

SECTION 504 BEHAVIOR MANAGEMENT & DISCIPLINE

Presented by David M. Richards, Attorney at Law

RICHARDS LINDSAY & MARTIN, L.L.P.

13091 Pond Springs Road • Suite 300 • Austin, Texas 78729

Telephone (512) 918-0051 • Facsimile (512) 918-3013 • www.504idea.org

©2012, 2017 RICHARDS LINDSAY & MARTIN, L.L.P. All Rights Reserved. National 2017

A note about these materials: These materials are not intended as a comprehensive review of all case law on the topic, but as an overview of the issues and concerns surrounding discipline for Section 504-eligible students. These materials are not intended as legal advice, and should not be so construed. State law, local policy, and unique facts make a dramatic difference in analyzing any situation or question. Please consult a licensed attorney for legal advice regarding a particular situation.

I. Context: Viewing discipline & behavior management through the lens of nondiscrimination.

The Inevitable Tension. Discipline of disabled students will, at some point, invariably create a conflict between two sets of equally valid educational policies: (1) a school's responsibility to maintain a safe learning environment, and (2) a school's federal statutory duty to provide a free appropriate public education to students with disabilities, including those whose disabilities involve significant behavioral disturbances. This collision of policies is always just around the corner when dealing with behavioral problems of disabled students, and it adds a measure of complexity to every major disciplinary situation involving disabled students.

It's all about leveling the playing field. In 1973 when the Rehabilitation Act was passed, little was being done on a federal level to encourage participation and equal access to federally funded programs for students with disabilities. The single paragraph we now refer to as §504 of the Rehabilitation Act provides that

“No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....” —29 U.S.C. § 794(a) (1998).

The Essence of Discrimination: Excluding students from school because of behavior related to disability. In its introduction to the IDEA (20 U.S.C. §1400, et. seq.), the federal law governing special education, Congress made clear its desire that public schools serve children suffering from severe disabilities to ensure that they receive an appropriate public education. Congress estimated that more than half of the roughly eight million children with disabilities in the United States [in 1976] were not receiving “appropriate educational services which would enable them to have full equality of opportunity.” One million of the children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers.” 20 U.S.C. §1400(b)(4). And why were many of those students excluded from school? Because (1) they had disabilities affecting behavioral controls (emotional disturbances, ADD, ADHD, etc), (2) and they did things because of those disabilities affecting behavioral controls that violated student codes of conduct and were expelled. In essence, many were excluded from school for lengthy periods of time for having disabilities that affected behavioral controls.

Manifestation determination is designed to identify those situations where removal will be discriminatory on the basis of disability. As early as 1981, the Fifth Circuit held (under both IDEA and §504) that expulsion or other changes in placement are proper disciplinary tools for disabled students, if their behavior was unrelated to their disability. *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 566, 454 U.S. 1030. Since 1981, other federal courts that have encountered the issue are

generally uniform in their support of the *Turlington* decision, at least insofar as it establishes that a disabled student's placement may be changed for disciplinary reasons if the behavior is properly found to be unrelated to the disability.

The need for appropriate services to address behavior. When the IDEA was first enacted by Congress there were two major problems impacting the education of students with severe disabilities. The Fifth Circuit explained: "Before passage of the Act, as the Supreme Court has noted, many handicapped children suffered under one of two equally ineffective approaches to their educational needs: either they were excluded entirely from public education or they were deposited in regular education classrooms with no assistance, left to fend for themselves in an environment inappropriate for their needs." *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1038 (5th Cir. 1989). Just as services must be provided to help a student with a learning disability access the regular classroom, so too are behavioral interventions required for a student with a disability impacting behavior to give him access to the classroom (and help him retain that access). Merely being "deposited" in the mainstream classroom without adequate supports to address his behaviors raises the distinct prospect of long-term removals from the educational setting for violation of student codes of conduct.

