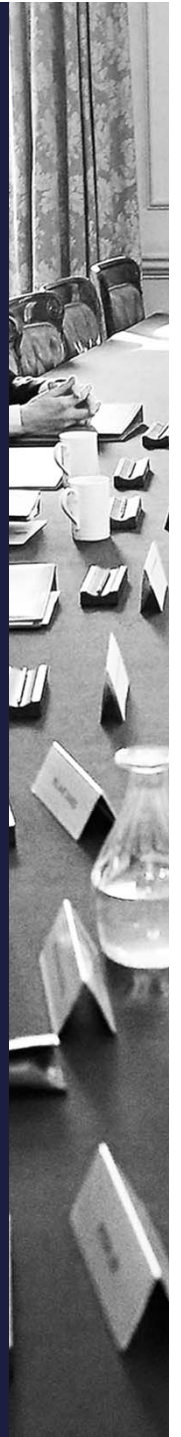


Addressing Challenging Behaviors: Student Discipline and Law Enforcement



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Law Enforcement and Special Education

- What to do about serious misbehavior?
- When is law enforcement involved?
- What information do schools share with law enforcement?
- How should the schools work with outside agencies?

Short-Term Removal

Under the IDEA, school personnel may remove a child with a disability who violates code of conduct to interim alternative setting, another setting, or suspension for not more than 10 school days to the extent such removal applies to children without disabilities. 20 U.S.C. § 1415(k)(1)(B). (Assuming no special provisions in the student's IEP)

Long-Term Removals & Manifestation Determination Reviews

MDR Meeting

- When district proposes removal of student that would exceed 10 school days due to violation of code of conduct, district, parent, and relevant members of IEP Team shall meet to conduct MDR within 10 school days of district's decision. 34 C.F.R. § 300.530(e)(1).
- Relevant members of IEP team shall be determined by parent and district.

Consideration of Information at MDR Meeting

- Group shall review all relevant information in student's file, including:
 - IEP;
 - Any teacher observations; and
 - Any relevant information provided by parents.

Consideration of Information at MDR Meeting

- Other relevant information in student's file, including:
 - Evaluation data;
 - Discipline history;
 - Details of the incident.

MDR Questions (34 C.F.R. § 300.530(e)(1))

- Group shall determine:
 - (1) Was the conduct in question caused by, or did it have a direct and substantial relationship to, the child's disability?
 - (2) Was the conduct in question the direct result of the district's failure to implement the IEP?

When is Behavior a Manifestation?

- If the answer to either question (1) or question (2) is “yes,” the conduct shall be determined to be a manifestation of the child’s disability.
- To be manifestation, conduct cannot have “attenuated association, such as low self esteem, to child’s disability.” H.R. REP. No. 779, 108th Cong., 2d Sess., at 225 (2004).

When Behavior is Manifestation (34 C.F.R. § 300.530(f))

- IEP Team shall:
 - (1) Conduct FBA and implement BIP (if not done prior);
 - (2) If BIP already exists, review BIP and modify it, *as necessary*, to address behavior; and
 - (3) Return child to placement (unless parent & district agree to change placement as part of BIP modification or 45-day removal applies).

When Behavior Isn't Manifestation

- If no manifestation, relevant disciplinary procedures applicable to children without disabilities may be applied to child in same manner and for same duration as for children without disabilities (except student must continue to receive FAPE). 34 C.F.R. § 300.530(c).
- Interim alternative educational setting will be determined by IEP Team. 34 C.F.R. § 300.531.

45-Day Removals (drugs, weapons, serious bodily injury)

- For certain violations of code of conduct, district may remove student to interim alternative educational setting (determined by IEP Team) for not more than 45 ***school*** days regardless of whether behavior was manifestation. 34 C.F.R. § 300.530(g).

Do the police need to be involved?

