

**Legal Issues Regarding Discipline and Special Education:
Implications for School Administrators**

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Overview

The much-awaited final regulations to the 2004 amendments to the Individuals with Disabilities were recently published in the Federal Register. While a number of topics have captured the attention of educators and advocates, perhaps one of the most anticipated areas of discussion continues to be the discipline and behavioral expectations and parameters described in more detail in these regulations which expand on the basic elements as signed into law by President Bush in December, 2004. This paper will address the following topics in relation to these provisions:

- What are the expectations under IDEA 2004 in the behavioral and discipline areas?
- What are some focused themes that seem to be the most salient in meeting these expectations?

There are a number of provisions that would seem to be most important for our discussion. This includes the areas of IEP special considerations (in relation to behavior), issues regarding the need to remove students from school settings, including interim alternative settings and ongoing challenges for teams in implementing such expected competencies as conducting manifestation determinations, functional behavioral assessments and developing behavioral intervention programs for students requiring such.

In regard to special considerations, IEP teams continue to face the expectation that if a student displays behavior impeding their learning or the learning of others that the team should consider positive behavioral supports and interventions and other strategies to address these behaviors. While this is not a new requirement it still seems to present significant challenges. For example, most of the recent literature on positive behavioral supports has focused on schoolwide

systems or, when applied to individual students, has a richer data base for disabilities other than emotional or behavioral disorders.

In the Individuals with Disabilities Education Act Amendments of 2004 (hereafter IDEA '04), Congress addressed the discipline of students with disabilities by restraining school officials' ability to unilaterally change placements for disciplinary reasons. The changes to the law in 2004 did allow for the consideration of "case-by-case" considerations for school personnel in considering the unique circumstances in which a change of placement, consistent with the law is needed for a student with disabilities.

The law outlined requirements for making manifestation determinations, and conducting functional behavioral assessments (FBAs) and a number of other requirements described below. Indeed, the provision on FBAs was largely responsible for the implementation of this technology in public school settings (Katsiyannis & Maag, 1998). With these provisions, Congress addressed (a) the safety of all students, (b) the ability of school personnel to address problem behaviors, (c) the need to protect students' right to free appropriate public education (FAPE), and (d) the requirement that individualized education programs (IEPs) include well-designed positive behavior intervention strategies and supports.

IDEA '04, consistent with the Amendments of 1997, responded to sometimes competing interests by mandating a number of measures that must be performed by school personnel when students with disabilities are disciplined. Accordingly, a student's IEP planning team may be called upon at any time to perform any one or combination of the following procedures: (a) designing, conducting, documenting functional behavioral assessments and behavioral intervention plans, (b) preparing data to substantiate dangerous behavioral situations, (c) substantiating appropriateness of placements/interventions, (d) generating possible sites and adequacy of alternative educational settings, (e) implementing strategies to assess the whether a student's IEP has been truly implemented and the relationship of behaviors leading to disciplinary action to a student's disability, (f) participating in screening of children facing discipline actions

who may “not yet be eligible”, and (g) establishing relationships with other agencies including law enforcement and courts.

Evaluation Expectations

Screening/Early Assessment

“Assessment is a process of collecting data for the purpose of making decisions about individuals or groups and this decision making role is the reason that assessment touches so many people’s lives” (Salvia & Ysseldyke, 2001, p. 5). Within the IDEA 04 behavioral and discipline provisions, and the field of emotional or behavioral disorders (EBD), we have challenges in areas such as early identification of students who may require special education programs or services because of their behavior IDEA 04 requires that IEP teams participate in screening students facing disciplinary actions who may “not yet be eligible” but who should be considered for possible special education programs and services because of significant behavioral needs.

When a student facing disciplinary action, one who has not been identified as having a disability, but claims that they should have been, the primary issue that must be addressed is whether the educational agency had “knowledge” that the student had a disability and failed to act on this knowledge.

This “screening/early assessment” provision serves as a primary nexus between the roles of general and special educators in the discipline/behavior arena. This requirement reinforces the notion that all students who are displaying a pattern of unacceptable behavior in the school setting should be screened for potential need and eligibility for special education programs and services. Although this provision does not suggest that all these students should qualify for special education, it does seem to suggest that unacceptable behavior must be addressed and assessed rather than just dealt with by using traditional discipline procedures.

