



ADDRESSING ISSUES PRESENTED BY VIOLENT SPECIAL EDUCATION STUDENTS

A SPECIAL REPORT • 2007

When it enacted the IDEA, Congress created a federal right for children with disabilities to receive a public education that is designed for each child individually at no cost to their parents. Because the law is a funding statute, school districts must comply with it in order to receive federal education dollars.



IDEA entitles each child with disabilities in a school district the right to a “free appropriate public education” (FAPE), through an individual education program (IEP) designed to meet the child’s unique needs in the “least restrictive environment...appropriate.” In addition, parents of children with disabilities have the right to take legal action against school districts to ensure that their children receive FAPE.

Because of the IDEA, increasing numbers of students with violent behaviors are appearing in regular and special education classrooms in public schools.

Imagine the following news item appearing in the local association newsletter to members:

Your School, Wisconsin—Jason, a ten year old child with several disabilities, was well behaved while visiting a nursing home with his class last Friday, so the paraeducator assigned to work with him told him that he would get a treat. However, on the bus back to school he kicked another student and swore. As a result, he was told that he would not get a treat after all.

Jason became more and more agitated. When the bus reached the school, Jason began to scream obscenities while kicking and hitting the staff members. He gave his teacher a black eye and bruised the ribs of the bus driver. The police were called. The one staff member who had been trained to use passive restraint techniques eventually restrained Jason. When the police arrived, Jason attacked the police officer. Jason was handcuffed and placed in the squad car.

This is the fifth incident this year where Jason became so violent that he injured others. When asked whether Jason will be returned to the classroom or placed in an alternate educational setting, the District stated that it could not remove Jason to an alternate placement without the parents’ consent.

This fictional report is an amalgamation of actual reports received from educators and support staff across the state. Though such incidents are relatively rare, they are extremely traumatic for all involved.

Each year, serious injuries are inflicted on school staff by special education students whose violent behavior is often substantially related to or caused by their disability. In the past several years, WEAC members have suffered injuries including broken teeth, scratched corneas, dislocated jaws, disabling spinal injuries, bites, scratches, and bruises, among others. Among the primary reasons that teachers and paras are repeatedly injured by the same student is misunderstanding on the part of the school district about whether students with disabilities can be removed for safety reasons.

NOTE: This information is not intended to serve as legal advice. If you have questions about a specific situation, call your UniServ director.

The following issues are those that arise when staff must work with special education students whose violent behavior is uncontrolled:

- *whether the student can be removed from the regular or special education classroom,*
- *whether the district can suspend or expel the student,*
- *whether the member can call the police or press charges against a student,*
- *whether the member will be liable for injury inflicted on other children by the special education student,*
- *what recourse the member has if injured by a student, and*
- *whether a staff member who was injured can be required to continue working with the student.*

Even if a staff person's injuries do not require medical attention, where the aggressive behavior is repeated throughout the day, every day, the constant anxiety associated with the fear of being hurt causes teachers and other staff to suffer psychological injury and burnout. Some of these "invisible" injuries are depression, insomnia, anxiety attacks, and post-traumatic stress syndrome.

Despite clear evidence of the severity and frequency of injuries, however, some school districts are unwilling to remove the special education student to an alternate placement to keep staff and other students safe, especially if the parents insist that the child remain in the classroom. As a result, employees in some districts face the likelihood of serious injury each day they work with or near a violent child with disabilities.

In addition, some teachers and paraeducators are told that the student cannot be subject to consequences of any kind for behavior that injures others. School staff have even been told that students with disabilities cannot legally be removed from the classroom, despite the severity and frequency of the behavior. Such statements leave staff and students at the mercy of violent outbursts by students with disabilities whose behavior is allowed to continue unchecked. This does a disservice to the violent student as much as to those he/she may injure by failing to teach the child that in the world outside the classroom, real consequences will be forthcoming, and, without learning to stop the behavior, he/she is likely to end up in the criminal justice system.

Hence, the problem of violent behavior caused by students' disabilities continues to bedevil teachers who are trained in academic, not therapeutic, techniques. Because school personnel are not trained to work with children whose violent behavior stems from a disability and where the possibility of injury is discounted or ignored altogether by the District, they daily face a situation they are ill-suited to handle without suffering injury, both physical and psychological.

I. Can Special Education Students Be Removed From the Classroom for Engaging in Violent Behavior? YES.

A. Federal Law Permits Removal of Students if Certain Procedures Are Followed.

IDEA as amended in 1997 and in 2004 permits school personnel to remove dangerous students from the classroom for up to 10 days per school year before additional procedures must be used if parents object to a longer removal.