II. Preparing for the behavior of a Section 504 Student

Since both the IDEA and Section 504 require the student with disability to be educated in the least restrictive environment, both laws recognize that merely "depositing" a student with disability into a mainstream classroom without adequate supports will not provide the student with a free appropriate public education. To that end, IEP Teams and Section 504 Committees are required to put together individualized plans which lay out the types of services and supports necessary for the student, based on the unique needs of the student. **To the extent that a student's behavior "impedes his or her learning or that of others" the IEP Team is required to "consider the use of positive behavioral interventions, supports, and other strategies to address that behavior."** §300.324(a)(2)(i). That's the common-sense IDEA standard, and a good standard to look to in determining when behavior management should be considered for a Section 504 student.

A. The foundation of a good Behavior Plan is a Functional Behavioral Assessment (FBA).

What are the required components of an FBA? There is neither IDEA nor Section 504 language on necessary components of a functional behavioral assessment. "The requirements for an FBA are not well defined by federal law or regulation; nevertheless, a proper FBA attempts to identify the likely triggers to and the appropriate interventions for problem behaviors. An FBA may, therefore, aid an IEP Team in developing appropriate IEPs." *D.B. v. Houston ISD*, 48 IDELR 246, fn 6 (S.D. Tex. 2007). **A good common sense definition of an FBA is an assessment of a student's behavioral functioning, gleaned from observational data from sources knowledgeable about the student's day-to-day behavior, that is reasonably calculated to assist the 504 Committee in developing an appropriate BIP.** It is likely to include information regarding type of behaviors, frequency, severity, location, triggering factors, and previously attempted strategies, among others. There is no requirement that the FBA be conducted with assistance by a school psychologist, or that it be part of a psychological evaluation.

A common-sense based FBA would be:

- An assessment of a student's behavioral functioning,
- Gleaned from observational data from sources knowledgeable about the student's day-to-day behavior.
- Reasonably calculated to assist development of an appropriate BIP.
- Includes information regarding type of behaviors, frequency, severity, location, triggering factors, and previously attempted strategies.

Why does an FBA typically precede a good Behavior Plan? Because we use evaluation data to determine eligibility and services. A good BIP will address the most problematic behaviors, and will attack them in a way that makes sense in light of the uniqueness of the child. You have to know what the student does, where he does it, how often he does it, who else is around, and a lot of other facts if you want to significantly change behavior. A good FBA makes for a good BIP. *See, for example, Boston Public Schools*, 40 IDELR 108 (SEA Mass. 2003)(Hearing Officer found a FAPE violation when a school failed to appropriately respond to an attendance problem by a student with an emotional disturbance. “BPS did not conduct any formal assessment of this problem (such as a functional behavioral assessment (FBA)) so that it could develop a systematic way to address it, or alternatively did not establish consistent contact with Student’s outside therapist. Such assessment was particularly important here because Student’s combination of disabilities made it very difficult for her to discuss the anxiety and panic that impeded her attendance, even with McKinley Tech staff members with whom she had close relationships... As a result, Student’s teachers and counselor at McKinley Tech did not know what student was experiencing.” And presumably, could not possibly respond appropriately.). *See also, New York City Dept. Of Educ.*, 108 LRP 9562 (SEA N.Y. 2008)(Without an adequately developed FBA, the IEP Team could not develop an appropriate BIP).

What is the student doing, when does he do it, where does he do it, how often....? The student at issue is fifteen and eligible under the IDEA as a student with an emotional disturbance. Behaviors were problematic, including kicking another child, tackling a child to the ground, punching a child in the groin, and inappropriate touching and sexual harassment. In support of the IEP, the district provided scant detail as to the nature and impact of the student’s behaviors. Under IDEA, this data is utilized as the basis of a required IEP statement on how the child’s disability affects the child’s involvement and progress in the general curriculum. Wrote the district court:

“Without that baseline of current performance and/or behavior, it is difficult to draft measurable and relevant annual goals. The District provided the following information regarding K.H.’s ‘behaviors.’ presumably based on K.H.’s disability: her behaviors ‘resulted in short term suspensions,’ K.H. had been physically and verbally aggressive, and K.H. ‘had been involved in some sexual harassment incidents.’ It was further noted that K.H. had difficulty maintaining friendships, verified by the behavioral inventory, and that people ‘don’t always enjoy [K.H.’s] company.’ Finally, K.H.’s ‘inappropriate behaviors interfere with her success in the classroom both socially and academically.’

