

2015-2016 CASE STUDIES AND RELATED OSEP LETTERS REGARDING BEHAVIOR

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1. *LETTER TO GALLO*, 61 IDELR 173 (OSEP 2013)

- ❖ Is parental consent required prior to conducting a functional behavioral assessment (FBA)?

KEY QUOTES

- “[A]n FBA is generally understood to be an individualized evaluation of a child in accordance with 34 CFR §§ 300.301 through 300.311 to assist in determining whether the child is, or continues to be, a child with a disability. The FBA process is frequently used to determine the nature and extent of the special education and related services that the child needs, including the need for a BIP. As with other individualized evaluation procedures, and consistent with 34 CFR § 300.300(a) and (c), parental consent is required for an FBA to be conducted as part of the initial evaluation or a reevaluation.”
- “[I]f the FBA is intended to assess the effectiveness of behavioral interventions in the school as a whole [all or most children in a school], the parental consent requirements in 34 CFR § 300.300(a) and (c) generally would not be applicable to such an FBA because it would not be focused on the educational and behavioral needs of an individual child.”

2. LETTER TO JANSSEN, 51 IDELR 253 (OSEP 2008)

- ❖ Who can or must conduct a functional behavioral assessment (FBA)? Must it be conducted by a Board Certified Behavior Analyst (BCBA)?

KEY QUOTE

- “The statute and regulations do not specify which individuals must conduct the FBA. There is no Part B requirement, as you suggest in your inquiry, that a Board Certified Behavior Analyst (BCBA) conduct the FBA, unless State law imposes such a requirement.”

3. COBB COUNTY SCH. DIST. V. D.B. BY G.S.B. AND K.B., 66 IDELR 134 (N.D. Ga 2015)

❖ Functional Behavioral Assessment (FBA)

- See 34 C.F.R. § 300.304(c)(7)
- See also 34 C.F.R. § 300.324(a)(2)(i)

34 C.F.R. § 300.304(c)(7)

- “Each public agency must ensure that—... Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.”

34 C.F.R. § 300.324(a)(2)(i)

- The IEP Team must— “In the case of a child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior....”

BACKGROUND FACTS

- D.B. is a 5-year-old student with autism.
- The IEP Team agreed that D.B.'s behavior interfered with learning and that he needed goals to address his behavior. Parents requested that the District conduct an FBA. IEP Team agreed and District conducted an FBA.
- Parents disagreed with the District's FBA and requested that the District pay for the parents' independent FBA.
- District requested a due process hearing to prove that its FBA was appropriate.
- ALJ found District's FBA to be inappropriate and ordered the District to pay for the parents' independent FBA. District appealed. Court affirmed ALJ decision.

KEY QUOTES

- “FBAs rely on the premise that all behaviors serve a purpose. With this in mind, FBAs attempt to identify the underlying reasons and environmental variables that contribute to problem behaviors. Information gathered through the FBA helps evaluators design a Behavior Intervention Plan ('BIP') with strategies to reduce or eliminate conditions that encourage problem behaviors and to create conditions that encourage positive behaviors.”
- “IDEA provides no explicit requirements for FBAs. Rather, industry standards provide the framework for such an evaluation. FBAs may be conducted by educators or behavioral analysts. First, the evaluator relies on teacher and parent interviews, direct observation, and school records to identify targeted behaviors and form a hypothesis about the purpose of the problem behaviors. Next, the evaluator collects ‘ABC’ -- Antecedent, Behavior, Consequence -- data.”

KEY QUOTES (CONTINUED)

- “ ‘Antecedents’ are events or environmental conditions that precede (and presumably trigger) problem behaviors. ‘Behavior’ refers to behavior topographies, which describe how the behavior looks. ‘Consequence’ data records the immediate aftermath of the behaviors.”
- “The evaluator looks for patterns in the ABC data to create a hypothesis about the function of the problem behaviors. Because FBAs have no explicit requirements, analysts may exercise substantial discretion in tailoring their data collection to the particular student. But analysts must ensure the accuracy of the data by, e.g., including explanations and demonstrations of data collection, asking data takers to define variables to ensure understanding across all data takers, observing data collection, or providing feedback during the collection.”

