

AGGRESSIVE BEHAVIOR: STUDENTS WITH IEPs AND 504 PLANS

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INTRODUCTORY REVIEW:

What if the student who engages in aggressive behavior has an IEP/504?

Remember: 10 days of FAPE free removals (i.e., in school or out of school suspensions) must be followed by an IEP meeting to conduct a manifestation determination for every removal (both in and out of school suspension) that occurs past 10 days even if the behavior is the same behavior over an over! During the removal, the Principal must make sure there is no “pattern” constituting a defacto change in placement due to the removal. If the behavior is a manifestation of the disability, we must conduct a Functional Behavioral Assessment (and implement interventions).

CHANGES IN LAW IMPACTING COURSES OF ACTION FOR AGGRESSION:

1. What if the student who engages in aggressive behavior has an IEP and the parents revoke placement, or if there is no IEP, the parent won't allow assessment or placement?

Parent Revocation of Consent for Special Education and Related Services, 34 C.F.R. 300.300

1. Parent may refuse or fail to respond to a request for the “initial provision of special education and related services to a child with a disability. **If so, the LEA may not pursue mediation and/or due process hearing seeking an agreement or ruling that services be provided to the child.** 34 C.F.R. 300.300(b)(3)(i).
2. If a parent fails or refuses to give written consent for the provision of special education and related services to a child with a disability, the LEA will not be in violation of the requirement to provide FAPE, and is not required to convene an IEP meeting or develop an IEP. 34 C.F.R. 300.300(b)(3)(ii) and (iii).
3. If, at any time subsequent to the initial provision of special education and related service, the parent of a child revokes consent in writing for the continued provision of special education and related services, the LEA:
 - a. May not continue to provide special education and related services to the child;
 - b. Must provide prior written notice (PWN) before ceasing the provision of special education and related services;
 - c. May not use mediation or due process hearing procedures seeking to obtain an agreement or ruling permitting the provision of special education and related services to the child;
 - d. Will not be in violation of the FAPE requirement;

- e. Is not required to convene an IEP meeting or develop an IEP. 34 C.F.R. 300.300(b)(4)(i) through (iv).

2. What if the aggressive behavior required SRO involvement, or local law enforcement, can we disclose educational records?

NEW FERPA REGULATIONS (Effective January 8, 2009) Published at Federal Register, Vol. 73, No. 237, Tuesday, December 9, 2008.

<http://edocket.access.gpo.gov/2008/E8-28864.htm>

A. Definition of "Education Records," 34 C.F.R. 99.3(b)(6)

FYI: Owasso Ind. Sch. Dist. v. Falvo, 534 U.S. at 435 (2002) – The new regs essentially adopt the US Supreme Court's FALVO decision, which allows teachers to conduct group grading of classroom assignments within the classroom, even though that grade may become a part of a student's protected educational records.

There are some significant changes regarding how personally identifiable information (PII) may be disclosed. The definition of PII was changed:

"Personally Identifiable Information The term includes, but is not limited to-- (a) The student's name; (b) The name of the student's parent or other family members; (c) The address of the student or student's family; (d) A personal identifier, such as the student's social security number, student number, or biometric record; (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name; (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates."

B. Outsourcing to Third Parties Who Qualify as "School Officials" with A "Legitimate Educational Interest," 34 C.F.R. 99.31(a)(1)(i)(B)

1. School officials may disclose, without obtaining informed parental consent, personally-identifiable information about a student to the following individuals:
 - School attorneys to whom a school district has outsourced legal services (even though the attorney is never hired as an employee of the school district).
 - Parent volunteers who serve on official committees, serve as teacher's aides, or any function for which they need access to student records to perform their duties.

- Non-teaching Staff. At the school's discretion, personally-identifiable information from education records may be disclosed to bus drivers, school nurses, practicum and fieldwork students, unpaid interns, consultants, contractors, volunteers, and other outside parties providing institutional functions, provided that notice is given to parents and appropriate training has been provided.
- **School Resource Officers may review personally-identifiable information from education records ONLY if they are "employed by the agency" and therefore under the "direct control" of the school district, and if appropriate notice has been given.**
- Outside Police Agencies – Police officers and/or sheriff's deputies who are not directly employed by the school district DO NOT qualify as "school officials" and therefore are NOT entitled to have access to education records **unless there is a health or safety emergency, a lawfully issued subpoena or court order, or some other FERPA exception. (Note from Diana Browning Wright): As was discussed in the Fall Institute, Investigation of a student's threat of violence would be considered a safety emergency.)**

C. Personally-Identifiable Information, 34 C.F.R. 99.3 and 99.31(b)

1. The only parties who have a right to access education records under FERPA are parents and eligible students. "Journalists, researchers, and other members of the public have no right under FERPA to access education records for school accountability or other matters of public interest, including misconduct by individuals running for public office." Comments, p. 74831.
2. Records that identify a student by a nickname, initials, or personal characteristics are considered "personally-identifiable information" only if a "reasonable person in the school community" who does not have personal knowledge about the situation could identify the student with "reasonable certainty." Comments, p. 74831.
3. If a teacher posts grades using a special code known only to the student and the teacher to identify the student, this code is not considered "personally identifiable information." Comments, p. 74831.
4. Parents and students generally do not waive their FERPA rights by sharing information with the media or other members of the general public. Comments, p. 74831.

3. What if the student who engages in aggressive behavior has a 504 plan or we don't think s/he needs one but the parents do?

IV. NEW ADA/SECTION 504 AMENDMENTS (Effective January 1, 2009), Codified as Public Law 110-325 (42 U.S.C. 12101) – September 25, 2008

Section 504 was revised in order to overturn previous Supreme Court decisions which restricted the right of individuals with certain health and life conditions from suing employers, alleging discrimination on the basis of disability. However, the law revises the definitions of “major life activity” and “substantial limitation: as contained in the Section 504 of the Rehabilitation Act of 1973. We may see an increase in identification of students who are eligible for 504 plans now for students who do not qualify for IEPs.

A. **Revised Definition of “Major Life Activity:** “ Now includes, but is not limited to, “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”

B. **Revised Definition of ‘Substantial Limitation’**

1. “An impairment that **substantially limits** one major life activity need not limit other major life activities in order to be considered a disability.”
2. “An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”
3. “The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as –
 - Medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
 - Use of assistive technology;
 - Reasonable accommodations or auxiliary aids or services; or
 - Learned behavioral or adaptive neurological modifications.
4. The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

C. **Interventions that Work Do Not Affect Determination of Disability Status**

The purpose of the amendments is to ensure that the use of medication or assistive technology devices does not affect a student’s eligibility status. For example, a student who is diagnosed by a pediatrician with ADHD and whose symptoms are controlled with daily medication may STILL qualify as eligible for a 504 plan if, without the medication, he/she would meet eligibility standards.