Here and Now

Addressing Dangerous Behavior by Students with Disabilities

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What’s On the Agenda . . .

- Identifying Potentially Dangerous Behavior
  - Threat Assessments
  - Child Find
- Responding to Dangerous Behavior
  - Behavioral Interventions
  - Disciplinary Actions
  - Removals to IAES
  - Reporting Crimes to Law Enforcement
  - Use of Aversive Interventions
- Balancing Student Confidentiality with School Safety
Introduction

- Obligation to identify and respond to dangerous or potentially dangerous behaviors by students with disabilities stems from:
  - IDEA requirements
  - California Constitution (Article 1, § 28: All students have “inalienable right to attend campuses which are safe, secure and peaceful”)
  - Various Education Code provisions
  - Case law
I. Identifying Potentially Dangerous Behavior
Threat Assessments

- Structured group process used to evaluate risk posed by student, typically as response to actual or perceived threat or concerning behavior
  - When warranted, threat assessments should be conducted regardless of special education status
  - Safety of students and staff is top priority
  - Primary purpose is to prevent targeted violence
What Is a Threat?

- Threat = expression of intent to do harm or act out violently against someone or something
- Threat can be spoken, written or symbolic – for example, motioning with one’s hands as though shooting at another person
Types of Threats

- **Direct threat** - Identifies a specific act against a specific target and is delivered in a straightforward, explicit manner
  - Example: “I am going to place a bomb in the school gym”

- **Indirect threat** - Vague, unclear, and ambiguous
  - Example: “If I wanted to, I could kill everyone at this at school”

- **Veiled threat** - One that strongly implies but does not explicitly threaten violence
  - Example: “The school would be better off if Principal Doe were dead”

- **Conditional threat** - Warns that violent act will happen unless certain terms are met
  - Example: “If Ms. Johnson does not give me an “A” in the class, I will place a bomb in the school”
Factors Used in Determining Whether Threat Exists

- Age of student
- Capability of student
- Student’s discipline history
- Credibility of student and willingness to acknowledge his/her behavior
- Credibility of witness accounts
Threat Assessment Inquiry

- When district establishes that threat has been made or threatening behavior exhibited, school officials should initiate threat assessment inquiry per established policy.
  - Inquiry should be conducted by multi-disciplinary team:
    - School counselor or school psychologist;
    - Student’s teacher(s);
    - School administrator;
    - Student’s parent(s); and
    - School resource officer, if appropriate.
  - Team should collectively gather information and determine what constitutes appropriate response(s).
Threat Assessment Follow-Up

- District’s obligations following threat assessment inquiry include:
  - Notify others – as needed and if warranted
    - Don’t forget FERPA
  - Elicit assistance of skilled professionals to determine whether findings warrant further investigation
  - Develop plan of involvement and support when necessary
  - Referral for possible special education eligibility (child find obligation)
Practice Pointer: Threat Assessments

- Sound and up-to-date district-wide threat assessment policy is essential to avoid potential liability and ensure that personnel know when and how to determine if threat exists and what steps to take in response.
Child Find

- For any student who is engaging in conduct that is – or could be – dangerous, districts should be alert for possible signs of a disability that would warrant a special education assessment
  - When at-home behavior impacts educational performance, child find may be implicated
  - But disruptive or even dangerous behavior occurring exclusively at home that does not affect student at school typically does not give rise to duty to assess
Child Find: Legal Standard

- **IDEA**
  - Affirmative, ongoing duty to identify, locate and evaluate all children with disabilities residing in the state who are in need of special education

- **California law**
  - Education Code’s child find requirements includes homeless children, wards of the state, children attending private schools
  - Applies regardless of the severity of disabilities

(34 C.F.R. § 300.111; Ed. Code, § 56301)
Child Find: Legal Standard

- Triggered when district has knowledge of – or reason to suspect – student has disability
  - Threshold for suspicion is “relatively low”
  - Appropriate inquiry: Whether student should be referred, not whether he or she will qualify
  - Child find violated if district overlooks clear signs of disability and offers no rational justification for not assessing
  - Child find obligation is not dependent on parental request for assessment

Child Find and Dangerous Behavior

Case Example #1: Panama-Buena Vista USD (OAH 2015)