KEY QUOTES (CONTINUED)

- “The ALJ found that D.B. required a more thorough assessment than that accomplished by Cooper's FBA. Her findings relied on the seriousness of D.B.'s violent and aggressive behaviors toward himself and others. Such serious behaviors require a more definitive identification of the functions of these behaviors. The ALJ concluded that the District's FBA was insufficient because it did not take data on escape/avoidance and access to preferred items. She further concluded that the FBA did not reliably collect data as to the consequences of D.B.'s behavior. In support of this finding, the ALJ cited numerous failures that ‘preclude a statistical and reliable assessment concluding [escape/avoidance and access to preferred items] are the functions.’”

KEY QUOTES (CONTINUED)

- “There is ample evidence in the record -- certainly more than a preponderance -- to support the ALJ's finding that Cooper's FBA was insufficient to evaluate D.B.'s educational needs. Again, IDEA's implementing regulations require that the '[a]ssessment tools and strategies provide *relevant* information that *directly* assists' determination of the child's educational needs. 34 C.F.R. § 300.304(c)(7) (emphasis added). Considering what is at stake here -- a disabled child's access to a free appropriate public education -- the Court agrees with the ALJ's decision that the FBA did not fulfill IDEA's requirements.”

LESSONS LEARNED

- Follow industry standards when conducting an FBA and be able to articulate those standards.
- Make sure the FBA is technically sound and provides relevant information that directly assists the IEP Team in determining and addressing the needs of the child.
- Rely on the FBA when developing behavior strategies and/or a BIP.

4. LETTER TO McWILLIAMS, 66 IDELR 111 (OSEP 2015)

- ❖ Can the State respond to State complaints that allege a failure to implement a BIP when the BIP did not result from a Manifestation Determination Review?

KEY QUOTES

- “Once an IEP Team considers a child’s behavioral needs through the IEP process...and deems a BIP necessary for the child to receive a ... FAPE, IDEA does not address how the BIP must be reflected in the child’s IEP.”
- “[A] BIP developed through the IEP process is a proper subject of a State complaint, regardless of the manner in which the BIP is reflected in a child’s IEP.”

*5. VALDEZ HERNANDEZ EX REL. J.V. v. BOARD OF EDUC. OF
ALBUQUERQUE PUB. SCHS., 66 IDELR 78 (D.N.M. 2015)*

❖ **Physical Restraint**

- See **Restraint and Seclusion: Resource Document (May 15, 2012)** available through the U.S. Department of Education website at:

<http://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf>.

BACKGROUND

- This case involved a 13-year-old student with Down Syndrome who was involved in a classroom altercation with staff.
- On one occasion, staff “physically managed” the student consistent with the District’s policies and guidance documents – (1) "Staff Conduct with Students – March 2007 Revision; and (2) "Best Practice [sic] Use of Physical Management for Students with Disabilities." These documents emphasize that "[p]hysical management is always a last resort, used only after all other less restrictive interventions have been exhausted or ruled out due to significant safety concerns."
- Parent brought action claiming District discriminated based on disability, arguing that the District through its guidance documents “manifests its intention to plan for and rely on physical restraints (with their attendant risk of injury) only with respect to students with disabilities.” Court rejected these arguments, ruling in favor of the District.

KEY QUOTES

- “Hence, the contention that APS ‘manifests its intention to plan for and rely on physical restraints’ solely for students with disabilities is demonstrably false; APS policy expressly contemplates the restraint of all students, irrespective of disability. (not differentiating between students with respect to four enumerated justifications for physical intervention). Viewed in aggregate, it is unclear how APS policy is the product of prohibited discrimination.”
- “Permitting additional physical interventions solely in circumstances described in a student's IEP does not rely on stereotypes about the disabled, but rather draws from an individuated determination about what is appropriate for that student. To hold to the contrary would effectively imply that any policy incorporating exceptions predicated on IEPs is discriminatory because it facially differentiates between disabled and non-disabled students.”

