

Special Education and Mental Health

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Overview for Today

- The Elephant in the Room
- Mental Health and Section 504 Eligibility
- Mental Health and IDEA Eligibility
- Child Find Obligations
- Bullying, Harassment and Related Issues
- Responding to Threats
- Other considerations



Slide 3

1 Karen, here is an overview of the information that I included that what not present in any other KSB slides.

1- In "Elephant in the Room," I included information on how the pandemic is affecting mental health. I also updated some of the CDC data.

2- In "Child Find Obligations," I included information about PTSD and ADHD, which schools may observe more often as students return to the schools. Additionally, I talked about schools being understaffed and how this affects fulfilling child find obligations. I included the "District of Columbia Public Schools", where district cannot avoid liability for failing to provide FAPE even when impossible to do so.

3- In "Other things to keep in mind," I included the Biden's changes in Title IX (since it was motivated by mental health in LGBTQ+ students). I Included Mahanoy (since bullying online may be regulated by schools). And a quick update on schools being allowed under FERPA to disclose students' results of COVID tests if necessary to keep other students safe.

4- Everything else was compiled from other presentations.

Pedro Assis, 7/7/2021

The Elephant in the Room

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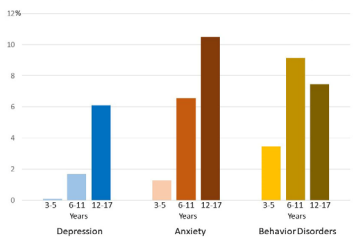
"That's not entirely true. We're here together in this room and I'm talking about you."

Who are we talking about?

- Students with mental health issues even before the pandemic:
 - In last 10 years, a 65% increase in mental, emotional, or behavioral disorders
 - According to the NIH, more than 1 in 5 parents reporting a child with a disability in 2009 cited ADHD as an underlying condition
 - An additional 19 percent cited other mental, emotional, or behavioral disorders (increase of 65 percent)

What conditions are we talking about?

Depression, Anxiety, Behavior Disorders, by Age



Co-occurrence of Conditions

- According to the CDC:
 - About 3 in 4 children aged 3-17 years with depression also have anxiety (73.8%) and almost 1 in 2 have behavior problems (47.2%)
 - For children aged 3-17 years with anxiety, more than 1 in 3 also have behavior problems (37.9%) and about 1 in 3 also have depression (32.3%)
 - For children aged 3-17 years with behavior problems, more than 1 in 3 also have anxiety (36.6%) and about 1 in 5 also have depression (20.3%)

Pandemic impacted parents and children

- CDC surveyed more than 1,500 parents or legal guardians of children aged 5-12 in mainly public schools
- The majority of stress and well-being indicators concerning child mental health, physical activity, and parental emotional distress
- **Parents** of students receiving virtual instruction or hybrid were more likely to report that them **and their children** experienced **depression** and **anxiety**
- Special educators want to keep the results in mind to determine what supports and services students and parents.

Morbidity and Mortality Weekly Report released by the CDC

Other Impacts by the Pandemic

- Suicidal ideation on the rise
- Increase in abuse at home
- Logistical challenges and uncertain budgets resulted in schools not meeting the students' mental health needs
- During the Fall 2020, a study showed "three-month loss in learning in math, and one-and-a-half months in reading"
 - Students recovered some of the ground they lost by winter, but still "with math achievement still more impacted than reading"
- Racial/ethnic minorities, low-income, LGBTQ+, and students with disabilities reported having experienced disproportionately worse mental health outcomes

Education in a Pandemic report released by the OCR

Pandemic for Students with Disabilities

- The **students with disabilities** surveyed were:
 - less likely (57%) to feel that they belong on campus than were students without disabilities (73%).
 - more likely than their peers to experience **financial hardships**
 - three times more likely than their peers to experience **food insecurity**
 - more likely to experience **lost income** from off-campus jobs (47%) compared peers (26%)
 - significantly more likely to report living in places during the pandemic that were not free from physical or emotional **abuse** or violence (from 25% to 41%, depending on the student's disability), compared to peers (14%)
- Students with disabilities surveyed (from 53% to 70%, depending on the student's disability) screened positive for a **major depressive disorder** that appears to be linked to the pandemic, compared to 34% of students surveyed without disabilities

Education in a Pandemic report released by the OCR

Mental Health and the IDEA



"Turns out my imposter syndrome was pretty much right on."