However, a school district can remove a special education student from the current placement for up to 45 days without parental consent in three situations: a) where the student has a weapon, or b) for illegal drug use or possession, or c) if the student inflicts "serious bodily harm" on someone at school or at a school function. Note that "serious bodily harm" is defined as being a life-threatening or permanently disabling injury, such as the loss of a limb or sensory function, such as sight, smell, touch, or hearing.

Whether short term removals to another location within the school count toward the ten day limit depends on factors such as the frequency of the short-term removals and whether the student continued to receive services required by the IEP while removed from the primary placement. If services are provided and IEP goals continue to be addressed, districts can unilaterally implement various short term removals which may not equal a change in placement, though cumulatively they add up to more than ten school days.

However, once the ten day limit has been reached, the law provides additional procedural safeguards to children with disabilities, including those whose disabilities cause them to be violent and dangerous.

For example, if a student's parents object to removal of the student from the classroom, the school district can and should seek an expedited hearing where it can



present evidence to a hearing officer who is empowered to order the removal of the student to an “interim alternate educational setting.” Safety removals can be ordered for up to 45 days, during which students must continue to receive educational and other IEP services.

To obtain such an order, the district must show that it provided sufficient supplementary aids and services for the student to succeed in the original placement and that it has adequately addressed the student’s behavioral issues. To do so, the IEP team must have conducted a functional behavior assessment and implemented a behavior improvement plan without success prior to the removal.

Following removal, the district must convene the IEP team to determine the appropriate placement for the student.

The IDEA requires school districts to provide a “continuum of placements” from the least restrictive environment (the regular education classroom) to increasingly restrictive environments, including hospitalization and home care, in order to meet the student’s unique needs. Violent and dangerous students often need a more restrictive environment than can be provided in the regular or special education classroom.

IDEA gives special education students the right to have any removal for more than 10 days in a school year reviewed by the procedures set forth in the law. Where parents object, the law does not preclude such removals per se, but does require the school district to support its decision with evidence that it has provided sufficient help to the student for the placement to have succeeded but for the student’s violent behavior.

B. Wisconsin Law Also Permits Removal of Violent Special Education Students.

The Wisconsin legislature acknowledged the need to keep educators and others safe from violent students when it passed § 120.13, Stats. This statute sets forth the bases upon which school officials can remove students: for violating school rules, for making a bomb threat, and for endangering or threatening to endanger the property, health, or safety of others.

Under § 120.13, school boards are empowered to allow school personnel to remove students for five days for one of the reasons stated above, and for 15 days if a notice of expulsion is sent to the parents. Note, however, that in the case of special education students, the length of the removal will be subject to the IDEA’s 10-day limit for unilateral removals, after which a hearing officer’s order must be sought if parents object to continued removal.

Under § 118.164, “Removal of Pupils from Class,” teachers can remove students who “violate the code of classroom conduct,” and who are “dangerous, unruly, or disruptive, or exhibit behavior that interferes with the ability of the teacher to teach effectively, as specified in

the code of classroom conduct.” Again, the length of removal of special education students is subject to the 10-day-per-school-year-removal limit in the IDEA.

In addition, where teachers might need to intervene to protect their own or others’ safety, § 118.31, Stats., allows teachers to use “reasonable and necessary force” in the following situations:

- (a) to quell a disturbance or prevent an act that threatens physical injury to any person . . .
- (b) . . . to obtain possession of a weapon or other dangerous object within a pupil’s control . . .
- (c) . . . for the purpose of self defense or the defense of others . . .
- (d) . . . for the protection of property . . .
- (e) . . . to remove a disruptive pupil from a school premises or motor vehicle . . . or from school sponsored activities . . .
- (f) . . . to prevent a pupil from inflicting harm on himself or herself. . . .
- (g) . . . to protect the safety of others.

§ 118.31 also requires each school district to adopt a policy that “allows any official, employee or agent of the school board” to use reasonable and necessary force for the purposes enumerated above, and provides that “deference shall be given to reasonable, good faith judgments made by an official, employee or agent of a school board.”

Thus, state law recognizes the need for teachers and school officials to be able to protect themselves and others from injury and threats of injury, whether inflicted by a regular or special education student. While state law must be applied subject to the IDEA’s restrictions on removal of special education students, IEP teams should consider what behavior will result in removal. If the parents agree to a behavior management approach that permits unlimited removal to prevent injury to others, then the district is not bound by the IDEA’s 10 day limit.



Teachers serving on IEP teams should ensure that the IEPs of students whose disability results in violent behavior contain provisions for dealing with the potential for violence, including the school conduct code and disciplinary measures that permit removal from the classroom to protect others' safety.