- Student with ADHD had more than 20 disciplinary incidents in previous district, including “sexual battery”
- Threatening behavior and provoking fights led to development of behavior contract and Section 504 plan
- Defiance of teachers resulted in Student’s transfer to another junior high school, where he was suspended for making sexual gestures toward female student
- ALJ found violation of child find because Student’s behaviors during first weeks of school, as well as prior district’s records, should have immediately triggered suspicion that he might require special education

(Student v. Panama-Buena Vista Unified School Dist. (OAH 2015) Case No. 2014100290)
Child Find and Dangerous Behavior
Case Example #2: Anaheim City SD (OAH 2013)

- Fifth-grade Student had been eligible as ED in three previous districts but was exited from special ed after she made progress on behavior issues
- Behavior problems re-emerged when Student moved to District, where she consistently “bullied and threatened”
- District offered assessment, but Parents refused consent
- ALJ granted District’s request to conduct assessment
- Sufficient maladaptive, aggressive and dangerous behaviors toward other students implicated child find
- Current behaviors were continuation of prior patterns

(Anaheim City School Dist. v. Student (OAH 2013) Case No. 2013040142)
II. Responding to Dangerous Behavior
When Must Behavior Be Addressed?

1. When behavior “impedes” learning — that of the student’s or others’
2. For certain disciplinary actions resulting from student’s misconduct
IDEA Requirement

- If behavior impedes learning, IEP team must consider positive behavioral interventions, supports and other strategies to address that behavior
  - IEP team decides what constitutes “behavior that impedes learning”

(34 C.F.R. § 300.324(a)(2))
What Types of Interventions Must Be Considered?

- Law is silent
  - Except for “positive”
- Up to the IEP team to decide
- But . . . LRE obligation applies
  - Consider more restrictive options only when lesser ones fail to adequately address the problem behavior
Functional Behavioral Assessment

- Process that searches for explanation of purpose behind student’s behavior
- IDEA does not require that FBAs precede all behavioral interventions
  - Regulations focus on interventions and strategies, not assessments, although an FBA “typically precedes” developing positive behavioral intervention strategies
- No formal IDEA requirements for specific process of how to conduct FBA

Behavioral Intervention Plan

- Positive “support or strategy” that IEP team might consider
- Written document addressing how IEP team will improve difficult/challenging behaviors
- Proactive, not reactive
- Generally BIPs are based on assessment of student’s behaviors
  - Converts observations in FBA into plan of action for managing student’s behavior
  - But, except in discipline context, no specific IDEA requirement to conduct FBA before developing BIP
Discipline: A Quick Review

### 4 Categories of Removal

- **10 School Days or Less** = No Change of Placement
- **>10 Cumulative Days (No Pattern)** = No Change of Placement
- **>10 Cumulative Days (Pattern)** = Change in Placement
- **>10 Consecutive Days** = Change of Placement
Manifestation Determinations

Legal Recap

- Required within 10 school days after proposed removal that would be change of placement
- Conducted by “relevant members of IEP team,” including parents
  - Technically, law creates separate MD team
  - Practically, meetings to conduct MDs are essentially IEP meetings
  - Parent who disagrees with MD determination may seek due process

(34 C.F.R. § 300.530(e)(1))
Manifestation Determinations

- Behavior is manifestation of disability if:
  - Caused by, or had direct and substantial relation to, student’s disability; OR
  - Was direct result of district’s failure to implement IEP

(34 C.F.R. § 300.530(e))
Obligation to Address Behavior

- If behavior is manifestation of disability
  - Conduct FBA (unless one had been previously conducted before behavior giving rise to change of placement occurred)
  - Develop and implement BIP
  - If BIP is already in place, review and modify as necessary to address behavior
  - Return student to previous placement, unless parent and district agree to change of placement as part of modification of BIP

(34 C.F.R. § 300.530(c)-(d); 34 C.F.R. § 300.532(c))
Obligation to Address Behavior

- If behavior is **not** manifestation of disability
  - Student is subject to same disciplinary sanctions as nondisabled students
  - But must continue to receive FAPE
  - And must receive, as appropriate, FBA and behavior intervention services and modifications “that are designed to address the behavior violation so that it does not recur”