20 U.S.C. § 1415(k)(6)/34 C.F.R. § 300.535

- (a) Rule of construction. Nothing in this part prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities or prevents State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

Criminal Conduct is generally NOT an IDEA Issue

- Criminal conduct is determined by the state criminal code
- School staff need to know reporting obligations for their state and position
- As an illustration, under Utah law, school staff have a duty to report certain criminal acts (alcohol and drugs related) to a designated school official. Utah Code Ann. § 53A-11-401.
- Reporting to the police is NOT mandatory
 - “The designated educator, upon receiving a report of a prohibited act from an educator under Section 53A-11-402, shall immediately report the violation to the student's parent or legal guardian, and **may** report the violation to an appropriate law enforcement agency or official.”

Utah Code Ann. § 53A-11-403 (emphasis added).

NEBRASKA REV. STAT. § 79-293

- The principal of a school or the principal's designee shall notify as soon as possible the appropriate law enforcement authorities, of the county or city in which the school is located, of any act of the student described in section 79-267 which the principal or designee knows or suspects is a violation of the Nebraska Criminal Code

Kansas Statute

K.S.A. 72-89a03

- (b) Each board of education shall adopt a policy that includes:
 - (1) A requirement that an immediate report be made to the appropriate state or local law enforcement agency by or on behalf of any school employee who knows or has reason to believe that an act has been committed at school, on school property, or at a school supervised activity and that the act involved conduct which constitutes the commission of a felony or misdemeanor or which involves the possession, use or disposal of explosives, firearms or other weapon

Calling the police for the wrong reasons?

- *Cabot Sch. Dist.*, 29 IDELR 300 (SEA AR 1998)
 - History of due process hearing requests and settlements with the family, complaining about discipline and calls to SRO
 - SRO called because student was throwing spit wads
 - “[T]he call to the police by agents of the school was not a call placed for the purpose of preserving the legitimate safety of students or the faculty, but was made for the purposes of avoiding compliance with the [BIP] and of causing a change in placement without following the procedures of the IDEA.”

But see...

- *Sch. Dist. Of Philadelphia*, 115 LRP 2743 (SEA PA 2014)
 - Student eloped and assaulted teacher, police were called both times
 - Parent alleged retaliation for filing previous DPH
 - HO found school's actions reasonable – “I cannot imagine responsible school staff failing to act to locate a student when a parent admits that she does not know for sure where her child is.”
 - School showed that it would have taken the same actions absent the parent's DPH filing

But see...

- *S.A.S. v. Hibbing Pub. Sch.*, 2007 WL 1322337 (Minn. Ct. App. 2007)
 - Student with ADHD claimed school discriminated by involving law enforcement
 - Police officer testified that he regularly arrested other students for similar behavior and had charged both students involved, not just plaintiff
 - Claim dismissed

Use law enforcement reasonably

- *Hoskins v. Cumberland Cty. Bd. Of Educ.*, 2014 WL 7238621 (M.D. Tenn. 2014)
 - Second grader swung fists at teacher, escorted to principal's office and handcuffed by SRO
 - Handcuffing student was found to violate his 4th amendment rights
 - Court considered his age, conduct, and length of time he was handcuffed
 - SRO was entitled to qualified immunity

Use law enforcement reasonably

- *Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295 (11th Cir. 2006)
 - 4th grader threatened teacher
 - SRO took student into hallway and handcuffed her “to impress upon her the serious nature of committing crimes”
 - Handcuffing violated student’s 4th Amendment rights
 - Court considered her age and a lack of a threat to safety
 - No qualified immunity because SRO should have known that “handcuffing a compliant nine-year-old child for purely punitive purposes is unreasonable.”

School to Prison Pipeline

- March 2014 OCR Study:
 - 260,000 students nationwide were referred to law enforcement, 65,000 (25%) were students with disabilities
 - 92,000 school-related arrests, 23,000 (25%) were students with disabilities
 - <http://ocrdata.ed.gov/downloads/crdc-school-discipline-snapshot.pdf>

Sept. 8, 2016 Dear Colleague Letters

- “I am concerned about the potential for violations of students’ civil rights and unnecessary citations or arrests of students in schools, all of which can lead to the unnecessary and harmful introduction of children and young adults into a school-to-prison pipeline.”
- “We have seen that there is the potential for SROs to have a negative impact on students through unnecessary arrest and improper involvement in routine school disciplinary matters.”