II. Special Education Students May be Suspended and/or Expelled From School If Provided Enhanced Procedural Review of the Decision.

In determining whether a student with a disability is eligible for enhanced due process prior to suspension or expulsion, the IEP team must make a "manifestation determination" in which it decides whether the student's behavior was caused by or is substantially related to the disability.

If the IEP team concludes that the behavior is unrelated to the disability, then the student can be disciplined like any other student, and is accorded no enhanced due process protection.

Even if the behavior is not related to the disability, the IDEA requires that students with disabilities must continue to receive the educational services required by their IEPs during the removal.

But if the IEP team concludes that the offense that would result in expulsion for a regular education student was caused by the student's disability, the school district must seek an expedited hearing and present evidence to convince a hearing officer that expulsion (essentially a change in placement to a location outside the school) is warranted.

III. A Staff Member Can Call Police or Press Charges if Attacked by a Special Education Student.

If any student, whether in special or regular education, attacks any staff member, the staff member may report the attack to police and can seek to press charges against the student, whether or not the attack resulted in physical injury. Staff may also call police if they witness an attack by a student.

Similarly, if any student threatens a staff member or someone else, the staff member may call the police to report the threat. Remember that the threat must be one that the student could carry out. For example, if a first grader threatens to kill his teacher with a knife, it is unlikely that such a threat could be acted upon. While such an unrealistic threat should never be ignored, common sense suggests that calling the police would not be appropriate. On the other hand, a high school student who sends an email threatening the life of a teacher with specific details

about how he could carry out the threat should never be ignored or minimized, and the police should be called.

Staff do not need the district's permission to report an attack or threat to police or to press charges against a student. However, it is up to the local prosecutor to determine whether charges will be filed against the student in court. If you work in a district where your administrator appropriately addresses violent student issues, the need to involve the police may not arise.

Even so, by reporting such incidents to police, a record of the student's behavior is created that can be presented in a hearing or other adjudication should the student be suspended or expelled.

IV. Barring Gross Negligence of the Staff Member, the Member Will Generally Not be Held Liable for Injury Inflicted on Other Children by a Special Education Student.

Staff members will almost certainly not incur liability for injury inflicted on others by a special education student unless the staff member is guilty of extreme negligence.

The following hypothetical may be illustrative:

A special education teacher is assigned to work with a child whose history includes violent behavior such as hitting, kicking, and biting. At the IEP team meeting, this behavior is discussed and interventions and preventive strategies are identified, including the provision of a one-on-one aide for the child. The teacher and aide have great success in reducing the violent behavior until one day when, before either staff member could intervene, the child suddenly dashed three feet away and bit another child in the face, inflicting an injury that required stitches and plastic surgery.

The parents of the injured child subsequently sued the school district and named the aide and teacher individually, claiming that they were negligent and are liable for their child's injuries.

Under state law, school employees who are acting within the scope of their employment are generally immune from suit as individuals. Employees may be liable in cases where their behavior was so negligent as to remove it from being within the scope of their employment.

In the hypothetical, the teacher and aide would almost certainly be immune from suit. They were present in the classroom, were carrying out their duties in the normal way, each was attending to assigned tasks, the IEP was followed, and the parents would not be able to prove that there was anything either could have done to prevent the tragic injury. (For similar reasons, the district also would likely prevail in a motion to dismiss the lawsuit.)

However, a staff member could be held individually liable for gross negligence resulting in injury inflicted by a special education student on another student. The following hypothetical will illustrate:

A staff member knew that the violent student in his/her class could not be trusted to remain unsupervised with other students without acting out violently. Nonetheless, on a day when the student's one-on-one aide was absent, the teacher went to the office to pick up his mail, leaving the student alone in the classroom with other students. The violent student broke another student's arm while the teacher was gone.

This injury arguably resulted from the staff member's gross negligence in knowingly leaving the violent student unsupervised without good reason in the presence of others vulnerable to harm.

V. Members Who Are Injured on the Job Are Generally Barred by Worker's Compensation From Filing Suit Against the School District to Recover Damages for Their Injuries.

In almost all instances where a staff member is injured by a student, the member's only recourse will be to claim state worker's compensation benefits.

In one rare instance, a staff member injured by a student who had been taken off medication that reduced violent behavior received workers compensation benefits, and also successfully sued the home insurance carrier of the parents of the student for negligence for failing to warn the school district that the student had been taken off his medication. (See *Nieuwendorp v. American Family Insurance*, 191 Wis. 2d 462 (1995).) But under state worker's compensation law, the worker's compensation insurer was eligible to claim a portion of the award for benefits it had paid the employee.