KEY QUOTES (CONTINUED)

- “[A]s a comparison of the Best Practice document and background restraint policy makes patent, the Best Practice memorandum requires that APS employees be more conscientious in their physical interventions with disabled students by demanding that certain procedures be followed, including the documenting of all physical management of disabled students. Certainly, this policy benefits, rather than harms, disabled students. Thus, because the undisputed facts make patent that Defendant is entitled to judgment as a matter of law, the Court will grant summary judgment as to the federal discrimination claims.”

LESSONS LEARNED

- Train staff on proper use of restraint.
- Make sure your policies and procedures (guidance documents) rely on current, sound guidance regarding use of restraint.
- Policies and procedures should apply to all students and may also specifically address the individual determinations to be made with respect to students with disabilities, and may impose additional protections for students with disabilities.

*6. J.V. AND M.Q. EX REL. C.V. v. ALBUQUERQUE PUB.
SCHS., 813 F.3D 1289 (10TH CIR. 2016)*

- ❖ Disability Discrimination under the Americans with Disabilities Act (ADA)

BACKGROUND

- This case involved a seven-year-old, 2nd grader who was identified as both gifted and as having autism.
- After several hours of extreme behaviors including running away, locking himself in the nurse's office bathroom, kicking staff, swinging his arms, pulling cables out of the wall, and shooting a rubber band at the school officer, the officer cuffed the student to a chair until his mom arrived. Mom took pictures of the welts and scratches on the child's wrists.
- Mom withdrew him and enrolled him in another APS campus where he continued to attend school.
- The mother sued, alleging discrimination based on his disability.
- Federal district court ruled in favor of APS and the parent appealed.

KEY QUOTES

- “Our role is not to opine on whether it was wrong to handcuff C.V.”
- “Appellants fail to cite any evidence showing his conduct indeed was a manifestation of his disability. Also, they cite no authority suggesting a school may not regulate a student's conduct if that conduct is a manifestation of a disability. Rather ... a student's conduct may be regulated, so long as action is not taken by reason of the student's disability.”
- “They contend APS's failure to train its security officers on how to calm disruptive disabled students supports each theory. This circuit has not recognized a failure-to-train claim of discrimination under the ADA, but we have not foreclosed the possibility. ... [W]e need not determine whether failure to train could establish ADA liability because Appellants failed to provide evidence to support any of the discrimination theories [intentional discrimination, disparate impact, or failure to make a reasonable accommodation].”

LESSONS LEARNED

- Train staff on de-escalation strategies and physical restraint.
- Behavior Strategies should be designed to ensure that the student is not “excluded from participation in or denied the benefits of ... services, programs, or activities, or was otherwise discriminated against” by the school district.”
- Complying with IDEA’s procedural requirements for behavior and discipline will help ensure against discrimination.

**7. T.K. AND S.K. EX REL. L.K. v. NEW YORK CITY
DEP'T OF EDUC., 67 IDELR 1 (2D CIR. 2016)**

❖ IEP and Bullying

BACKGROUND FACTS

- In third grade, L.K. was placed in a general education co-taught classroom.
- One day, L.K. came home crying and complained of bullying on almost a daily basis.
- When parents attempted to raise the bullying issue at an IEP meeting, “the school principal, without explanation, flatly refused to discuss the issue with them.”
- At the due process hearing, three of her one-on-one Special Education Itinerant Teachers testified that her classmates constantly bullied her.

