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Legal Considerations of Providing Educational Opportunities for Students with Emotional Disorders

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Common Understanding?

All on the same page?

- Meeting academic goals for our students and schools requires improving and supporting behavior of students.
- Improving and supporting behavior of students requires evidenced-based practices.

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- Positive school climates are not just desired but are a necessity
- Implementation of PBIS school-wide or district-wide is an effective evidenced based system.

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PBIS Systems Implementation anticipates individualized interventions!

Through development of IEPs and
Section 504 Plans and implementation of
services we can:

- Decrease or prevent challenging behaviors;
- Replace challenging behaviors with acceptable positive behavior;
- Reduce or eliminate the need for exclusionary discipline

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Top Five Procedural Errors in developing and Implementing Services

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#1 Insufficient Evaluation Data/ Information

- Is an outside psychological evaluation or psychiatric evaluation needed?
- Was an outside psychological evaluation obtained by parent that you have not obtained?
- Has a functional behavioral assessment (FBA) been conducted?

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Failure to Consider Outside Evaluation?

The IEP team members must “consider” the outside evaluation provided by the parent or provided by the outside evaluator.

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Example Student with Severe behaviors

After exhibiting behaviors that continue to escalate (hitting, scratching, pulling hair, screaming) and staff attempts (unsuccessful) to address using “strategies” a Functional Behavioral Assessment from an outside contractor is obtained by the school district

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Example Student with Severe behaviors cont’d

As a result of the FBA, the IEP team develops a Behavior Intervention Plan (BIP) with the help of the expert who conducted the FBA.

With only 14 days of implementation, the parent submits outside evaluation.

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Example cont'd

Parent obtains outside evaluation and gives copy to district.

Evaluation includes these recommendations:

An "ABA" approach with:

Structured teaching

Breaking down skills into small units

Teaching skills in a systemic manner

Using praise and other incentives to motivate participation

Gradually building to more complex skills

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Example cont'd

The outside evaluation report obtained by parent furthermore indicates that the student's primary diagnosis is "Autism Spectrum Disorder" with a secondary diagnosis of "mild intellectual disability." The evaluator indicates that the eligibility category should be changed to "Autism."

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What is the district's obligation in considering this outside evaluator report and recommendations?

District doesn't agree with academic focus, but does already do exactly what is recommended in connection to academics;

District doesn't agree that the student has "mild" intellectual disability;

District doesn't agree that Autism is the primary issue.

District has just begun implementing a quality BIP.

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- The team is not required to accept the results or the recommendations;
- No IEP meeting is automatically triggered by the receipt of the outside evaluation.
- Revision of the IEP is required only if the IEP team meets and decides it is needed.
- A reevaluation by the district is not automatically triggered.
- Reevaluation is triggered if IEP team members believe it is needed

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FBA

Is an FBA required?

Why is an FBA important?

- Inappropriate programming can occur without one
- Behavior may escalate if you don't know what you are looking for just ahead of the undesirable behavior

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What does the FBA accomplish?

Conducting a Functional Behavioral Assessment (FBA) can enable you to identify important information about the student's problem behaviors (e.g. **purpose that behavior may serve or reason student exhibits it**):

Frequency

Antecedents

Degree

Timing

Patterns

Responses to consequences used

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Back to Example!

FBA showed these behaviors:

1. FLEEING

Running away from staff members without permission.

- Average daily frequency for 2015-16 is approximately three times daily

2. YELLING

Volume of voice that can be heard from across the room (Level 3) during an activity in which students are expected to use a lower volume.

- Average daily frequency for 2015-16 is approximately seven times daily.

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Back to Example!

FBA showed:

3. HITTING, KICKING, PINCHING

Any physical contact with another person (staff or students) which uses force and causes pain.

- Average daily frequency for 2015-16 is five times daily (much variability between days and weeks noted)

4. PULLING HAIR

Grabbing and pulling the hair of another person (staff or student) which uses force and causes pain.

- Average daily frequency for 2015-16 is approximately two times daily

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Back to Example!

FBA showed:

5. SPITTING

Projecting saliva out of his mouth while indoors.

- Average daily frequency for 2015-16 is approximately six times daily (much variability between days and weeks noted)

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Back to Example! Context for behaviors

STRUCTURED ACTIVITIES- All categories of problem behavior occurred most frequently during structured activities, which include any activity in which the student is directed by a staff member to follow a series of directions.

TRANSITIONS- Problem behaviors also commonly occurred during transitions, which includes any time that a student is finishing one activity and preparing to begin a different activity.

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Back to Example! What immediately preceded behavior?

ASKED TO PERFORM A TASK -Problem behaviors were most common immediately after being directed by a staff member to perform a task.

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Back to Example! Why is the student engaging in the behaviors?

ESCAPE/AVOID TASK DEMANDS
GAIN PEER AND ADULT ATTENTION

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#2 Lack of a Behavior Intervention Plan (BIP)

Is a BIP required?

- Use of behavior strategies without a concrete written plan leaves a lot up to chance;
- When behavior impedes learning (of student or others in the classroom) lack of a plan can make the behavior escalate.

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BIP

A BIP in general:

Identifies problem behaviors

Identifies positive replacement behaviors

Provides for more intensive positive interventions to address the problem behaviors

Provides **a plan for data collection to monitor the success of the interventions identified**

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No BIP?

If you don't have a BIP, do you at least have Annual Goals that address the student's behavior?

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#3 Development of an inferior poor quality BIP

A BIP that focuses on punishment and exclusion is not worth the paper it is written on.