Functional Behavioral Assessment

Moving a step beyond screening, IDEA04 requires that we conduct functional behavioral FBAs in certain situations. Functional behavioral assessments are generally defined as assessment strategies that enhance understanding of the purpose and effect of the behavior(s) of concern, and which provide information that is useful in the development of a student's IEP or behavior intervention plan (BIP). Whereas our professional literature in special education and psychology has extended discussions of this concept (Simpson & Myles, 1998), the definition of this term is not contained in the law. Rather than defining the term itself, IDEA 04 specifies when we are required to conduct such an assessment. According to the law the IEP team is expected to review the adequacy of, or complete an FBA within 10 days of when a student is placed into an interim alternative setting.

In the absence of statutory definition of an FBA we need to look more carefully at the professional literature. Sugai (1998) defines FBA as "a systematic process for developing statements about the factors that contribute to the occurrence and maintenance of problem behavior and more importantly serve as the basis for developing proactive and comprehensive behavior support plans." (p. 10) Katsiyannis and Maag (1998) describe the procedures for conducting the FBA as follows: "Conducting a functional behavioral assessment entails following a series of procedures to arrive at socially valid interventions. The procedures involve defining a behavior, interviewing knowledgeable adults (and, when appropriate, students) about occurrences and nonoccurrence of the behavior, developing hypotheses about the potential function and effect of context and curriculum on a behavior, and verifying or testing hypotheses, usually by manipulating controlling variables" (pp. 281-282).

Manifestation Determinations

IDEA 04 also requires that IEP teams analyze the relationship of a student's disability to the behaviors that led to disciplinary action. This process, referred to as a manifestation determination, is required in those situations in which a student is being excluded from school for

over 10 days, is being placed into an interim alternative educational setting or other significant changes in placement. This determination must be completed no later than 10 school days after the date on which the decision to take the disciplinary actions described above was made.

Katsiyannis and Maag (2001) argued that it is logically impossible to make a valid manifestation determination unless there is a known physical cause for the behavior problem (e.g., disabilities are defined relative to particular cultural contexts, manifestation determinations are based on a medical model, lack of empirically validated methods). Maag (1999) emphasized the need for determining the nature of individual-specific deficits as an integral component in conducting manifestation determinations.

Implications for Administrators

A primary responsibility of IEP teams is to plan and provide an appropriate program for any student eligible for special education. This means that IEP team members must have the skills to (a) assess a student's academic and behavioral needs, (b) determine the interventions, supports, and placements needed to address these needs, (c) develop goals to measure a student's progress, and (c) evaluate his or her progress toward the goals. I would assert that this is the most important requirement of IDEA and that it serves as the keystone in our continuing advocacy in seeking needed programs and services for students with EBD.

When a student's IEP is developed, the team must, under the revised IEP section within IDEA 04, consider the behavioral needs of the student. This expectation has been made explicit within IDEA 04 under the section titled "Consideration of Special Factors." This section states that the IEP team shall "in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavioral interventions, strategies, including positive behavioral interventions, strategies and supports to address that behavior" (IDEA '04, Sec. 614(d)(3)(B)(i)). This expectation, in my opinion sets the scene for the expectation that educators are, in fact, actively seeking instructional strategies to address behaviors of concern rather than merely planning consequences for unacceptable behaviors. This

provision has also provided the basic foundation for many of our current efforts dealing with the application of positive behavioral supports in our schools

As suggested above, I would assert that the lynchpin of the IDEA amendments of 2004, as well as earlier amendments, is the promise and expectation that students with disabilities will receive an education designed and delivered on the basis of their individualized needs. And therein lies what may be the most important element of these provisions for professionals, advocates and parents. Thus, IEP teams are faced with challenges regarding whether a student is, in fact, receiving an appropriate education.