Because members can exert pressure on school districts through their local union, their best recourse is preventive. Bargaining over issues pertaining to staff safety is one way members have to prevent injury from occurring and provide enhanced benefits if injuries do occur.

In a case where the facts show that a district knowingly put an employee in a situation which it knew would result in injury to him/her, the employee may be able to sustain a legal action against the employer. However, such a case is extremely difficult to win, even where the facts are clear.

VI. Because Staff Members Injured by a Student May Be Required to Work With the Student Following the Incident, It Is Important to Involve the Local Union and/or UniServ Director to Ensure That Staff Remain Safe From Injury.

Staff members who are injured by a student understandably wish to be removed from working with that student. However, the assignment of staff is one of the "management rights" about which districts are not required to bargain. Thus, whether a staff member's request will be honored depends on several factors.

Districts may consider the extent of physical and mental trauma suffered by the staff member as a result of the injurious behavior. Regardless of the extent of injury, however, most districts will try to honor the request of an injured staff member to have the injuring student removed from the class.

Another factor districts may consider is whether another staff member is available to provide services to the student. A smaller district might not remove the student, even where the behavior was significantly injurious, arguing that it has nowhere else to place the student. However, members should not acquiesce to such a stance.

Instead, the district should seek permission from the parents to change the placement to an alternate setting while it determines what it can do to deliver services to the child. If the parents object, the district can seek an expedited hearing to have the student placed in an alternate educational setting so that the staff member is not forced to choose between his/her job and his/her safety.

In addition, the local union can be instrumental in support of the injured colleague by putting pressure on the district to resolve the issue without placing the injured staff member in harm's way. Such organized activity is often most effective in convincing a district to remove a student from an injured member's caseload or to otherwise ensure that further injury does not occur.

In those rare cases where a district refuses to protect a teacher from further injury by a violent student, a



restraining order may be necessary to protect the safety of the teacher. If a teacher believes that he/she is subject to certain harm by a student, the teacher should contact his/her local union and UniServ director. The UniServ director will then determine whether to refer the case to WEAC's Office of General Counsel for legal action.

VII. What to Do When Faced With Aggressive Behavior

When faced with a student whose behavior is violent, including kicking, biting, scratching, chasing, pushing, head-butting, hitting, choking, grabbing, etc., it is important to have a plan in place to protect all involved. The following suggestions will help to address the problem, and perhaps either help the child stop the behavior, or place the child where the behavior can be appropriately treated and resolved.

- The first time aggression is shown, notify the administration and your local representatives and UniServ Director. You are entitled to support from your union in resolving the problem, and in ensuring your right to a safe working environment is respected.
- Keep out of the range of the student. Your safety is more important than the IEP goals when the student is being violent.
- Have in place a plan to remove the other children from harm's way, and to keep yourself out of the violent student's reach. Notify the administration of the plan, and ensure that the plan provides a safe way to have the student removed by an administrator.
- Document the behavior each time it happens.
- Ask to reconvene the IEP team to conduct a Functional Behavior Assessment, if one hasn't been completed, and to discuss the behavior management plan, what additional supports may work, and the

appropriateness of the placement if they do not work.

- Ask for additional support and services for the student.
- Ask for training in how to help the student manage the behavior.
- Seek the parents' cooperation in finding a solution to the problem, even if it includes removal from the classroom.
- If necessary, call the police to have the student removed and/or to report assaults.
- Remind the district of its obligation to ensure the safety of staff and students, and of its obligation to provide a continuum of placements under IDEA.
- Explain to the district the importance of seeking an expedited hearing, if necessary, to have a student removed for inflicting injuries on others.

Injuries, both physical and psychological, to staff and students by special education students must not be tolerated. The degree to which public schools provide a safe teaching and learning environment depends on a number of factors, including 1) whether administrators, staff, parents and communities remain in a state of denial about violent behavior and the injuries inflicted on others by special education students because of their disabilities; 2) the degree to which school administrators and staff work together to find solutions rather than tolerate violent special education students' behaviors; 3) the education of the community about the existence of special education students' violent behaviors and the resulting injuries to staff and students; 4) the determination of the community to provide the programs, resources, and personnel with sufficient appropriate expertise to teach students to stop violent behaviors; and 5) the willingness and ability of school districts to make available the continuum of placements for special education students required under the IDEA.

Additional Resources

- National Education Association. www.nea.org
- American Federation of Teachers. www.aft.org
- National Association of School Psychologists www.nasponline.org
- Center for Positive Behavioral Intervention And Support www.air-dc.org/cecp/cecp.html
- National Dissemination Center for Children With Disabilities www.nichcy.org
- The Council for Exceptional Children . . www.cec.org
- WEAC www.weac.org

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