A BIP that is directly tied to the results of an FBA will be a quality BIP.

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A Quality BIP is based on an FBA

Remember: a functional behavioral assessment is a problem-solving process. It relies on a variety of techniques and strategies to identify the purposes of specific behavior.....which then will help the IEP team to select evidenced-based interventions to directly address the problem behavior.

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The BIP based on the FBA will include:

- positive strategies and positive supports that teach the student how to use acceptable behavior to get what they want;
- that will decrease the incidents of problem behavior;
- and that identify how the school staff is to respond when faced with the problem behavior.

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Back to Example! What does a quality BIP look like?

To address "Fleeing":

Reward desirable behavior (Allowing for a break when requested which involves attention and/or sensory input.

Appropriate behavior will be rewarded using visual token system which allows access to highly preferred item/activity. Not engaging in problem behavior while in regular education for short intervals will result in a token.)

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Back to Example! What does a quality BIP look like?

Consequences for undesirable behavior of Fleeing: Physically redirect back to task or transition with minimal attention (flat affect and tone). If in regular education setting, he will have a timer reset for each instance of problem behavior that will delay the presentation of a token in his reinforcement system.

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Back to Example! What does a quality BIP look like?

To address Hitting, Kicking, Pinching, Scratching (Operational Definition: Any physical contact with another person -staff or students- which uses force and causes pain.):

Reward desirable behavior (Allowing for a break when requested which involves attention and/or sensory input. Appropriate behavior will be rewarded using visual token system which allows access to highly preferred item/activity. Not engaging in problem behavior while in regular education for short intervals will result in a token.)

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Back to Example! What does a quality BIP look like?

Consequences: Physically redirect back to task or transition with minimal attention (flat affect and tone). If in regular education setting, he will have a timer reset for each instance of problem behavior that will delay the presentation of a token in his reinforcement system

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#4 Failure to share the BIP

- General education teachers
- Transportation folks
- Paraprofessional/aide

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#5 Incorrect or Inappropriate use of Disciplinary Action

- Is the disciplinary action appropriate?
- Is it inconsistent or in contradiction of the information in the FBA or the provisions of the BIP?
- Is it indicative of an existing BIP being ineffective or needing review/revision?
- Is the disciplinary action ineffective for future prevention and/or escalation?

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JJ v SSD
(U.S. District Court MO 2012)

- Did SSD make FAPE available to JJ when it transferred JJ from a general education setting with special education services to a public separate day school under an IEP which includes the use of a Secure Observation Room (SOR) as an accommodation; and
- Whether a self contained special education facility with access to support and secure observation rooms, was the “least restrictive environment” under the IDEA for JJ.

JJ v SSD

Despite numerous strategies to address JJ’s aggressive behavior in a classroom of other children, his behavior problems did not decrease in either quantity or intensity.

JJ v SSD

Court upheld the IEP Team's determination that JJ be educated in a separate public day school with the use of a secure observation room being a necessary component of the subject minor student's educational program.

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Another recent court decision example to consider

Miller ex rel. I.M. v Monroe School District (W.D. Washington 2016)

Extended time in "time-out" or "quiet room" justified

9 year old with Autism

Placed in room more than 20 minutes at a time

IEP required parent to be contacted if he needed more than 20 minutes

Court found the longer length of time was requested by student and that any violation of the IEP was irrelevant. Student received FAPE. Student himself requested to remain for additional time to calm down.

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CONT'D (INCORRECT OR INAPPROPRIATE USE OF DISCIPLINE ACTION)

- Was the need for the discipline related to a failure to implement the IEP or Section 504 Plan?
- Is the disciplinary action contrary to law?

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“Dear Colleague” Letter U.S. Department of Education August 1, 2016 OSERs and OSEP

- Failure to use positive behavior supports and strategies is leading to increased disciplinary exclusions.
- Development and implementation of services in an IEP should address behaviors.
- Repeated misconduct should lead to new or different behavior interventions and supports.

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- Use of exclusions and other disciplinary actions impacts instruction and can interfere with student receiving “meaningful educational benefit.”
- “We are issuing this guidance to clarify that the failure to consider and provide for needed behavioral supports through the IEP process is likely to result in a child not receiving a meaningful educational benefit or FAPE.”

- cited a variety of interventions, supports, and services that they believe can help reduce the need to exclude students from school or from a general education setting such as: violence prevention programs, anger management groups, counseling, behavioral coaching, and social skills instruction.(?????)

- Providing appropriate behavioral supports helps to ensure that children with disabilities are best able to access and benefit from instruction.
- “.....consider and include evidence-based behavioral supports in IEPs that, when done with fidelity, often serve as effective alternatives to unnecessary disciplinary removals, increase participation in instruction, and may prevent the need for more restrictive placements.”

Negative impact of exclusionary discipline?

- Ineffective in preventing reoccurrence of misbehavior.
- Adverse consequences shown in research include lower academic performance and increase risk of drop out.

“We have reason to believe these removals are due to minor instances of misbehavior that are unrelated to issues of child or school safety, and can and should be addressed through supports and guidance.”
OSERS/OSEP August 1, 2016 Letter to Colleague

OSERS identifies SW-PBIS

Cited as evidenced-based, schools are referred to the national PBIS website on how to support and respond to student behavior.

Disclaimer

PLEASE NOTE: The information provided in this training is for informational purposes only and not for the purpose of providing legal advice. You should contact your attorney to obtain advice with respect to any particular issue or problem.

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