Legal Applications and Challenges to FBAs, BIPs, and the IDEA

WDE Education Leadership Symposium

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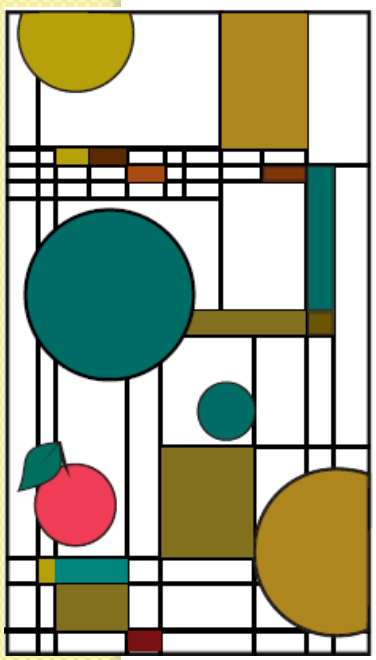

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DISCLAIMER: This presentation and any accompanying materials are intended as an introduction to the legal rights of students in Minnesota. Nothing in this presentation should be considered legal advice.

General Context

- IDEA limits the disciplinary removal of students with disabilities from their current placement
- IDEA requires the determination of the relationship between the behavior and disability to determine a fair placement

IDEA *Required Consideration* of the Use of FBAs and BIPs

- If the IEP team determines that the child's behavior impedes the child's learning or that of others –
  - The IEP Team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior
    - 34 C.F.R. §300.324(a)(2)(i)

IDEA *Required Use* of FBAs and BIPs

- If the conduct is a manifestation of the disability the IEP Team must:
  - Conduct an FBA and implement a BIP; or
  - If a BIP already exists, then review the BIP and modify as necessary to address the behavior
    - 34 C.F.R. §300.530(f)
      - Authority: 20 U.S.C. § 1415(k)(1) and (7) (2011)

IDEA *Recommended Use* of FBAs and BIPs

- If the child with a disability is removed from the current placement pursuant to –
  - Disciplinary changes in placement that would exceed 10 consecutive school days; or
  - Possession of a weapon or illegal drugs on school premises, or has inflicted serious bodily injury upon another person while at school

IDEA *Recommended Use* of FBAs and BIPs

- The child must receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur
  - 34 C.F.R. 300.530(d)(1)(ii)

Wyoming Department of Education Interpretation: In re: Student with a Disability

- The Wyoming Department of Education (WDE) received a complaint alleging violations of special education law

In re: Student with a Disability

- Relevant Issues:
  - Whether the student's IEP was reasonably calculated to meet the educational needs of the Student, including a FBA and/or BIP
  - Whether removing the student from school for disciplinary reasons resulted in a change of placement

In re: Student with a Disability

- WDE found the following:
  - Student has a Cognitive Disability
  - The Student was frequently sent home due to his behavior
  - Student's behavior was impeding his learning and the learning of others.
  - No evidence of a BIP

In re: Student with a Disability

- WDE came to the following conclusions:
  - (1) It was incumbent upon the District to address all educational needs resulting from the Student's disability, including his aggressive behavior

In re: Student with a Disability

- WDE came to the following conclusions:
  - (2) Despite the fact that the evaluation report documented that the triggers for the Student's behavior were unknown, no further assessment was undertaken to help appropriately plan for the Student

In re: Student with a Disability

- WDE came to the following conclusions:
  - (3) There was no evidence in the file that the behavior intervention plan was implemented

In re: Student with a Disability

- WDE came to the following conclusions:
  - (4) Without a comprehensive evaluation of the student's needs, the resulting IEPs were not sufficient to address all of his educational needs

In re: Student with a Disability

- WDE came to the following conclusions:
  - (5) The District is required to accurately monitor the number and duration of disciplinary removals for the Student

In re: Student with a Disability

- WDE came to the following conclusions:
  - (6) The cumulative total of removals resulted in a pattern of removals constituting a change in placement

In re: Student with a Disability

- WDE came to the following conclusions:
  - (7) The disciplinary change in placement triggered additional duties on behalf of the District and safeguards on behalf of the Student