(34 C.F.R. § 300.530(c)-(d); 34 C.F.R. § 300.532(c))
Practice Pointer: Manifestation Determinations

- All individuals involved in MD review should be familiar with IDEA rules concerning returning student to previous placement if behavior is manifestation of disability.
- Leaving student in disciplinary setting if behavior is manifestation of disability, even for a short time, can deny FAPE.
Manifestation Determination

Case Example #1: New Haven USD (OAH 2013)

- Student with ADHD engaged in fight with another student, stemming from incident at restaurant the previous evening
- Student punched and kicked principal when he tried to keep her from leaving scene following fight
- District suspended Student for several infractions, including assault or battery on school employee
- ALJ found Student’s ADHD did not cause or have substantial relation to her conduct
- Student’s actions were not impulsive and her impulsivity did not manifest itself in physical aggression

(Student v. New Haven Unified School Dist. (OAH 2013) Case No. 2013031128)
Manifestation Determination

Case Example #2: Los Angeles USD (OAH 2014)

- Student with OHI came to school with semi-automatic handgun and full magazine of ammunition
- Suspended and placed in IAES; District began expulsion
- IEP team determined behavior was manifestation of disability, but District continued expulsion proceedings, claiming obligation to expel under federal Gun Free Schools Act
- ALJ: IDEA requirements trump Gun-Free Schools Act and Ed. Code expulsion rules
- When behavior found to be manifestation of Student’s OHI, District was limited to 45-day IAES

(Student v. Los Angeles Unified School Dist. (OAH 2014) Case No. 2014040246)
Unilateral Removals to IAES

Legal Recap

- Districts may remove student to IAES for not more than 45 school days if student (while at school or school function):
  - Carries or possesses weapon
  - Possesses/uses illegal drugs or sells/solicits sale of controlled substances
  - Inflicts serious bodily injury
- Removal can be made whether or not behavior is manifestation of student’s disability

(34 C.F.R. § 300.530(g))
Weapons

“Device, instrument, material or substance, animate or inanimate, that is used for, or is readily capable of causing death or serious bodily injury”

- Exclusion for pocket knife with blade less than 2½ inches

Cases:
- “Adult size” scissors – yes
- Cigarette lighter with retractable blade – yes
- “Safety” scissors – no
- Paper clip – no
- Pencil – no
- Pulling on principal’s necktie – no

(34 C.F.R. § 300.530(i)(4); 18 U.S.C. § 930(g))
Drugs

- Important difference between illegal drugs and controlled substances (i.e., prescription medication possessed by individual for whom it is prescribed)

- Removal allowed for:
  - Knowingly possessing illegal drugs
  - Knowingly using illegal drugs
  - Selling, or soliciting sale of, controlled substances

- Student who purchases and uses another student’s medication becomes a user of an “illegal drug”

(34 C.F.R. § 300.530(i)(2))
Serious Bodily Injury

- “Bodily injury that involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or impairment of [bodily function or faculty]”

- Very difficult standard to prove

- Case-by-case basis, largely depending on testimony of victim (e.g., suffered extreme physical pain)

(34 C.F.R. § 300.530(i)(3); 18 U.S.C. § 1365(h))
Serious Bodily Injury

Case illustrations:

- Removal upheld:
  - For Student who “head-butted” teacher (extreme physical pain; missed week of work; painkillers ineffective)

- Removal overturned:
  - For Student who hit paraprofessional on head four times (pain was only “7” on scale of 1-10)
  - For Student who caused other student’s concussion and broken nose (no evidence of “extreme physical pain”)
  - For Student who kicked principal in knee (principal did not seek medical attention)
  - For Student who threw objects at teacher requiring her to get tetanus shot (no extreme pain)
  - For Student who struck teacher resulting in psychological trauma
Practice Pointers: Unilateral Removals to IAES

- Before making quick IAES decision, make sure staff fully understand definition of “weapon”
- Removal to an IAES for infliction of serious bodily injury is murkiest standard of the three removal circumstances – and it is meant to encompass only the most serious physical acts
ALJ Removals to IAES

Legal Recap

- ALJ may remove student to IAES for not more than 45 school days if:
  - District successfully demonstrates that maintaining current placement is substantially likely to result in injury to student or to others
  - Burden of proof on district at expedited due process
  - Unlike unilateral removals, district can ask for additional 45 days