The ALJ correctly found that the statement quoted above was insufficient to determine an accurate baseline of K.H.’s behaviors affected by her disability. **The information explaining K.H.’s current level of performance failed to provide any measurable level of problematic behaviors, including how many times K.H. had been suspended as a result of the behaviors associated with her disability, or how many instances and in what settings had K.H. been verbally aggressive.”** *Bend-Lapine School District v. K.H.*, 43 IDELR 191 (D.C. Or. 2005), *affirmed*, 48 IDELR 33 (9th Cir. 2007)(Emphasis added).

B. Developing Behavior Intervention Plans (BIPs). The behavior intervention plan (BIP) sets forth the strategies, techniques, contingencies, and consequences that will be used to reduce the presentation of certain target or priority behaviors, as well as to promote the acquisition of adaptive behavioral competencies. Many school district BIPs are simply lists of consequences without corresponding strategies to help children develop appropriate behaviors. All children need to be taught how to behave, as well as how not to behave. The best BIPs work concurrently on consequences for inappropriate behavior and techniques and strategies to promote appropriate behaviors. Thus, if a child tends to hit other children, the underlying problem may be inadequate conflict resolution skills. In this situation, the school should provide a consequence for engaging in a physical assault, but also work on developing more adaptive conflict resolution skills. A child will not develop these skills by the sole application of a consequence. He or she must be guided toward more appropriate means of either avoiding conflict situations or handling these situations when they arise.

What are the required components of a Behavior Intervention Plan? “With regard to the Petitioner’s arguments that somehow the behavior intervention plan was deficient because every contingency or reinforcer possible was not set forth under the plan, neither the IDEA nor the implementing regulations specify what the content of a proper behavior intervention plan should be. In 2004, the Seventh Circuit Court of Appeals refused ‘to create out of whole cloth’ any substantive standards for the structure of such plans. *See Alex R. V. Forrestville Valley Community Sch. Dist. #221*, 41 IDELR 146, 375 F.3d 603 (7th Cir. 2004). As the Court said in that case, **‘the District’s behavioral intervention plan could not have fallen short of substantive criteria that do not exist...’**” *Student b/n/f Parent v. Katy ISD*, Docket No. 004-SE-0906 (SEA Tex. 2007). Section 504 likewise does not list the required components of a behavior intervention plan. **Logic tells us that the BIP ought to identify the behaviors that interfere with instruction and seek, through appropriate services and supports, to decrease the intensity and/or number of the behaviors to improve the ability of the student and his peers to learn.**

A student with difficult and frequent behaviors requires a better than average behavior plan. The parents contested the appropriateness of a BIP of a student with ADHD and his placement in a self-contained “behavior improvement class.” The student exhibited extremely severe and disruptive behavior at school. The Hearing Officer found that the BIP was inappropriate because it contained no measurable criteria for determining progress on behavioral competencies. Moreover, there was no means for evaluating behavioral progress other than counting disciplinary referrals. The BIP also gave staff no guidelines for deciding which strategies to use from the BIP at any given time. Given the severity of the student’s behaviors, the BIP simply had to be better constructed than it was. *Matthew C. v. El Paso ISD*, Docket No. 174-SE-0299 (SEA Tex.1999).

It’s ok to change a behavior plan that doesn’t work anymore. The parents contested the removal of a behavior hierarchy from James’ BIP. The student, however, had learned to manipulate the behavior hierarchy portion of the BIP to his advantage. The Hearing Officer concluded that removing the hierarchy was appropriate since James was manipulating the hierarchy to the point that it was no longer appropriate to manage his behavior. *James G. v. Alief ISD*, Docket No. 279-SE-599 (SEA Tex.1999) (Part II).