IDEA Eligibility

- Child with an enumerated disability who, by reason thereof, needs special education and related services
 - Autism, **behavior disorder (ED)**, deaf-blindness, developmental delay, hearing impairment, intellectual disability, multiple impairment, orthopedic impairment, **other health impairment**, specific learning disability, speech-language impairment, traumatic brain injury, or visual impairment

Emotional and Behavioral Disorders (ED)

- 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
 - An inability to learn that cannot be explained by intellectual, sensory, or health factors
 - An inability to build or maintain satisfactory interpersonal relationships with peers and teachers
 - Inappropriate types of behavior or feelings under normal circumstances
 - A general pervasive mood of unhappiness or depression
 - A tendency to develop physical symptoms or fears associated with personal or school factors

Other Health Impairment (OHI)

- Limited strength, vitality or alertness, including a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment that is due to chronic or acute health problems which adversely affects the child's educational performance such as:
 - Asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome

Mental Health Issues Trigger Child Find Obligations



Child Find Obligation

- Child find obligations triggered when a district has reason to suspect that a student is a "child with a disability" who needs special education and related services
- This obligation applies:
 - Regardless of the severity of the disability
 - Even if the student is advancing in grade level

Spring Branch ISD v. O.W.

76 IDELR 234 (5th Cir. 2020)

- Student enrolled in kindergarten at Spring Branch
 - Well-above average intelligence, but various behavioral problems
- Attended various private therapeutic schools until fifth grade
 - Continued with social-emotional issues
- Returned to Spring Branch for fifth grade
 - Prior to return, mom provides letter from psychiatrist discussing O.W.'s ADHD and need for 504

Spring Branch ISD v. O.W.

76 IDELR 234 (5th Cir. 2020)

- On the first day of school, teachers found violent images of murder and death drawn by O.W.
 - Included anti-semitic language and imagery, as well as obscenities; principal met with parent about it
- Next day, flipped off, cursed out teacher
 - Hurling vulgar, racist insults at administrators
 - Threw writing utensils at assistant principal
- Mom met with school re students prior therapeutic schools, ODD, mood disorder, anxiety, and depression
 - School continued to collaborate with parents and previous school counselor to develop incentives to positive behavior

Spring Branch ISD v. O.W.

76 IDELR 234 (5th Cir. 2020)

- Early October: 504 team met
 - Mom provided history of O.W.'s behavioral issues and psych eval
 - Determines student qualified for 504 plan
 - Agreed to BIP utilizing success charts
- "The BIP's implementation had a minimal impact on O.W.'s behavior."
 - Major disruption in November; dropping grades by end of semester; assaulted staff member in January
- January: 504 referred for IDEA evaluation
 - Verified as ED

Spring Branch ISD v. O.W.

76 IDELR 234 (5th Cir. 2020)

- FBA led to new BIP utilizing positive behavioral approaches and providing for use of cool down room; no reference to time-outs or restraints
- Student enrolled in alternative program; BIP not followed
 - Take-Discipline and physical restraints
 - Police summoned four times; interacted with O.W. once
 - School unilaterally shortened school day
 - Parent privately placed

Spring Branch ISD v. O.W.

76 IDELR 234 (5th Cir. 2020)

5th Cir:

"Reasonableness of a delay [between notice and referral for evaluation] is not defined by its length but by the steps taken by the district during the relevant period. A delay is reasonable when, throughout period between notice and referral, a district takes proactive steps to comply with its child find duty to identify, locate, and evaluate students with disabilities. Conversely, a time period is unreasonable when the district fails to take proactive steps throughout the period or ceases to take such steps."