(34 C.F.R. § 300.532(b)(2))
ALJ Removals

Case Example #1: Sacramento USD (OAH 2015)

- Student with ED attempted to order crossbow and “ninja star” from Amazon on school computer
- When computer account checked, aide discovered pictures of nude children
- District sought 45-day removal
- ALJ ruled Student was not safety threat
- Student wanted to learn how to use crossbow based on interest in survival shows and camping
- ALJ concerned about pictures, but found no evidence Student showed or discussed them with others

(Sacramento Unified School Dist. v. Student (OAH 2015) Case Nos. 2015090053)
ALJ Removals
Case Example #2: Saddleback USD (OAH 2009)

- District unilaterally removed Student with ED to 45-day IAES for possession of knife
- When Student returned to general ed placement, he engaged in physical altercation with classmate and other conduct that concerned teachers
- District requested ALJ order return to IAES
- ALJ refused request
- Physical altercation was result of teasing, no aggression
- No evidence of behaviors that were substantially likely to cause injury and Student seemed sorry about knife incident

(Saddleback Unified School Dist. v. Student (OAH 2009) Case No. 2008110184)
ALJ Removals
Case Example #3: San Leandro USD (OAH 2013)

- 8-year-old Student with ED engaged in behaviors that included poking himself with a paper clip, throwing chairs, attempting to stab another student with a pencil, fleeing campus, and hitting and kicking staff
- After incident in which Student bit his behaviorist, drawing blood, District sought ALJ removal to IAES
- ALJ granted removal request
- “Physical aggression and eloping behavior put [him] at risk of injury in the classroom, on the playground, in the school parking lot, and on the street”

(San Leandro Unified School Dist. v. Student (OAH 2013) Case No. 2013100168)
Elementary school Student with ADHD was involved in 16 incidents of causing or attempting to cause physical injury and 14 incidents of defiance, damaging property and disrupting school activities.

On a single day in September 2013, Student kicked his teacher in the groin, hit and kicked staff, threw chairs at staff, and tried to pull rolling cabinet over onto himself.

ALJ granted request for removal to IAES, finding Student’s injurious and dangerous behaviors were likely to continue.

None of District’s “substantial efforts” were effective in helping Student to reduce or eliminate his aggressive behaviors.

(Rialto Unified School Dist. v. Student (OAH 2013) Case No. 2013090966)
Practice Pointers: ALJ Removals to IAES

- Unilateral IAES removal provisions do not cover threats, so if you determine that student’s threatening behavior toward others constitutes a danger, you may need to resort to due process to seek ALJ-ordered removal.

- If you decide that student’s return from unilateral IAES removal poses significant safety risks, seek an ALJ order to extend the IAES placement.
Court Removals to IAES

Legal Recap

- District may be able to apply to court for “Honig injunction” to temporarily remove student exhibiting dangerous behaviors from his or her current placement to IAES.
- Similar to ALJ removals, District must demonstrate to court that maintaining student in his or her current placement is substantially likely to result in injury to student or to others.

(Honig v. Doe (U.S. 1988) 559 IDELR 231; Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents of Children with Disabilities (OSERS 2009) 52 IDELR 266)
Placement for IAES

- IAES students must continue to participate in general curriculum (although in another setting) and progress toward meeting their IEP goals
- IEP team makes ultimate determination of setting
- “Participate” does not require district to replicate all services of student’s normal classroom
- If above criteria can be met, student’s home can be IAES, although it is highly restrictive

(34 C.F.R. § 300.530(d); 71 Fed. Reg. 46,716 (Aug. 14, 2006))
Reporting Crimes to Police

- Nothing in IDEA prohibits districts from reporting crime committed by student with disabilities to appropriate authorities (see Ed. Code § 48902 for required notifications)
  - District that reports crime must ensure that copies of student’s special education and disciplinary records are transmitted for consideration by authorities
    - But copies may be transmitted only to the extent that FERPA permits the disclosure

(34 C.F.R. § 300.535))
Aversive Interventions

- IDEA emphasize positive behavioral interventions
- But “[it] does not flatly prohibit the use of mechanical restraints or other aversive behavioral techniques,” including seclusion and restraint
  - Whether to allow IEP teams to consider use of aversive interventions is “a decision left to each state”
- California law specifically prohibits mechanical restraints and numerous aversive interventions