It’s NOT ok to recycle behavior plans that failed. The parents of a 12-year-old ED student challenged the appropriateness of the student’s behavior plan. A BIP, prepared on the standard District form, was developed and revised, but always contained similar consequences. Matthew’s behavioral problems continued (48 disciplinary referrals in one year), and culminated in a terroristic threat behavior which led to police intervention. The Hearing Officer concluded that the BIPs attempted for this student were very similar to each other, and never appeared to work to reduce inappropriate behavior. The Hearing Officer wrote that “if the same [BIP] with minor modifications has utilized year after year, but no behavior has been modified, it seems apparent that the [BIP] is not working.” In advising the school to renew attempts to develop an appropriate BIP, the Hearing Officer added that “perhaps the standard form could be put aside for this attempt.” *Matthew L. v. Fort Bend ISD*, Docket No. 234-SE-499 (SEA Tex. 1999).

III. Section 504 Discipline: Appropriately Responding to Behavior

A. Follow the Behavior Plan

Since the essence of discrimination is exclusion of students from school because of disability, it’s easy to conclude that neither Congress nor the U.S. Department of Education wants kids excluded from school because they did not receive adequate services to help them maintain good behavior. Two mistakes are possible here.

The First Mistake: the school fails to provide a BIP where it is necessary. A Minnesota hearing officer ruled that bringing a paintball gun to school was in fact a manifestation of a 15-year-old student's ADHD, Bipolar Disorder, and ODD. Despite some level of planning on the part of the student, the hearing officer held that the student's disorders caused impulsivity and failure to consider consequences. An important element of the decision was the school's failure to have a BIP in place (despite the parent's request some four months prior to the incident at issue here.) *Ind. Sch. Dist. No. 279, Osseo Area Sch.*, 30 IDELR 645 (SEA Minn.1999).

The Second Mistake is perhaps more painful– the school develops a great BIP, but the plan is not properly implemented. A 13-year-old student with an emotional disturbance and ADHD challenged his disciplinary placement in an alternative Student Learning & Guidance Center. His IEP called for resource placement, some regular classes, modifications, and a BIP. After being taken to the office for disrupting class, Gene hit a teacher with his arm as she redirected him away from a computer and he pulled his arm away from her. After Gene pulled a fire alarm in the alternative placement, the campus recommended expulsion. Neither Gene's individualized BIP nor his counseling was implemented at the Guidance Center. Without much discussion, the Hearing Officer held that the District failed to implement Gene's IEP at the Guidance Center due to the lack of BIP and counseling in that setting. The manifestation determination in the alternative setting was suspect in light of the failure to implement either a BIP or counseling there. One of the manifestation determination questions requires that the Team determine if the IEP was properly implemented at the time of the offense (particularly with respect to behavioral components). If no BIP or counseling was being implemented, the Team would appear to be required to find that the behavior was related to disability (thus rescinding the proposed expulsion). *Gene F. v. Corpus Christi ISD*, Docket No. 036-SE-999 (SEA Tex. 2000).

B. The Discipline Short Course

1. Learn how to identify short-term disciplinary removals. A short-term removal occurs when a campus administrator removes a child from his normal setting for less than 10 consecutive school days for disciplinary purposes. The most common example is a suspension to the home. In-school suspension (ISS) should be considered a short-term removal, unless the "smart ISS" criteria discussed below is met, in which case the removal days may not "count" as disciplinary removal days.

2. Learn to identify long-term disciplinary removals. A long-term removal is one of over 10 consecutive school days, usually in the form of a removal to an alternative education program (AEP) or expulsion.

3. Don't mix up the rules for long-term and short-term removals—learn and apply the two sets of rules separately. It's easy to get confused if you try to learn and apply the separate rules for long and short-term removals as simultaneous concepts. Rather, learn and apply these rules as two separate sets of rules. This eliminates a lot of mixed-up §504 discipline questions, such as "is it 10 cumulative or 10 consecutive days?" There are really two sets of rules that involve a 10-day timeline, and trying to apply them simultaneously frequently causes confusion.