Spring Branch ISD v. O.W.

76 IDELR 234 (5th Cir. 2020)

5th Cir:

"We in no way suggest that a school district necessarily commits a child-find violation if it pursues RTI or § 504 accommodations before pursuing a special education evaluation. We instead recognize that determining whether a child find violation occurred is a fact-intensive inquiry and highlight that § 504 accommodations are not a substitute for an evaluation once a school district is 'on notice of acts or behavior likely to indicate a disability.' The Child Find obligation is for a 'child with a disability' who, by reason of that disability, 'needs special education and related services.'"

Spring Branch ISD v. O.W.

76 IDELR 234 (5th Cir. 2020)

- **5th Cir:** District's continued use of ineffective interventions were not proactive steps; child find violation occurred
 - Affirmed use of Take-discipline violated state law and IEP
 - Found use of restraint did not violate state law and IEP
 - No actionable violation for single police response
 - Unilateral halving of school day inappropriate

Indep. Sch. Dist. No. 283 v. E.M.D.H

76 IDELR 203 (8th Cir. 2020)

- Student diagnosed with generalized anxiety disorder, school phobia, ASD with unspecified OCD traits, panic disorder with associated agoraphobia, ADHD, and severe recurrent major depressive disorder
- Progressed and excelled in elementary despite absences
- By middle school, absences more frequent with student telling mom she's too afraid to go
 - By last quarter of 8th grade, student was consistently absent and placed in psychiatric day-treatment facility
 - Teachers aware absences due to mental health issues; assigned I's
 - School disenrolled

Indep. Sch. Dist. No. 283 v. E.M.D.H

76 IDELR 203 (8th Cir. 2020)

- Before beginning 9th grade, parents informed guidance counselor student missed end of middle school due to anxiety and school phobia
- By November, student disenrolled again and admitted to in-patient care
- Spring, district discussed evaluating student for special education
 - Suggested to parents student could not enroll in honors classes if she verified and was evaluated
 - Parents did not request evaluation
 - Again disenrolled

Indep. Sch. Dist. No. 283 v. E.M.D.H

76 IDELR 203 (8th Cir. 2020)

- Returned for tenth-grade with plan for extra time and breaks
 - Disenrolled within first six weeks of hardly attending
- Next spring reconsidered special education, again told honors classes would be unavailable; again disenrolls
- Parents then requested evaluation
- Six months later, District determined student didn't qualify
 - Too smart

Indep. Sch. Dist. No. 283 v. E.M.D.H

76 IDELR 203 (8th Cir. 2020)

8th Cir:

"The District confuses intellect for an education. . . The IDEA guarantees disabled students access to the latter, no matter their innate intelligence. . . The record demonstrates that the Student's intellect alone was insufficient for her to progress academically and that she was in need of special education and related services."

- Failed child find *for over two years*

Placement



"Again, that's like super dark, Bachelor Number Three, but I have to admit I'm intrigued."

Considerations for Placement

- Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. 34 CFR 300.115.
- The obligation to make a continuum of placements available means that an IEP team must consider a range of such placements for a particular child.
- A claim of impossibility does not relieve a district of its FAPE obligation

Types of Placement

- The continuum generally ranges from the least restrictive environment to the most restrictive. 34 CFR 300.115 (b)(1)
- Possible placement options (order of restrictiveness):
 - General education classroom;
 - General education classroom with accommodations and modifications
 - individualized instruction
 - pullout services.
 - Part-time in a general education classroom with most of the day in another setting.
 - Self-contained special education classroom.
 - Special day school.
 - Residential treatment facility or hospital.
 - Home instruction.