KEY QUOTES

- “We conclude that the Department denied L.K. a FAPE by violating her parents' procedural right to participate in the development of her IEP.”
- “The Department's persistent refusal to discuss L.K.'s bullying at important junctures in the development of her IEP ‘significantly impede[d]’ Plaintiffs' right to participate in the development of L.K.'s IEP. 20 U.S.C. 1415(f)(3)(E)(ii). This constituted a procedural denial of a FAPE similar to other procedural violations that our sister circuits have held to constitute denials of a FAPE, such as the predetermination of an issue prior to an IEP meeting, ... or the failure to inform parents about a fact significant to the development of the IEP....”
- “To summarize, we hold that the Department denied L.K. a FAPE, that Summit [private school] was an appropriate placement, and that the balance of equities favors reimbursement.”

LESSONS LEARNED

- Be prepared to discuss bullying in an IEP meeting.
- The issue before the IEP Team should be whether bullying is interfering with the child's ability to receive a FAPE.
- The negative impact on FAPE can be multi-factored. The IEP Team should explore all factors and design student-specific strategies to address those factors.
- If the contributing factors are not clear, consider an FBA or other type of reevaluation.

8. *TROY SCHOOL DISTRICT v. K.M.*, 65 IDELR 91 (E.D. MICH. 2015)

❖ IEP implementation in the Least Restrictive Environment

BACKGROUND FACTS

- The hearing officer held that the Student with autism, ADHD and Oppositional Defiant Disorder should return to the regular education classroom from an autism-specific classroom despite Student's aggressiveness and classroom disruption.
- The IEP Team recommended a move from the general education classroom to a more restrictive placement. As a result of a settlement, the more restrictive (autism-specific) placement was implemented for a 30-day trial period. After the conclusion of the trial period, the parents challenged the placement as too restrictive.

KEY QUOTES (STUDENT'S CONDUCT IN THE REGULAR CLASSROOM)

- “On the fourth day of the seventh grade... K.M. escalated instantaneously in his math classroom, throwing chairs at his teacher, the adult support, and students. K.M. cursed and yelled, ‘Leave me alone you mother fucker,’ ‘I’m going to kill you,’ and ‘I’m going to kill the students.’ ... When Mr. DeVault removed K.M. from the room, K.M. bit Mr. DeVault in the leg through his jeans, drawing blood and leaving a bite mark. ... K.M. continued screaming through the hallway, frightening other students.”
- “When K.M. was released to his father, K.M. bolted out the school door, entering and exiting the woods on the edge of the school property. ... K.M. found a log, measuring 55 inches in length and 9 inches in circumference, and charged back toward the school attempting to crash the log through a classroom window. ... K.M.’s father stepped in front of him and K.M. struck him with the log in the head and neck area.”

KEY QUOTES (STUDENT'S CONDUCT IN THE SPECIAL EDUCATION-AUTISM SPECIFIC PROGRAM)

- “K.M. experienced continued behavioral episodes. ... On January 6, 2012, Maureen Ziegler ('Ziegler'), a Statewide Autism Research and Training consultant and autism expert retained by the District, observed K.M. ... K.M. had an episode where he threw items at staff and began climbing into the ceiling. 911 emergency was contacted and K.M.'s parents arrived. ... K.M. came down from the ceiling and left with his mother.”

KEY QUOTES (OUTCOME)

- “The Court finds that because the June 2011 IEP and PBSP were never properly implemented, that placement at a more restrictive school, such as Edison, is inappropriate since the least restrictive placement set forth in the June 2011 IEP was never implemented. Evidence established that the West Bloomfield placement did not follow the IEP in that K.M. had a negative association with an authoritarian principal and an unwelcome environment.”
- “The more restrictive environment of Edison or similar placement would not benefit K.M. Although K.M. has disrupted the general education setting, those incidents could be more controlled if the staff was properly trained and the IEP was properly followed.”

LESSONS LEARNED

- Failure to properly implement a student's IEP including BIP can lead to an order to return a highly aggressive student from a special education classroom back to the general education classroom.