4. For short-term removals of §504 students, schools start the year with 10 "free" removal days at their disposal. At the start of the school year, imagine the school is given 10 "free" removal days for each §504-eligible student. These days are "free" under §504 because they can be used without the need to convene a §504 committee meeting, without a manifestation determination, and generally, without worrying about any §504 procedure or safeguard. They can be imposed as they would be in the case of a nondisabled student who commits the same disciplinary offenses.

Under federal law for §504, disciplinary removals of less than 10 school days are not considered a change in placement. Logically then, manifestation determination reviews are not needed for short-term removals that do not accumulate to become a "pattern" or "series", since no significant change of placement has occurred.

By the way, somebody needs to be keeping track of the removal days. *School Administrative Unit #38, 19 IDELR 186 (OCR 1992).*

Since violations occur based on the number of days of disciplinary removal, it seems obvious that someone needs to track the days as they are used. Unfortunately, since disciplinary sanctions are not always handed out by the same administrator, it is possible on a large campus, a busy campus, or a chaotic campus for a student to be removed many times with no action prompted by the §504 Committee. For example, a student identified as having ADD and emotional problems was served under special education. The school recognized that the child was often defiant, angry, and confrontational. The school placed the child (who apparently was quite gifted academically) in the regular classroom in the “high performance group” of students. There appear to be no modifications made to the regular classroom. While the IEP indicated that a behavior management plan could be added, no formal plan was ever developed. The child’s parents complained when the child failed English, math, social studies, and science.

Why did he fail? OCR found that the problem was not cognition, but being kicked out of class. The student was repeatedly sent to the principal’s office (on average 7-8 times per week) for conduct such as yelling, hitting other students, disobeying teachers, etc.—conduct OCR identified as clearly arising from his disabilities. While teachers seemed eager to send him to the office, they did not keep records of why or when the student was sent. In keeping with the theme of “why bother,” campus administration disciplined the student, but kept no records of the discipline administered. OCR was concerned with several violations. First, despite the school’s expectation that the student would experience behavior problems, no formal plan was in place to address the child’s behaviors. Further, because they failed to keep disciplinary records, school officials never realized the amount of educational time that the child was missing due to his frequent trips to the office. Likewise, there was no evidence that the school had ever attempted to determine whether the behavior that made the child a frequent fixture in the principal’s office was related to his disability. Bottom line: a student eligible entirely because of behaviors was denied education in violation of §504 because of the school’s failure to address the behaviors.

5. Although schools may go over the 10-day per year total, at a certain point the accumulated removals will constitute a “pattern of exclusion,” which triggers the manifestation requirement and poses legal dangers to the school. At a certain point, accumulations of too many short-term removals will become a “pattern of exclusion” (in Office for Civil Rights (OCR) lingo), which is considered an overall long-term removal that first requires a manifestation determination. OCR developed this rule over time, and it was also exported into the IDEA discipline regulations. Whether accumulations of short-term removals after the 10-day mark constitute a “pattern of exclusion” depends on how long each removal is, how close they are to each other, and how many they add up to overall. The rule might be designed vaguely in order to promote caution among school administrators who are considering disciplinary removals.

Generally, however, it’s good advice for schools to limit forays into the over-10-total-school-days danger zone. And, obviously, the higher the number of removals after the 10-day total is reached, the more precarious the school’s legal position becomes. Indeed, excessive disciplinary removals may demonstrate a school’s failure in managing or addressing the child’s behavioral problems through the BIP development and implementation process, potentially leading to claims of denial of FAPE in §504 legal proceedings.

6. Before short-term removals add up to 10 total school days, have a §504 meeting to address behavior. The best preventive measure in §504 disciplinary matters is to convene a §504 meeting *before* short-term removals add up to 10 total days. The §504 committee can decide to develop a BIP, provide counseling, evaluate the student further, or make other adjustments to the student’s §504 plan. The idea is to take action before a disciplinary issue becomes a major problem.

As a team member in these meetings, advocate for a refocusing of efforts toward proactive, positive measures, and away from reactive, removal-based consequences that likely have not been very effective up to this point. Although sometimes student removal can be a tempting option to campuses, it may not prove a long-term solution and may, in fact, be counterproductive. Research is indicating more strongly than ever that whole-school positive approaches to behavior that in grounded on training, behavioral supports, and positive reinforcement are more effective than consequence-based discipline systems.