District of Columbia Public Schools
120 LRP 8116 (SEA DC 2020)

- Student with multiple disabilities
 - Intellectual disability, emotional disturbance, schizophrenia, ADHD, and other health impairments
- The student was discharged from a residential treatment center
 - The school could not manage the student's extreme behaviors

District of Columbia Public Schools
120 LRP 8116 (SEA DC 2020)

- The district made significant efforts to locate a placement
 - It applied to all approved schools without success and requested permission to pursue non-approved schools
 - As a result, the student did not receive academic services for two months
- IHO: Violation of IDEA
 - Districts may not use an impossibility defense to thwart a claim of a denial of FAPE when no school will accept a child.
 - Districts may not avoid liability when it provided the student with no placement at all, even if acting in good faith.
 - District ordered to pay compensatory services.

D.L. v. St. Louis City Sch. Dist.
76 IDELR 31 (8th Cir. 2020)

- D.L. 13 y.o. with ASD, PTSD, ADHD, disruptive mood regulation, encopresis, and enuresis
 - Toileting issues, potentially FAS
 - Neglected, likely abused, fostered at age 5, and lived with 8 families before adoption
 - Since kindergarten, student hits, scratches, kicks, and bites himself and others, screams, refuses activities, soils his pants, makes animal noises, threatens to kill himself and others, and runs away from school
 - Hospitalized for suicidal/homicidal ideations multiple times

D.L. v. St. Louis City Sch. Dist.

76 IDELR 31 (8th Cir. 2020)

- Student continued to regress after series of placements deviating from sensory diet
- District continued placement in cross-categorical classroom "with disastrous results"
 - Attacks on others; self harm; shortened school day
 - Parents placed in residential facility; school unilaterally disenrolled
- At time, residential facility medically necessary
 - Student improved

D.L. v. St. Louis City Sch. Dist.

76 IDELR 31 (8th Cir. 2020)

- Upon improvement, sought new IEP to return to school
 - School initially refused to meet, then relented
- IEP team decided to place student in a school for children with educational and behavioral difficulties
 - Parents disagree and privately place; seek reimbursement
- School: offered placement appropriate
- 8th Cir: District denied FAPE with placement
 - Record shows that "a student who has no control over his behaviors would not benefit from instruction at [the district's proposed placement.]"
- Reimbursement appropriate

Mental Health and Section 504



Section 504
29 U.S.C. § 794(a)

- Prohibits:
 - **Discrimination** on basis of disability (retaliation, intimidation, threats and coercion)
 - Exclusion of eligible students from programs and activities on basis of student's disabilities
 - Denial of participation or enjoyment of benefits of school's programs or activities because of student's disabilities
- Enforcement: Administrative Complaints, Lawsuits

Child Find
34 C.F.R. § 104.32

- A recipient who operates a public elementary or secondary education program or activity shall annually:
 - Undertake to identify and locate every qualified [person with a disability] residing in the recipient's jurisdiction who is not receiving a public education; **and**
 - Take appropriate steps to notify [persons with disabilities] and their parents of the recipient's [child find] duty

Eligibility

- A child is eligible for protections Section 504 and ADA if he or she:
 - Has a physical or mental impairment
 - Which substantially limits
 - A major life activity
 - And "needs or is believed to need" services
- It is **NOT** necessary to establish adverse effect on educational performance

Physical or Mental Impairment

"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"

"[A]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."

Substantially Limits

- Congress: "[An activity is substantially limited when it is] restricted as to the conditions, manner or duration under which they can be performed in comparison to most people."
- **Excludes** "transitory" impairments, which generally last 6 months or less; BUT
- **Includes** "episodic" impairments and impairments which are in remission

When is a 504 referral required?

- When a district believes that the student has a physical or mental impairment that substantially limits one or more major life activities; **and**
- Student is in need of either regular education with supplementary services or special education and related services.
 - Cannot consider "mitigating measures" (except glasses)

When To Refer A Student

- Parents report health condition
- Parents request evaluation*
- Student failing to make progress
- Staff refers student to SAT*
- Student exhibits or reports mental health needs
- Student habitually absent

**Parent request is a "trump card"*

Commonwealth Charter Academy

118 LRP 30092 (SEA PA 2018)

- High school student has exhibited separation anxiety since kindergarten; diagnosed with generalized anxiety disorder
- In 5th grade, parent enrolled in cyber school based on suggestion of therapist
- Parent did not inform cyber school of diagnosis
- Student did not have IEP or 504 at prior school; no educational concerns in records