In re: Student with a Disability

- WDE came to the following decisions:
  - (1) The IEPs were not reasonably calculated to meet the educational needs of the Student

In re: Student with a Disability

- WDE came to the following decisions:
  - (2) The district failed to provide special education and related services to the Student in conformity with his IEPs due primarily to the repeated practice of sending the Student home as a behavioral consequence

In re: Student with a Disability

- WDE came to the following decisions:
  - (3) There was a de facto change of placement

In re: Student with a Disability

- WDE Corrective Action Plan
  - (1) District must provide an independent evaluation in order to develop a comprehensive BIP
  - (2) IEP Team must determine an appropriate BIP
  - (3) Student shall receive 50 hours of compensatory education

In re: Student with a Disability

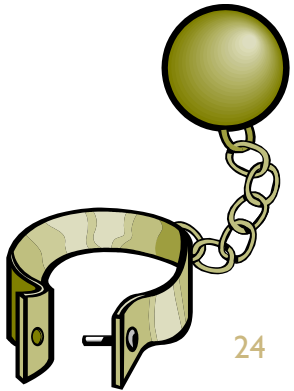
- WDE Corrective Action Plan
  - (4) The District shall provide 2 hours of training to key special education staff on the use of positive BIPs, removal of students for disciplinary reasons, and writing prior notice

Inadequate or Missing FBAs and BIPs: 10th Judicial Circuit

- *Ebony S. v. Pueblo School District 60*, 819 F.Supp.2d 1179 (D.Colo. 2011)
  - Student with Down Syndrome was secluded to a wrap-around desk for apparent misbehavior.

Inadequate or Missing FBAs and BIPs: 10th Judicial Circuit

- *Ebony S. v. Pueblo School District 60*, 819 F.Supp.2d 1179 (D.Colo. 2011)
  - District Court held that this was not a violation of 14th Amendment, procedural due process, or equal protection rights
  - Fact issues remained as to whether use of the table violated ADA and Rehabilitation Act.



Ebony S. v. Pueblo School District 60: Predicted Outcome

- The use of the wrap around table constituted a mechanical restraint
  - Wrap around desk was used in non-emergency situations which is a substantial departure from accepted professional practice
    - *Youngberg v. Romeo*, 457 U.S. 307, 314 (1982)
  - Colorado Department of Education states that the only justification for restraint of a school aged child is in an emergency situations
    - 1 Colo. Code Regs. § 301-45 2620-R- 2.01

Ebony S. v. Pueblo School District 60: Predicted Outcome

- Ebony S. has a constitutional right to be free from bodily restraint under the 14th Amendment regardless of her disability
  - *Youngberg v. Romeo*, 457 U.S. 307, 314 (1982)

- District court erred in granting summary judgment

T.W. v. Unified School Dist. No. 259, 136 Fed. Appx. 122 (10th Cir. 2005)

- Student with Down Syndrome sued school district challenging a hearing officer's determination that the proposed IEP for the Student complied with IDEA.

T.W. v. Unified School Dist. No. 259

- Facts:
  - IEP Team recommended that the Student be placed in a self-contained classroom for developmentally disabled children
  - Student's parents disagreed and placed the Student in a regular education classroom

T.W. v. Unified School Dist. No. 259

- Facts:
  - In the classroom Student was unable to perform academic tasks and acted out disturbing others learning
  - Teachers concluded that the regular class room placement was inappropriate for the Student

T.W. v. Unified School Dist. No. 259

- Facts:
  - IEP Team reconvened and recommended placement in a self-contained classroom
  - Student's parents would not sign the IEP
  - Parties engaged in due process hearings before an IHO

T.W. v. Unified School Dist. No. 259

- IHO determined that
  - The proposed placement in a self-contained classroom met IDEA's LRE requirement
  - The IEP was reasonably calculated to provide FAPE
  - The District had included the appropriate elements in the inclusion trial placement
- District Court granted summary judgment for the District

T.W. v. Unified School Dist. No. 259

- Court's Analysis:
  - "To the extent plaintiff argues that the BIP is substantively deficient, he faces an uphill battle. Neither the IDEA nor its implementing regulations prescribe any specific substantive requirements for a BIP."