7. For long-term removals, proceed to a manifestation determination §504 meeting as soon as you can, and before the removal reaches 10 consecutive school days. As soon as possible after the campus initiates a long-term disciplinary removal, a §504 committee meeting must be convened to determine if the student’s alleged offense was directly related to their disability. This is called the manifestation determination. In addition, the rule also requires the §504 committee to determine whether the behavior is related to an inappropriate implementation of §504 program. The meeting must definitely take place before the long-term removal reaches its 10th consecutive day.

The manifestation determination questions (adapted from the IDEA rule) asks:

- (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the student’s disability; or
- (ii) If the conduct in question was the direct result of the department’s failure to implement the Section 504 Plan.

The manifestation determination essentially decides whether the student can be subjected to long-term removal or not. If the §504 committee properly determines that the behavior in question is not related to disability, then the student can be subjected to regular disciplinary procedures, as in the case of a similarly-situated nondisabled student. If the §504 committee determines that the behavior is related to disability, then a long-removal cannot take place. Thus, the quality of the manifestation determination is crucial to a long-term removal. §504 members are well-advised to prepare and pre-staff for manifestation determinations.

8. Additional Thoughts on Manifestation Determination

Some traditional disciplinary strategies are counter-productive to both behavior management and academic improvement. “Research strongly suggests that if schools raise their level of achievement, behavior decreases; and, if schools work to decrease behavior problems, academics improve. So why not do both? Especially when we know that punishing the at-risk populations and using ‘discipline’ to systematically exclude them from schooling does not work. **Schools that use office referrals, out-of-school suspension, and expulsion—without a comprehensive system that teaches positive and expected behaviors and rewards the same—are shown to actually have higher rates of problem behavior and academic failure.** Specifically, chronic suspension and expulsion have detrimental effects on teacher-students relations, as well as on student morale; these kinds of responses leave the student with reduced motivation to maintain self-control in school, do not teach alternative ways to behave and have been shown in the research to have limited effect on long-term behavioral adjustment. In fact, a history of chronic referrals, suspensions and expulsions from school is a known risk factor for academic failure, dropout, and delinquency.” *RTI and Behavior: A Guide to Integrating Behavioral and Academic Supports*, Jeffrey Sprague, Clayton R. Cook, Diana Browning Wright, and Carol Sadler, LRP Publications (2008) [hereinafter “*RTI & Behavior*”], p. 1 (emphasis added).

Behavior problems and academic troubles are linked. “If students are having problems with learning, they are, more likely than not (and sooner or later), going to present problems in behavior,

and vice-versa. So the effort to screen and support early on both fronts becomes mutually serving for students, families, and educators.” *RTI & Behavior*, p. 3.

“More and more children and youth are bringing well-developed patterns of behavioral and academic adjustment problems to school. At-risk students often come to school with emotional and behavioral difficulties that interfere with their attempts to focus and learn. Others may have interpersonal issues with other students or educators that make concentrating on learning difficult. **Bullying, mean-spirited teasing, sexual harassment, and victimization are relatively common-place occurrences on school campuses, and these behaviors clearly compete with our schools’ mission of closing the achievement gap.**” *RTI & Behavior*, p. 2 (emphasis added).

Make good use of evaluation data, including prior disciplinary referrals. An Indiana hearing officer agreed with the school that a 14-year-old’s setting fire to a sweatshirt in a locker room was not related to his ADHD and depression. *Valparaiso Comm. Sch.*, 30 IDELR 1033 (SEA IN 1999). Although the hearing officer found that some of the student’s behaviors were directly to his disabilities, especially impulsivity and attention-getting behaviors, the degree of planning and covertness involved in the fire-setting (obtaining and bringing matches, lighter, and a flare to school) demonstrated the behavior was neither impulsive nor attention-seeking. In addition, the Hearing Officer looked at the student’s disciplinary referrals over time, and analyzed the locker room fire in that context.