*9. JASON O. AND JILL. O. EX REL. JACOB O. V.
MANHATTAN SCH. DIST. No. 114, 67 IDELR 142
(N.D. ILL. 2016)*

❖Least Restrictive Environment

BACKGROUND FACTS

- Following a six-day hearing, the parents appealed a hearing officer's decision involving their 7-year-old child with Disruptive Mood Dysregulation Disorder and ADHD. He was initially eligible for special education as Speech or Language Impaired, later identified as Developmental Delay and OHI, and finally reclassified as having an Emotional Disability.
- Jacob's significant behavioral difficulties at school began when he was placed in a regular kindergarten class in order to repeat kindergarten, after having spent his first year of kindergarten in a special education Early Childhood classroom. His difficulties included noncompliance and aggression.
- After implementing an initial and revised BIP, the IEP Team concluded that Jacob needed a more restrictive placement. Parents disagreed.

RATIONALE FOR CHANGE OF PLACEMENT

- Jacob had regressed academically and behaviorally despite implementation of a BIP (including revised BIP) developed based on an FBA including independent FBA, and with “considerable input” and express approval by parent’s expert psychologist and district’s outside behavior consultant.
- The outside behavior consultant conducted classroom observations from March 11 to May 30 and wrote an 11-page report which provided an overview of Jacob's "current placement, ongoing accommodations and behavioral interventions" implemented after the March 2014 IEP.
- Outside consultant concluded that Jacob should be placed in a more restrictive setting because it was not possible to implement Jacob's academic and behavioral goals in a general education setting “where, for example, Jacob could not receive immediate, frequent correction to address his anger and insensitivity towards peers.”
- School social worker and school psychologist agreed.

KEY QUOTES

- “At the time, the School District knew of no further adjustments that could have been made in the regular classroom setting to keep Jacob there, and Plaintiffs have not identified any such adjustments on review.”
- “Although structured, the SELF program does not wall-off Jacob entirely from his nondisabled peers. Children in the program can interact with their nondisabled peers in multiple arenas, including in: (1) special area subjects (e.g., art, music and gym); (2) lunch and recess; and (3) academic classes, based upon Jacob's emotional ability to handle those classes.”

LESSONS LEARNED

Before removing to a more restrictive environment:

- **Conduct a FBA;**
- **Develop and implement a BIP;**
- **Expect to update the FBA and review/revise the BIP;**
- **Involve and document the parent's participation in IEP meetings to review/revise the BIP;**
- **Involve appropriate experts and consider any expert opinions provided by the parent; and**
- **Document and be able to show implementation of the IEP/BIP.**

10. *LETTER TO BORUCKI*, 16 IDELR 884 (OSEP 1990)

❖ Does the school have to continue to provide services to a student who refuses to cooperate with efforts made by school staff to assist the student in attaining goals and objectives listed on his IEP?

KEY QUOTES

- “[T]he failure of a student to cooperate with school staff in attaining the goals and objectives in the child’s IEP does not relieve school officials of the responsibility to provide a FAPE to that child.”
- “The obligation of States and school districts to provide appropriate educational services to eligible students with [disabilities] is equally applicable to cooperative and uncooperative students.”

11. *BRISTOL TWP. SCH. DIST. V. Z.B. BY K.B. AND R.B.*, 116 LRP 1736 (E.D. Pa. 2016)

❖ **Manifestation Determination Review**

- See 34 C.F.R. § 300.530(e)(1)(ii)

34 C.F.R. § 300.530(e)(1)

- “Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child’s IEP Team (as determined by the parent and the LEA) must review all relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents to determine—
 - (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or
 - (ii) If the conduct in question was the direct result of the LEA’s failure to implement the IEP.”

BACKGROUND FACTS

- This case involved a 17-year-old student with ADHD.
- The misconduct that was the subject of the manifestation determination review (MDR) involved a pretend physical altercation in the hallway with some friends, which led to a physical altercation with a teacher who tried to stop the pretend fight.
- Hearing officer held MDR deficient; district court affirmed.