T.W. v. Unified School Dist. No. 259

- Court's Analysis:
  - Courts should be leery of creating such substantive requirements
  - Plaintiff fails to show that the BIP was an inadequate accommodation

T.W. v. Unified School Dist. No. 259

- Court's Analysis:
  - Evidence shows that the District did propose modifications to the plan, but the District could not implement the modification because it did not have consent from the Student's parents
  - Proposed placement did not violate IDEA's LRE provision

T.W. v. Unified School Dist. No. 259

- Court's Analysis:
  - Student was not denied FAPE
  - Judgment affirmed

T.W. v. Unified School Dist. No. 259, 136 Fed. Appx. 122 (10th Cir. 2005)

Legal Challenges to FBAs and BIPs: *Lack of Legal Standard*

- T.W. references a 7th Circuit decision:
  - *Alex R. by Beth R. v. Forrestville Valley Community Unit. Sch. Dist. No. 221*, 104 LRP 33610 (7th Cir. 2004)
  - Court recognized that there is no set legal standard for an FBA or BIP

Legal Challenges to FBAs and BIPs: *Lack of Legal Standard*

- T.W. references a 7th Circuit decision:
  - "In short, the District's behavioral intervention plan could not have fallen short of substantive criteria that do not exist, and so we conclude, as a matter of law it was not substantively invalid under the IDEA."

Legal Challenges to FBAs and BIPs: *Lack of Legal Standard*

- 7th Circuit referred to *Letter to Janssen*, 51 IDELR 253 (OSEP 2008):
  - When asked what an FBA is and should consist of and who can or must conduct the FBA, OSEP responded:
    - "Part B of the IDEA and the Part B regulations do not specifically explain what an FBA is or what components must be included in an FBA… The statue and regulations do not specify which individuals must conduct the FBA."

Legal Challenges to FBAs and BIPs: *Lack of Legal Standard*

BUT WHEN YOU READ THE FULL LETTER…

Legal Challenges to FBAs and BIPs: *Lack of Legal Standard*

- "Schools are expected to have properly trained professionals available to conduct FBAs and to provide positive behavioral interventions and supports. It is the LEA's responsibility, working with the state department of education, to provide professional development, in servicing training, and technical assistance, as needed, for school staff members to be able to conduct an FBA and provide positive behavioral interventions and supports"
  - *Letter to Janssen*, 51 IDELR 253 (OSEP 2008)

T.W. v. Unified School Dist. No. 259: Things to Consider

- There **is** a substantive standard

T.W. v. Unified School Dist. No. 259: Things to Consider

- Look at the context of the law
  - One purpose of IDEA is to assess, and ensure the effectiveness of efforts to educate children with disabilities
    - 20 USC §1400(d)(4)

T.W. v. Unified School Dist. No. 259: Things to Consider

- Why have a law with no means to achieve the purpose?

T.W. v. Unified School Dist. No. 259: Things to Consider

- The words tell us the standard
  - "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."
    - 20 USC §1414(d)(3)(B)(i)

T.W. v. Unified School Dist. No. 259: Things to Consider

- The words tell us the standard

  - "A child with a disability who is removed from the child's current placement . . . shall . . . receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur."
    - 20 USC §1415(k)(1)(D)

T.W. v. Unified School Dist. No. 259: Things to Consider

- The words tell us the standard

  - "[T]he IEP Team shall . . . conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement."
    - 20 USC §1415(k)(1)(F)

T.W. v. Unified School Dist. No. 259: Things to Consider

- The standard is meant to address the behavior, through the use of FBAs and BIPs, so that the behavior does not
  - (1) impede the learning of the child or others; and
  - (2) does not recur

How is This Standard in Practice in Wyoming?

