they often transfer in and out, the evaluation process must continue once the parent's consent for evaluation has been obtained, even if the student will not be in the facility long enough to complete the process. In addition, if a student is transferred to a correctional facility in the same school year after the previous district has begun but not completed an evaluation, both agencies must coordinate assessments to ensure the evaluation is completed in a timely manner. Finally, the IDEA's disciplinary safeguards also apply to these students, including the right to a manifestation determination upon 11 days of a disciplinary exclusion. "These disciplinary protections apply regardless of whether a student is subject to discipline in the facility or removed to restricted settings, such as confinement to the student's cell or living quarters or 'lockdown' units."

Dear Colleague Letter, 114 LRP 51901 (OCR 2014). Residential juvenile justice facilities, as federal fund recipients, are no less responsible for providing FAPE in a discrimination-free environment than are public schools. Thus, they must abide by federal laws, such as Section 504 and Title II of the ADA when disciplining, evaluating, placing and responding to alleged harassment of students with disabilities. All public schools, including those in juvenile justice facilities, are obligated to avoid and redress discrimination in the administration of school discipline. As a result, they must ensure that they comply with provisions governing the disciplinary removal of students for misconduct causes by, or related to, a student's disability. In addition, state and local facilities must implement reasonable modifications to their policies, practices, or procedures to ensure that youth with disabilities are not placed in solitary confinement or other restrictive security programs because of their disability-related behaviors. In addition, residents of such facilities must be educated with nondisabled students to the maximum extent appropriate in compliance with Section 504's LRE mandate.

And one recent court has found that educational changes within a correctional facility must be made by the student's IEP team:

Buckley v. State Correctional Institution-Pine Grove, 65 IDELR 127, 98 F.Supp.3d 704 (M.D. Pa. 2015). State prison erred in discontinuing special education services to an incarcerated teenager with ED and the provision of "self-study packets" to be completed in the student's cell denied FAPE. As allowed by the IDEA, the public agency was able to show that the prison had a bona fide security interest that would allow them to modify the student's IEP where the student's prison record reflected four instances of assault and approximately 25 other incidents of serious misconduct. However, the official comments to the 1999 IDEA regulations state that the IEP team must consider possible accommodations for an incarcerated student who poses a security risk. Here, the prison did not convene the student's IEP team and instead enforced a policy requiring all eligible inmates in its restrictive housing unit to study in their cells. Further, the right to modify the IEP of an incarcerated student who cannot otherwise be accommodated does not allow a public agency to discontinue IDEA services altogether. An education program should be revised, not annulled, in light of safety considerations. Thus, the student is awarded a full day of compensatory education for each school day that he was placed in the prison's restrictive housing unit.