Commonwealth Charter Academy

118 LRP 30092 (SEA PA 2018)

- Student participated in online classes; received straight As
 - Refused to speak to teachers on phone
 - Refused to ask for help or talk about make-up assignments when necessary
 - Required parent to sit near her during classes
- September, 2015 – discussion with parent about missing assignments
 - Parent provided school with documentation of anxiety diagnosis
 - School provided parent with 504 consent; parent promptly returned
 - School did not meet or evaluate; did provide alternative communications
- Student continues to earn straight As
- Parent filed for due process in November of 2017

Commonwealth Charter Academy

118 LRP 30092 (SEA PA 2018)

• School's defenses:

- Student academically successful
- Teachers only used e-mail after Mom disclosed anxiety
- Mom didn't follow up

Commonwealth Charter Academy

118 LRP 30092 (SEA PA 2018)

• Hearing Officer:

- No evidence that student qualified under IDEA, so no IDEA Child Find violation
- Student clearly qualified under Section 504; 2.5 year Child Find violation
- *Student's anxiety no doubt impacted Student each school day that Student attempted to attend a lesson or complete an assignment or assessment. However, the Parent's efforts in helping Student manage anxiety and perform academic tasks clearly enabled to Student to derive meaningful educational benefit over the course of the relevant time period. Through the dates of the hearing, Student's teachers communicated directly with Student through email, Student continued to attend lessons both live and recorded, and Student achieved very high marks in all classes. Under these circumstances, it is impossible to calculate with any certainty an appropriate amount of compensation education.*

Commonwealth Charter Academy

118 LRP 30092 (SEA PA 2018)

• Awarded:

- Two hours of comp ed for every day school was in session dating back to December of 2015 through end of the 17-18 school year
- IEE at public expense to determine if student qualifies under IDEA
- Denied request for fees and costs

Services and FAPE

"**Free appropriate public education (FAPE):** a term used in the elementary and secondary school context; for purposes of Section 504, refers to the provision of regular or special education and related aids and services that are designed to meet individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and is based upon adherence to procedures that satisfy the Section 504 requirements pertaining to educational setting, evaluation and placement, and procedural safeguards."

Bullying, Harassment, and Related Risks



Bullying at a "tipping point"

- All 50 states have anti-bullying laws
- Heavy emphasis by OCR and USDOE
- Basis for "deliberate indifference" discrimination claims
- Increase in bullying/harassment litigation nationwide:

Holben, Diane M. and Zirkel, Perry A. (2014)
"School Bullying Litigation: An Empirical Analysis of the Case Law," *Akron Law Review*: Vol. 47: Iss. 2, Article 1

Bullying Defined

- CDC's new uniform definition (as of 2015):
 - "Bullying is any **unwanted aggressive** behavior(s) by another youth or group of youths who are not siblings or current dating partners that involves an **observed or perceived power imbalance** and is **repeated multiple times or highly likely to be repeated**"
 - Behaviors could be verbal, physical, relational, or occur through technology

Harassment Defined

- Behavior which is
 - Severe, pervasive, or persistent
 - Creates a hostile environment at school
 - Is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school
 - Based on a student's race, color, national origin, sex, disability, or religion

Differing Legal Standards

- The Courts
 - Deliberate indifference
 - Some courts utilize bad faith/gross misjudgment standard
 - Schools must respond reasonably to known harassment
- OCR: schools should
 - Prevent harassment from happening in the first place
 - Eliminate harassment which it knows about or should know about
 - Remediate the effects of harassment

Dear Colleague Letter: "Harassment and Bullying"
55 IDELR 174 (OCR 10/26/2010)

- Before a claim, schools must:
 - Have a clear anti-discrimination policy
 - Have a curriculum focused on character/respect
 - Ensure a safe environment to report
- After a claim, schools must
 - Promptly investigate harassment claims
 - Follow up with students when harassment is suspected
 - Take steps beyond disciplining bullies
 - Provide victim with remedial measures