Courts are concerned about the school to prison pipeline

- *Hawker v. Sandy City Corp.*, 774 F.3d 1243 (10th Cir. 2014) (Lucero, J., concurring)
 - “The criminal punishment of young schoolchildren leaves permanent scars and unresolved anger, and its far-reaching impact on the abilities of these children to lead future prosperous and productive lives should be a matter of grave concern for us all. Focusing narrowly on the legal standards applicable in this case renders it too easy to overlook the obvious question: why are we arresting nine-year-old schoolchildren?”

What information to share with law enforcement?

20 U.S.C. § 1415(k)(6)/34 C.F.R. § 300.535

- (b) Transmittal of records.
 - (1) An agency reporting a crime committed by a child with a disability must ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.
 - (2) An agency reporting a crime under this section may transmit copies of the child's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act.

FERPA

FERPA is a federal law that prohibits school districts from releasing personally identifiable information from an education record without the prior consent of the student's parent or the student (if the student is over 18 or is attending a post-secondary institution).

FERPA

What is an education record?

- Education records are records that are directly related to a student and are maintained by an educational institution or a party acting for the institution.
- Education records may be in any form, including handwritten, typewritten, tapes, film, video, and computer records.

Exceptions to FERPA which MAY Apply to Police Officers:

- School officials with a legitimate educational interest in the information (*i.e.*, police officers employed by the district investigating violations of school rules).
- Directory information (unless objected to by the parent).
- Law enforcement unit records.
- In connection with a health or safety emergency.
- In compliance with a statute that concerns the juvenile justice system.
- To comply with judicial order or lawfully issued subpoena.

School Resource Officers

- SROs, hired by school district, are typically school officials with a legitimate educational interest in the student records
- SROs cannot re-disclose FERPA-protected information to outside law enforcement
- *See* Letter to Jene Watkins, Superintendent, Indian Creek Local School District, from LeRoy Rooker, Director, Family Policy Compliance Office (Feb. 21, 2008); Letter to Montgomery County Public Schools, from LeRoy Rooker, Director, Family Policy Compliance Office (Feb. 15, 2006).

Outside Law Enforcement

- The IDEA provides that "[a]n agency reporting a crime committed by a child with a disability must ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime." 34 C.F.R. § 300.535(b)(1), but "only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act." 34 C.F.R. § 300.535(b)(2).
- *Menominee Area Pub. Sch.*, 114 LRP 34039 (SEA MI 2014) (A district that made no effort to obtain parental consent to the release of a student's records in conjunction with reporting the student's alleged bomb threat to law enforcement violated the IDEA. The Michigan ED concluded that the IDEA required the district to transmit the student's records to authorities and that FERPA required it to seek parental consent to do so.)

Outside Law Enforcement

- *Pikes Peak BOCES*, 66 IDELR 56 (SEA CO 2014) (Regarding a disabled student's reported crime for possession of marijuana pipe, State Complaints Officer found that district violated the IDEA when it failed to inform law enforcement of the student's special education status and failed to request Grandparents' consent in order to disclose Student's special education and disciplinary records to the Sheriff's office)
- If a staff member pursues criminal reporting on their own, not on behalf of the school, the duty to share records is NOT triggered
- *Brookwood Academy*, 114 LRP 53987 (SEA OH 2014)

Iowa Code § 280.25

Information sharing — Interagency agreements

- The board of directors of each public school and the authorities in charge of each accredited nonpublic school shall adopt a policy and the superintendent of each public school shall adopt rules which provide that the school district or school may share information contained within a student's permanent record pursuant to an interagency agreement with state and local agencies that are part of the juvenile justice system. These agencies include, but are not limited to, juvenile court services, the department of human services, and local law enforcement authorities. The disclosure of information shall be directly related to the juvenile justice system's ability to effectively serve, prior to adjudication, the student whose records are being released.