What related behaviors look like: “The student has a history of impulsive or habitual behaviors, best characterized as immediate responses to what the Student perceived to be verbal or physical confrontation. The Student does not possess enough internal controls to consistently interrupt these impulsive or habitual responses. To the extent the Student misinterprets the intentions and behaviors of others, such behaviors are related to the Student’s inappropriate feelings under normal circumstances....”

What unrelated behaviors look like: “At times the Student also exhibits inappropriate behavior which requires some degree of forethought and planning. These behaviors include exacting revenge on peers for their prior conduct and bringing inappropriate items such as rubber bands, matches, lighters and a flare to school. The occasional nature of these acts together with the Student’s inability to control other genuinely impulsive acts support the conclusion that these behaviors are not the result of any irresistible impulse connected with his emotional handicap[.]”

How the behavior at issue fits the pattern: “The Student showed no sign of emotional upset or animosity toward the owner of the sweatshirt on the day he lit the fire. The circumstances and location of the fire, together with the Student’s attempts to evade detection and hiding the matches indicate the fire was not set with the purpose of creating a disturbance and drawing attention to himself. The fact the Student brought matches and a flare to school indicate the Student was contemplating misbehavior. There was no convincing evidence to show this behavior was related to any feature of the Student’s emotional handicap[.]” *Id.*, at 1036.

The more data about the incident, the better. A popular manifestation determination argument, especially in cases of students with ADHD or other behavioral disorders, is that the student’s behavior was related to their disability because the offense was impulsive. In these situations it is crucial to have detailed information about the offense, particularly the timeframe for the behavior and the degree of planning that was involved. The longer the timeframe of the behavior, and the higher the degree to planning that must have been involved, the less likely that the behavior was impulsive, or without thought.

Is this something we should have seen coming? In manifestation determinations, an important question is **whether the existing evaluation data would lead one to predict that a certain**

behavior might be exhibited. If from the evaluation data, a reasonable person would conclude that the behavior is likely to take place, the §504 committee should find that the behavior is related to disability.

Beware of the “third-cousin-twice-removed” argument.... Under the old manifestation standard, arguments sometimes attempted to link disability to low self-esteem and then to conduct as a way of creating a daisy chain to get to disability and conduct linked. An important federal court decision addressed the issue of the degree of relationship between disability and behavior that is required for a finding that the behavior is related to disability. *Doe v. Maher*, 793 F.2d 1470 (9th Cir. 1986). In a footnote to that opinion, the court indicated that an essential component to finding that a behavior is linked to handicapping condition is whether the disability “significantly impairs the child’s behavioral controls.” The Court stated that this definition did not “embrace conduct that bears only an attenuated relationship to the child’s handicap,” such as conduct allegedly caused by low self-esteem in turn caused by the handicap. The “self-esteem” argument is even less persuasive now, as the 2004 manifestation questions make clear the need for the conduct to be “caused by” the disability (not by something that led to something that generated something that resulted in...) or that the conduct had a “direct and substantial relationship to the student’s disability.”

The manifestation determination is an evaluation under §504. The starting point for undertaking the “link” inquiry is the child’s existing evaluation data. Under §504, the evaluation data might not include formal psychological assessments, but it may include behavioral checklists, teacher observations, anecdotal evidence, disciplinary reports, incident reports, police reports, etc. When a §504 Committee gathers, reviews, and interprets data about a disciplinary infraction, together with a review of the child's existing data, it is conducting a valid §504 evaluation under §504. *See* 34 C.F.R. §104.35(a). It is on the basis of this evaluation that the committee makes the manifestation determination.

IV. Other Important §504 Discipline Rules

For illegal drug and alcohol offenses, if the student is a “current user” the student loses the protections of §504 with respect to the offense. The procedural protections of manifestation determination do not apply to Section 504 students who are currently engaging in the illegal use of drugs or use of alcohol.