Bowe v. Eau Claire Area Sch. Dist.
71 IDELR 168 (W.D. Wis. 2018)

- Student with Asperger syndrome victimized by a number of different students in a variety of incidents
 - Peers directed derogatory and demeaning insults toward the student, often in language that was clearly inappropriate
 - Student's house was also vandalized (bag of feces was left at the home, house was egged)
- Over the course of the student's time at the district, the student and his parents complained of 30 discrete acts of bullying
- "Defendants investigated each complaint, which generally involved interviewing the students involved, and sometimes the investigation included referring the matter to police or speaking to the classroom teacher."

Bowe v. Eau Claire Area Sch. Dist.
71 IDELR 168 (W.D. Wis. 2018)

- If the district determined that a student behaved inappropriately, it would call the student's parents or implement corrective action
 - Corrective action ranged from counseling, to suspension, to referral for criminal charges
- Parents took issue with the adequacy of these responses, alleging that the failure to more severely punish bullies constituted deliberate indifference

Bowe v. Eau Claire Area Sch. Dist.
71 IDELR 168 (W.D. Wis. 2018)

- Court:
 - District “certainly favored counseling” rather than more punitive forms of punishment... But...
 - The counseling appeared effective in many instances
 - Bullying incidents alleged included a large number of schoolmates, rather than the repeated actions of a select few
 - “Continued counseling of a handful of students after numerous instances of bullying might be clearly unreasonable, but the evidence does not indicate that’s what happened here.”
 - While the district should not be “particularly proud of its response to the problem,” the district did not act with deliberate indifference

Fear of bullying does not justify placement restrictions

- *J.E. v. Boyertown Area Sch. Dist.* 56 IDELR 38 (ED Pa. 2011):
 - “A free appropriate public education does not require that the District be able to prove that a student will not face bullying at a placement”
- *Charlotte-Mecklenburg (NC) Schs.*, 113 LRP 18233 (OCR 2013):
 - Fear of bullying did not justify school failing to include severe and profound students in school dances

Bullying Could Result in Denial of FAPE

- *M.L. v. Federal Way Sch. Dist.*
105 LRP 13966, 394 F.3d 634 (9th Cir. 2005)
 - “If a teacher is deliberately indifferent to teasing of a disabled child and if the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied FAPE.”
 - Parent could not meet this standard

T.K. and S.K. v. New York City Dept. of Educ.
63 IDELR 256 (E.D.N.Y. 2014)

- Third-grader with a language-based learning disability became emotionally withdrawn, gained 13 pounds, and frequently arrived late to school due to her fear of ostracism by classmate
 - 46 absences or tardies in a single school year
 - Teacher testified that classmates treated the student like a "pariah" and laughed at her for trying to participate in class
- The district's failure to address peer harassment in the student's IEP or BIP amounted to a denial of FAPE
 - Where there is a substantial probability that bullying will severely restrict a student's educational opportunities, an anti-bullying program must be included in the student's IEP.
 - Parents to recover the student's private school cost

Practical Pointers on Response

- Keep "Responding and Reporting" separate in your mind
- Investigate reported incidents
 - Focus on the small stuff
- Determine if bullying is related to victim's disability
- **Document, Document, Document**
- Don't make promises you can't keep

Supporting the Victim

- Educational Responses
 - SEL
 - Resilience
- SAT/Test
- Social Skills Interventions
- Follow up
 - Report back with information regarding handling

Consider IEP of Bully

- Ensure IEP and supports implemented with fidelity
 - Remember to consider this as part of Manifestation
 - Manifestation for every removal over 10 days
- Consider reconvening IEP team to add BIP, 1:1 support, social skills
- If student's behavior impedes the learning of others, can be moved to a more restrictive placement

Responding to Threats



McNeil v. Sherwood Sch. Dist. 88J 2019 U.S. App. LEXIS 7653 (9th Cir. 2019)