(Letter to Anonymous (OSEP 2008) 50 IDELR 228; Letter to Trader (OSEP 2006) 48 IDELR 47; Ed. Code, § 56521.2.)
Emergency Interventions

- Only in extremely limited circumstances
- May be used only to control unpredictable, spontaneous behavior that poses:
  - A *clear and present* danger of *serious physical harm* to student or others, *and*
  - Cannot be immediately prevented by response that is less restrictive
- May not be used as substitute for BIP
- Limited duration and force

(Ed. Code, § 56521.1)
Prohibited Emergency Interventions

- Locked seclusion, unless it is in facility licensed or permitted to use locked room
- Intervention employing device that immobilizes all four extremities (except that prone containment may be used by trained personnel as limited emergency intervention)
- An amount of force that exceeds that which is reasonable and necessary under the circumstances

(Ed. Code, § 56521.1)
Use of Aversive Interventions

- Case example: **Temecula Valley USD** (OAH 2014)
  - 4-year-old Student’s behaviors included hitting, spitting, kicking, biting and throwing objects
  - District restrained Student and placed him in unlocked seclusion room when less drastic measures did not work
  - ALJ found interventions were justified

- Case example: **Bellflower USD** (OAH 2010)
  - When Student misbehaved on playground, substitute removed him and loosely tied him in chair in corner of classroom because he would not remain seated
  - ALJ found intervention denied FAPE, but harm was minimal because Student was tied for only 5 minutes

III. Balancing Student Confidentiality with School Safety
FERPA Confidentiality Protections

- District disclosure of information to third parties about student in circumstances surrounding threats, potential threats and/or dangerous activity implicates FERPA considerations
- FERPA shields “education records” from disclosures to third parties without prior parental consent
- “Education records” are those records, in whatever form, that are:
  - Directly related to student; and
  - Maintained by education agency or institution or by party acting for agency or institution

(34 C.F.R. § 99.3; 34 C.F.R. § 300.611)
Confidentiality Has Limits

- FERPA contains numerous specific exceptions under which districts may disclose personally identifiable information about student without prior consent.

- Many exceptions can apply to disclosures from student’s records pertaining to – or in response to – threats, potential threats or dangerous behavior:
  - Includes disclosures to school officials with legitimate educational interests, disclosures to juvenile justice agencies, disclosure in response to subpoenas, and importantly, in connection with health or safety emergencies.
Health and Safety Emergencies

- Districts may disclose personally identifiable information from education records without parental consent if:
  - “Articulable and significant threat” to health or safety of student or others
  - Requirement that there must be “articulable and significant threat” does not mean that threat must be verbal; district simply must be able to articulate what the threat when it makes the disclosure
  - “Protect” means “to keep from harm, attack or injury”

Health and Safety Emergencies

- Information may be disclosed to appropriate parties whose knowledge of information is necessary
- In investigations for improper disclosure under this exception, if there is rational basis for disclosure, then USDOE “will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination”
- District must keep records of specific threat that was basis of the disclosure, and to whom information was disclosed

(34 C.F.R. § 99.36)
Law Enforcement Unit Records

- Specifically excluded from definition of “education record” under FERPA
- These records are not protected and may be disclosed to third parties – including police – without parental consent
- To qualify as a “law enforcement unit record,” record must:
  - Be created by a school’s “law enforcement unit”;
  - Be created for a “law enforcement purpose”; and
  - Be maintained by the law enforcement unit
- Note: Student disciplinary records generally are not created by law enforcement unit or for law enforcement purposes and, therefore, are “education records” protected by FERPA

(34 C.F.R. § 99.8)
Take Aways . . .

- School safety is primary essential concern for all parties—administrators, teachers, parents and students—and **everyone** must accept responsibility for ensuring schools provide a safe learning environment by effectively identifying and responding to potentially dangerous behaviors.
Resources
Timely and Timeless Topics

Webinars, handouts, tip sheets and practical videos on a wide range of education issues are available at www.fagenfriedman.com/resources. Access these materials for use in your staff and department meetings.

Contact F3 for additional copies of these materials.