Seclusion and Restraint in Schools

- Wyoming Department of Education – Chapter 42 – Section 3 states:
  - Each student has a right to be free from seclusion or restraint used as a means of coercion, punishment, convenience, or retaliation
  - Seclusion and restraint are not instructions tools for the development of prosocial behavior

Seclusion and Restraint in Schools

- Proactive and preventive behavior interventions should be initiated and ongoing to diffuse disruptive and volatile situations

Evaluation Procedures

- In conducting the evaluation, the public agency must:
  - (1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information
    - 34 C.F.R. § 300.304(b)(1)

Evaluation Procedures

- In conducting the evaluation, the public agency must:
  - (2) Not use any single measure or assessment as the sole criterion
    - 34 C.F.R. § 300.304(b)(2)
  - (3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors
    - 34 C.F.R. § 300.304(b)(3)

When *Should* an FBA be Conducted?

- Even when the behavior will not result in a change of placement, the behavior should be addressed if it is interfering with the child's education or that of others
- The Act emphasizes a proactive approach to behaviors that interfere with learning

When *Should* an FBA be Conducted?

- "This provision should ensure that children who need behavior intervention plans to succeed in school receive them."
  - 71 Federal Register 46721 (2006)

Special Considerations Section of the IEP

- Directs IEP Team's attention to the potential behavioral needs of the Student
- The IEP Team must:
  - Consider the use of positive behavioral interventions and supports

Strategies for Compliance

- An FBA and BIP should be provided when:
  - The Student is suspended in excess of 10 days during the school year; or
  - The Student is recommended for expulsion
  - The Student is placed in a 45-school-day interim alternative educational placement

Strategies for Compliance

- An FBA and BIP should be provided when:
  - A manifestation determination review is conducted and results in a finding of relatedness
  - The IEP Team recommends a more restrictive placement
    - Donald Y. Yu, *Discipline Dilemmas: Your Guide to Avoiding to Top IDEA and Section 504 Mistakes* (2009)

Suggestions for Best Practices

- Have written documentation of the FBA
  - The IDEA does not expressly require that an FBA be in writing. *Board of Educ. of the Akron Cent. Sch. Dist.*, 28 IDELR 909 (SEA NY 1998).

Suggestions for Best Practices

- Develop, review, implement, and document the BIP as a part of the IEP process
  - 71 Fed. Reg. 46,721 (2006)
  - *John M. v. Board of Educ. of Evanston Cmty. Consol. Sch. Dist. 65,* 37 IDELR 38 (N.D. Ill. 2002); *Santa Fe Pub. Schs.*, 36 IDELR 52 (SEA NM 2001); and *Eastern Lebanon County Sch. Dist.*, 34 IDELR 190 (SEA PA 2000).

Suggestions for Best Practices

- Be proactive in deciding when to conduct an FBA
  - FBAs and behavior intervention plans are not required components of the IEP under 34 CFR 300.320.
    - 71 Fed. Reg. 46629 (2006)

Suggestions for Best Practices

- Identify and define behaviors in terms that are specific, observable, and measurable
  - Minnesota Department of Education, "Addressing Challenging Student Behavior: Functional Behavior Assessment and Positive Behavioral Support."

Suggestions for Best Practices

- Consider cultural factors in evaluating behavior. Students may respond to acculturation by demonstrating different forms of behavior.
  - IE: use culturally neutral questions during assessment, ask about prior experiences in schools
  - Minnesota Department of Education, "Addressing Challenging Student Behavior: Functional Behavior Assessment and Positive Behavioral Support."
  - Minnesota Department of Education, "Reducing Bias in Special Ec Assessment." (1998).

Suggestions for Best Practices

- Develop a realistic and specific plan of action in the BIP

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Suggestions for Best Practices

- Disciplinary sanctions should be consistent with the intervention strategies set out in the student's BIP
  - *Cabarrus County (NC) Sch. Dist.*, 22 IDELR 506 (OCR 1995).

Suggestions for Best Practices

- The decision is ultimately with the IEP team to determine a student's need for a BIP
  - 71 Fed. Reg. 46,683 (2006).

Suggestions for Best Practices

- In other words, it just has to work
- Teachers, students, parents, and administrators ALL benefit from effective plans to address behavior

Comments or Questions?

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