- Student created a "hit list" in his personal journal while at home
 - Identified 22 classmates
 - "I am God" and "All These People Must Die"
 - Depictions of graphic violence
 - Student had access to guns, 525 rounds of ammunition, and lived close to school
- Mom found journal cleaning the room
 - Made copies and consulted with therapist
 - Therapist is alarmed, reports to police as mandatory reporter

McNeil v. Sherwood Sch. Dist. 88J

2019 U.S. App. LEXIS 7653 (9th Cir. 2019)

- Police investigated, found no evidence student took steps to follow through
 - No charges but inform school
- School expelled citing substantial disruption
- 9th Cir.: Applying Tinker, school did not violate First or Fourteenth Amendment by disciplining
 - "Schools have a right, indeed an obligation, to address a credible threat of violence involving the school community" even when police or mental health professionals have elected not to take action.

McNeil v. Sherwood Sch. Dist. 88J

2019 U.S. App. LEXIS 7653 (9th Cir. 2019)

9th

Circuit:

"We have recognized repeatedly that the specter of school violence places a weighty social responsibility on school districts to ensure that 'warning signs' do not turn to tragedy. This responsibility does not mean schools may expel students just because they are loners, wear black and play video games. It does mean, however, that a student's intent, although relevant, does not necessarily define the threat of violence."

Greenville (SC) County Sch. Dist.

56 IDELR 145 (OCR 2010)

- Student made multiple threatening posts on Facebook related to bringing gun to school
 - Was not verified as disabled at time of the threat
 - Was subsequently evaluated and determined eligible
- Principal's response:
 - Contacted law enforcement
 - Recommended expulsion
 - After MDR, student assigned to alternative school

Greenville (SC) County Sch. Dist.
56 IDELR 145 (OCR 2010)

- Parent filed OCR complaint, alleged discrimination in imposing harsher discipline
- OCR: Four other students made Facebook threats and were suspended 1-2 days rather than expelled
 - Threat from student with a disability specifically referred to a gun and threatened harm to entire student body
 - Disparate treatment not based on disability

Placement and Removal

34 CFR § 300.530(a); 34 CFR § 300.530(b)(1)

"School personnel may consider any unique circumstances on a case-by-case basis when **determining** whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct."

"School personnel... may **remove** a child with a disability who violates a code of student conduct from his or her current placement... for not more than 10 consecutive school days... and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under § 300.536)."

**"Not more than
10 consecutive school days"**

- 10 consecutive days per offense
- Additional removals in same school year for separate incidents of misconduct allowable so long as not a "pattern of removals" constituting a "change in placement"

Functional Behavioral Assessment (FBA)

34 CFR § 300.530(f)

- If student's conduct is a manifestation of the student's disability, the IEP team must:
 - Conduct a functional behavioral assessment (provided the district had not conducted such assessment prior to the conduct at issue) and implement a behavioral intervention plan for the child
 - When a behavioral intervention plan already has been developed, review the plan and modify it as necessary to address the behavior
 - Return child to the placement from which he was removed, unless the parent and district agree to a change in placement

Removal to IAES

- Special rules related to **weapons, drugs, and serious bodily injury** allow schools to remove students to an Interim Alternative Educational Setting for 45 days regardless of outcome of MDR

Vilonia Sch. Dist.

72 IDELR 136 (SEA AR 2018)

- Student, 15-year-old male, eligible for IDEA services as an individual with TBI
 - Behaviorally, the student struggled with respectfully interacting with school staff and with work avoidance
- March 1, 2019: Principal informed of threatening social media post from the student
 - Picture showed the student holding a gun of some type with the message that read "I love it when they run."

Vilonia Sch. Dist.

72 IDELR 136 (SEA AR 2018)

- Principal notified the local police, who confronted the student about the message
 - Student indicated that the image depicted an airsoft gun, that he was not serious, and did not intend to carry out any threats
- Next day, additional audio clips and social media posts emerge wherein the student made threatening statements and referred to committing suicide

Vilonia Sch. Dist.