Research Base/Recommendations for Administrators

A 1995 U.S. District Court decision in the Southern District of Texas (*Cypress-Fairbanks*, 1995) dealt with questions regarding what constituted educational benefit for a student with various psychiatric diagnoses and who was identified as in need of special education. This Court concluded that a threshold for determining educational benefit includes an individualized program delivered in the least restrictive environment. This Court went on to specify that such a program is also provided in a coordinated and collaborative manner by key stakeholders and demonstrates positive benefits both academically and non-academically. In an Appeal of this decision the Fifth Circuit Court of Appeals (*Cypress-Fairbanks*, 1997) supported such criteria and went on to state: “. . . the educational benefit to which the Act (IDEA) refers to which an IEP must be geared cannot be a mere modicum or de minimus; rather an IEP must be **“likely to produce progress, not regression or trivial educational advancement.”** In short, the educational benefit that an IEP is designed must be **“meaningful.”** (p. 3)(emphasis added) This meaningful benefit notion seems to lead naturally into our recent expectations that we use research or evidence based practices in meeting the educational needs of all students; including those with emotional or behavioral disorders.

This policy and legal discussion of “meaningful educational benefit” seems central to the more recent movement within educational reform circles for assuring our publics that educators

are using research or evidence based practices in our classrooms. The 2001 amendments to the Elementary and Secondary Education Act (No Child Left Behind) contain numerous references to the use of research based practices in our teaching practices. While some may have initially assumed that such rhetoric or “high expectations” (depending on one’s perspective) is meant to apply to traditional areas as reading, mathematics or science, it has become more apparent, as evidenced by the drafts of House and Senate versions of the IDEA Reauthorization of 2003, that these same questions are going to be asked more rigorously as we plan and deliver programs for students with emotional or behavioral disorders and other students with disabilities. And some may insist that just such a question is a natural bridge between our ongoing admonition to deliver meaningful educational benefit for these students and providing the ongoing data to demonstrate such.

The Broad-Based Context of Educational Benefit

First, it is clear that the notion of educational benefit includes more than academic progress (*Roland M.*, 1990). This conclusion has also been recently supported in the Eighth Circuit (*CJN v. Minneapolis Public Schools*, 2003). This Court alludes to the complexity in separating out academic and behavioral components when it states, “We believe . . . that the student’s IEP must be responsive to the student’s specific disabilities, whether academic or behavioral . . . Academic and behavioral matters, however, are not always independent of each other.” (p. 8) Even more explicitly the Ninth Circuit in 1996 (*County of San Diego v. California Special Education Hearing Office*, 1996) indicated that when a student is identified as having a serious emotional disturbance that the student’s goals are not limited to academic benefits but rather should address behavioral and emotional growth.

The scope of what is needed in order to deliver meaningful benefit may not stop at the schoolhouse door. For example, the First Circuit Court of Appeals recently heard a case addressing the question of whether schools, in some instances, might be required to provide

specific training for parents in order for them to better control as student's behavior at home and concluded that the IEP “. . . should be expanded to include further services and training for Gabriel's parents designed to help them manage Gabriel's behavior at home. And there is sufficient evidence in the record as to the nature of Gabriel's behavioral problems to support the district court's conclusion that they can be managed effectively through such means.”(*Gonzalez v. Puerto Rico Department of Education*, 2001, p. 3)

Moving Beyond Blame

In an earlier analysis of IDEA implementation with IDEA '97 (Smith, 2000), one of the critical dynamics that seems to affect how schools approach a given student is the extent to which those working with the student tend to blame him or her for intentionally engaging in misbehavior. Because they believe that students' should be held accountable for these intentional actions, they often react by with punishment or suspension, rather than designing needed special programs or accommodations for the student. In some earlier work (Smith, 1997) I had alluded to this dynamic as the application of a “deservedness” criteria that seems to be triggered when the a student's behaviors (a) are not qualitatively different from “normal” behavior, but may be at an intensity level that implies volitionally uncontrolled behavior; (b) do not suggest any type of biological or medical causation for the behavior of concern; (c) challenge the basic function of teacher control; and (d) elicit basic emotions such as anger in the teacher working with such students.

Summary/Discussion

While many parents and advocates feared that the 2004 Amendments to the Individuals with Disabilities Act would significantly remove the protections afforded to students with disabilities in the behavioral and discipline areas this does not seem to be the case. Yes, there has been additional discretion given to school authorities under the “case by case” determination language. Yes, there has been a narrowing of the expectations under the manifestation determination. Yes, there have been expansions to the circumstances under which students can be

removed to alternative settings. Yet with all of these procedural changes I would assert that the basic seminal expectation of providing an appropriate program for students with emotional and behavioral disorders is still in place. And this seems to be the most important element of all!

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