Iowa Code § 280.25

Information sharing — Interagency agreements

- The purpose of the agreement shall be to reduce juvenile crime by promoting cooperation and collaboration and the sharing of appropriate information among the parties in a joint effort to improve school safety, reduce alcohol and illegal drug use, reduce truancy, reduce in-school and out-of-school suspensions, and to support alternatives to in-school and out-of-school suspensions and expulsions which provide structured and well-supervised educational programs supplemented by coordinated and appropriate services designed to correct behaviors that lead to truancy, suspension, and expulsions and to support students in successfully completing their education.

Iowa Code § 280.25

Information sharing — Interagency agreements

- Information shared under the agreement shall be used solely for determining the programs and services appropriate to the needs of the juvenile or the juvenile's family, or coordinating the delivery of programs and services to the juvenile or the juvenile's family.
- Information shared by the school district or school under the agreement is not admissible in any court proceedings which take place prior to a disposition hearing, unless written consent is obtained from a student's parent, guardian, or legal or actual custodian.
- Information shared by another party to the agreement with a school district or school pursuant to an interagency agreement shall not be used as a basis for a school disciplinary action against a student.

Records of Law Enforcement Entities are NOT Student Records

- Education records do not include (34 C.F.R. § 99.3):
 - Certain law enforcement records--Records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for law enforcement purposes.
- If a copy of the law enforcement report is placed in a student's file, the information cannot be released from the student's file even though it is also a law enforcement record.

When are School Police Records Exempted?

- **Law enforcement unit means** any individual, office, department, division, or other component of an educational agency or institution such as a unit of commissioned police officers or noncommissioned security guards, that is officially authorized or designated by that agency or institution to:
 - enforce any local, State, or Federal Law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law; or
 - maintain the physical security and safety of the agency or institution.

When are School Police Records Exempted?

- **A component of an educational agency or institution does not lose its law enforcement unit status merely because it also performs non-law enforcement functions such as investigating conduct that leads to disciplinary action or proceedings against the student.**
- **Records of the law enforcement unit means files, documents, and other materials that are:**
 - created by the law enforcement unit;
 - created for a law enforcement purpose; **and**
 - maintained by the law enforcement unit.

When are School Police Records Exempted?

- **Records of the law enforcement unit does not mean:**
 - records created by a law enforcement unit for a law enforcement purpose that are maintained by a non-law enforcement component of the educational institution;
or
 - records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose such as a disciplinary action or proceeding conducted by the educational institution.

Student Statements

- Student statements taken by school administrators may NOT be shared with law enforcement for referral to the judicial system.
- Statements may be used by school officials for school disciplinary purposes.
- The school resource officer, although privy to the information, is bound by FERPA.

School Security Videotapes

- The Family Policy Compliance Office has held that acts of misconduct caught on videotape by school officials may not be disclosed to law enforcement. Such videotapes constitute an “education record” under FERPA and may not be released without parental consent of all students on the videotape, unless one of the FERPA exceptions applies.

Student Searches

- Searches by SROs and outside law enforcement are held to different standards than those conducted by educators
- Searches by educators and SROs acting as educators require reasonable suspicion
- Searches by outside law enforcement and SROs investigating crimes require probable cause and Miranda rights
- Search must be reasonable at inception and appropriate in scope
- Always request student consent before searches
- All of these standards apply to searches of student cell phones

What To Do When The Police Come To Your School

- Ask for ID and document the name and shield number of the officer.
- If the officer has subpoena, court order or directive to apprehend and wants to speak with the child, ask if you can get the child.
- If the officer has a right to question the student, ask if an administrator and or counselor can be present.

- Make reasonable efforts to contact the parents, unless the officer has asked you not to do so.
- If the officer requests copies of confidential records, explain that FERPA protects the documents, unless one of the exceptions apply.
- If the officer has a directive to apprehend or a subpoena, ask to see it and make a copy for the school's records, before releasing the information or the student.
- If you are unsure, contact your school attorney.

Tips for SROs

- Do not handcuff or take a child into custody “to teach them a lesson”
- Consider the age of the child
- Consider whether the child is currently a threat or has calmed
- Consider what you know about any of the child’s possible disabilities
- Know your state law on use of restraints
- Don’t involve SROs in routine classroom or behavior management – only for safety, not discipline
- Don’t write SRO contact into a BIP or IEP

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