72 IDELR 136 (SEA AR 2018)

- In response, District recommended the student be expelled and sought to place him in an IAES
 - Parents filed a due process complaint challenging placement in IAES
- District: Student's removal justified based upon the posts and statements

Vilonia Sch. Dist.

72 IDELR 136 (SEA AR 2018)

- IHO: IDEA allows for a student to be removed to an IAES for not more than 45 school days without regard to whether the behavior is a manifestation of the student's disability if:
 - Student brings a weapon to school;
 - Inflicts serious bodily injury on another person at school; **or**
 - Knowingly possesses, sells, or uses illegal drugs under school authority
- IHO: Student's behavior did not qualify for IAES
 - Statements were not directed at any specific individuals, or the school itself, and behavior was likely a cry for help
 - Student was not dangerous to himself or others, and the district did not have the authority to remove the student to an IAES following 10-day suspension

Reporting Threats Made by IDEA Eligible Students 34 C.F.R. § 300.535(b)(1)

- An agency reporting a crime committed by a child with a disability must ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.
- **However**, an agency reporting a crime may transmit copies of the child's special education and disciplinary records only to the extent that FERPA permits the transmission.

Menominee Area Pub. Schs. 17 FAB 40 (SEA MI 2014)

- Bomb threat found written on desk
- Student with undisclosed disability admits to writing the bomb threat
- Principal reports the threat to the police
 - Student arrested
- Parents file complaint with SEA
 - Allege district violated IDEA by failing to inform law enforcement of student's disabilities
 - SEA: Found for parents
 - Referred to and applied requirements of 34 C.F.R. § 300.535(b)
 - School failed to provide authorities with records
 - School failed to seek parent's consent to disclose

Other things to keep in mind



Changes in Title IX

- Experiencing LGBTQ+-related discrimination was related to being nearly three times as likely to have missed school in the past month, lower GPAs, lower self-esteem and school belonging, and greater depression
- Title IX's prohibition on discrimination "on the basis of sex" includes discrimination on the basis of gender identity and sexual orientation.
- **Effective since June 22, 2022**
 - Also, amendments to Title IX rule to come in May 2022
- Implications for students with disabilities who have special disciplinary protections under the IDEA and Section 504.
- Students with disabilities may be able to seek monetary damages under Title IX against districts they claim failed to protect them from sexual harassment or assault.

Mahanoy Area School District v. B.L. 594 U.S. ____ (2021)

- Schools can regulate student's off-campus speech:
 - that causes a "material and substantial disruption."
- Schools can likely regulate student's off-campus speech related to:
 - bullying
 - harassment
 - threats
 - the failure to follow rules concerning online school activities
 - breaches of school security devices.
- BUT heavy burden to show that such regulation does not violate the student's freedom of speech.

Letter to Anonymous

121 LRP 19451 (Student Privacy Policy Office 4/16/21)

- Parent did not approve of a teacher's decision to disclose her children's positive COVID-19 test results to colleagues and classmates
- Student Privacy Policy Office (SPPO) concluded that the disclosure did not violate FERPA:
 - Under FERPA, a district must generally obtain prior written parental consent before disclosing student's PII.
 - However, under the FERPA's "health or safety emergency" exception, the district may nonconsensually disclose a student's education records to if knowledge of that information is necessary to protect the health or safety of the student or other individuals.

Takeaways

- The pandemic increased the number of students in need of special education due to mental issues.
- Many mental health issues will trigger child find under Section 504 and IDEA.
 - Combined with the logistics and budget issues created by the pandemic, special educators must be extra vigilant for potential child find situations such as ADHD and PTSD.
- The district must continue to make significant efforts to locate placement even when options appear impossible.

Takeaways

- Bullying, harassment and related issues must be considered by IEP teams.
 - But fear of bullying does not justify excluding students from school activities.
 - IEP team may need to include an anti-bullying program in the student's IEP.
- Pay attention to bullying, harassment, and threats (including online):
 - Respond, report, and **document**.

Questions?

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