“For purposes of programs and activities providing educational services, local educational agencies may take disciplinary action pertaining to the use or possession of illegal drugs or alcohol against any handicapped student who currently is engaging in the illegal use of drugs or in the use of alcohol to the same extent that such disciplinary action is taken against nonhandicapped students. Furthermore, the due process procedures at 34 C.F.R. 104.36, Procedural Safeguard, shall not apply to such disciplinary action.” 29 U.S.C. §705 (20)(C)(iv) (*italics added*).

OCR has interpreted this phrase to mean that if a student is currently using illegal drugs or alcohol, and is to be disciplined by the school for use or possession, the student loses the procedural protections provided by §504, including the manifestation determination prior to a change in placement for disciplinary reasons even if the child has another disability (for example, ADHD) that could be related to the misconduct. *1991 OCR Policy Memo on ADA Amendments to §504* (OCR 1991). *See also Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities* (March 27, 2009, last modified March 17, 2011), *Question 16* (“Section 504 excludes from the definition of a student with a disability, and from Section 504 protection, any student who is currently engaging in the illegal use of drugs when a covered entity acts on the basis of such use.”) & *Question 17* (“Section 504 allows schools to take disciplinary action against students with disabilities using drugs or alcohol to the same extent as students without disabilities.”).

*****Important note: this exception for current use does not apply to students who are IDEA-eligible!**

Criminal behavior of a §504 student can be reported to law enforcement if you would do so for a non-disabled student's behavior under your policies, but make sure you have implemented the BIP, if there is one. IDEA makes clear that schools may report criminal offenses committed by special education students at school. This is also the case under §504, as long as school administrators ensure that resort to law enforcement occurs in a non-discriminatory fashion, for nondisabled and disabled students alike. In addition, staff must ensure that the student's BIP, if any, is fully implemented before the police are called, if at all possible. Reports to law enforcement cannot be undertaken instead of complying with the requirements of a BIP or §504 plan.

A §504 committee should address the need for a behavior intervention plan (BIP) when students' behaviors get to the point that they impede their learning or that of others. Early development and consistent implementation of a BIP can help both reduce inappropriate behavior and protect the campus legally. The importance, both educationally and legally, cannot be understated. §504 committees should act early to develop BIPs to address students' behavior problems. You can't get in trouble for doing one too early, but many schools have suffered the consequences of developing a BIP too late, or not at all. When a BIP is developed, the §504 committee should monitor the implementation and effect of the BIP, and use the information to revise the BIP as needed, especially if behavior problems escalate.

Explore development of a "smart ISS" option on your campus to help minimize suspensions to home. The commentary to the final IDEA regulations states that in-school suspension (ISS) would not be considered true removal days as long as the child is given the opportunity to continue to appropriately progress in their curriculum, continue to receive their IEP services, and continue to participate with nondisabled children to the extent they would have in their usual placement. 71 Fed. Reg. 46,715 (August 14, 2006). It appears that this exception applies to Section 504 students as well. *See, Fox (MO) C-6 School District*, 109 LRP 54751 (OCR 2009)(Letter of Finding suggests that the in-school suspension of a Section 504 student may not count toward the 10 cumulative days if the IDEA Commentary conditions are met).

By this guidance, the feds are obviously creating an incentive for schools to use in-school forms of suspension rather than out-of-school suspensions, which can have adverse side-effects. A review of recent OCR decisions appears to indicate that this is OCR's position under §504 as well. OCR will probably find that ISS days are not true "removals" under §504 as long as students are provided an equal opportunity to continue progressing in the regular curriculum, and receive their §504 accommodations, in ISS.

The higher the degree of continuity of educational services at the ISS facility, the better your chance of successfully arguing that these are not true removal days. The more "traditional" your in-school suspension program (i.e. supervision-only while students allegedly work independently, or minimal services), the more likely that OCR will find that removals to your in-school suspension program in fact constitute disciplinary removals that "count" toward the 10-day mark. It is important to be able to show that the student received all of the work done in the regular classes, and that the §504 accommodations continued to be implemented in the ISS setting. Even better—have the regular teachers check with the students in ISS to see if they are having problems with the classwork.