KEY QUOTES

- “Dr. Newsham protested during the hearing that she included the parents in the conversation at the manifestation determination review, read her findings aloud, and gave the team an opportunity to object. But, ultimately, Dr. Newsham convened the manifestation determination with a prefabricated document that encompassed solely her views and conclusions and then asked if anyone objected, which is materially different than, say, for efficiency, filling in background information gathered ahead of time in order to facilitate meaningful discussion about the appropriate answers to the two crucial questions at the heart of the manifestation determination, questions that Dr. Newsham had already answered ‘no’ to.”

KEY QUOTES (CONTINUED)

- “The manifestation determination team also did not consider any specifics regarding the incident in question, or specifics about Z.B.'s behavior as a manifestation of his disability. Although the worksheet provided a space for a detailed description of the incident and the behavior in question, all the team considered was that Z.B. had engaged in ‘aggressive assault behavior.’ Dr. Newsham candidly explained, ‘To be quite honest, we looked at it more from a global picture. We didn't [dive] into the specifics. We weren't looking at what occurred during that specific incident. We were looking at does [Z.B.'s] disability have anything to do with aggressive behaviors? And the team absolutely did not feel that.’”

KEY QUOTES (CONTINUED)

- “This failure to consider the specific circumstances of the incident and the alleged conduct renders the manifestation determination deficient because it precluded any meaningful discussion of whether Z.B.'s behavior was a manifestation of his disability.”
- “As the Hearing Officer noted, the manifestation determination review team considered Z.B.'s behavior in light of what is typical for students with ADHD rather than giving ‘specific consideration’ to whether the behavior arose from, or was substantially related to, Z.B.'s particular disability and manifestation thereof.”

LESSONS LEARNED

- Always fully engage parents in the discussion and analysis of the MDR and document their input.
- Do not make decisions based on globalized understandings of the disability category; and instead, consider the disability in relation to the particular student and how it impacts the particular student.
- Bring as much information as possible about the incident to the MDR table and make the determination based on the particulars of the incident.

12. *WAYNE-WESTLAND CMTY. SCHS. v. V.S. BY Y.S.*, 65 IDELR 13 (E.D. MICH. 2015)

❖ What if the student poses a danger?

- See 34 C.F.R. § 300.532(a).

34 C.F.R. § 300.532(a)

- If the school “believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others” it “may appeal the decision by requesting a hearing.”

BACKGROUND FACTS

- Student was six feet tall, 250 pounds.
- In one month in the spring of 2014 he (1) physically attacked a student and several staff members, spitting at and kicking them; (2) “menaced” two staff members with a pen held in a stabbing position and refusing to put it down when told to do so; (3) punched a student; (4) punched the principal; (5) threatened to rape a female staff member; and (6) punched another staff member in the face.
- Later in the semester, the student attacked a security liaison. He was told to leave the building. When he attempted to return, four staff members held the door closed to keep him out. Since the student would not leave the school grounds, the entire school was placed on lockdown.

BACKGROUND FACTS (CONTINUED)

- When school resumed in the fall of 2014, the student (1) threatened to bring guns to school to kill staff members; (2) made racist comments toward African American staff members; and (3) punched the director of special education in the face.
- School bypassed special education hearing officer and went straight to court to obtain an injunction.
- Court granted an injunction to keep the student away from school until the IEP Team could meet to discuss a change of placement. The court agreed that during the interim he would be provided education through a Virtual Academy, with a staff member available to help him and answer questions by phone or email.

LESSONS LEARNED

- Remember the Supreme Court's words in *Honig v. Doe* (1988): “We think it clear, however, that Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school.”
- A school is not acting unilaterally when “the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.” 34 C.F.R. § 300.530(f)(2).
- A school is not acting unilaterally when it requests an expedited hearing to remove a student based on dangerousness or seeks an injunction from a court.

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