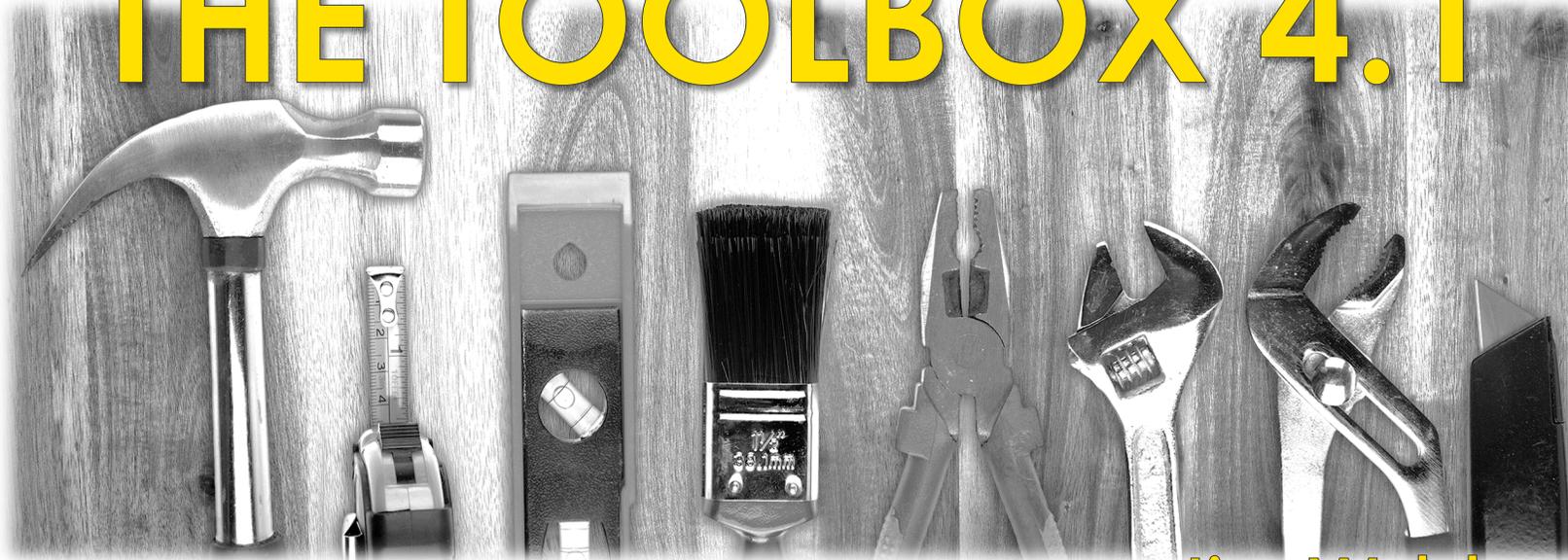


THE TOOLBOX 4.1



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A PLACE OF SPECIAL DANGER

- ❑ "School attendance can expose students to threats to their physical safety that they would not otherwise face."
- ❑ "Students may be compelled on a daily basis to spend time at close quarters with other students who may do them harm. Experience shows that schools can be places of special danger."
- ❑ Justice Alito: *Frederick v. Morse* (2007)



DILEMMA

- ❑ IDEA imposes two requirements that are in tension with each other.
- ❑ Schools have a duty to provide an appropriate education to every student, regardless of the student's behavior.
- ❑ Schools also have a duty to maintain a safe and orderly campus.
- ❑ And the authority of school officials is constrained—on purpose.



THE ONLY SCOTUS CASE

- ❑ In *Honig v. Doe* the school argued that “stay put” did not apply when a student was dangerous. Due to the responsibility of the school to maintain safety, a school administrator could order a student’s removal from the IEP placement, despite the “stay put” rule.
- ❑ This issue went to SCOTUS.

THE SUPREME COURT SPEAKS

- ❑ “We think it clear, however, that Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school.”
- ❑ *Honig v. Doe*, 1988.
- ❑ So authority is limited, constrained.



HOW TO RESOLVE THE TENSION

- ❑ For the most part, the tension between these competing duties must be resolved INDIVIDUALLY by each student's IEP Team.
- ❑ But there are also tools in the administrative toolbox.



YOUR TOOLBOX: TEN TOOLS

1. BIPs.
2. Educational change of placement, with agreement.
3. Educational change of placement, without agreement.
4. Expedited hearing.
5. "Special circumstances" removal.
6. Disciplinary change of placement.
7. 10-day "FAPE-Free Zone."
8. Short term removal AFTER FAPE-Free Zone.
9. Leadership at the non-consensus IEP Team meeting.
10. Law enforcement involvement.

TOOL #1
BIPS



TOOL #1: BIPs

- ❑ Positive behavior strategies and supports.
- ❑ What we do FOR the student;
not what we do TO the student.
- ❑ Proactive; Individualized; Focused on identified behaviors;
Parental agreement.
- ❑ If inappropriate behaviors continue at the same rate, BIP is
not working—review and revise.

WHEN SHOULD WE CONSIDER A BIP?

- ❑ At every annual IEP Team meeting, the Team answers this question: does the student engage in behaviors that impede learning of the student or others?
- ❑ If yes, the Team is required to CONSIDER positive interventions and strategies, such as a BIP, to address the behaviors.

SOME THINGS TO THINK ABOUT

- ❑ Should the “interventions” include short term removals, such as ISS or OSS for up to three days?
- ❑ How should a BIP address physical restraint?
- ❑ Make sure parents and students understand that the Code of Conduct applies to all students. A BIP is not a personalized Code of Conduct.





Tool # 2

Educational Change of Placement WITH Agreement



THREE THINGS TO NOTICE

- ❑ Tool #2 involves a “change of placement.” So it’s for more than ten consecutive days.
- ❑ It’s “educational” as opposed to “disciplinary.” So it’s based on behavior that IS a manifestation of disability.
- ❑ The parent agrees with the change. If the parent does not agree, you can consider Tool #3.

THE TWO DON'TS

- ❑ IDEA gives us two “don’ts” when the behavior of the student is a manifestation of disability.
- ❑ Don’t punish it.
- ❑ Don’t ignore it.
- ❑ The law spells that out in more detail. SEE NEXT SLIDE!!



IF THE BEHAVIOR IS A MANIFESTATION

- ❑ The IEP Team must conduct an FBA unless one is already done. And develop a BIP, or review and revise an existing one.
- ❑ The school must return the child to the placement from which the child was removed...“unless the parent and the LEA agree to a change of placement as part of the modification of the BIP.”

TOOL #2: EDUCATIONAL C.O.P. WITH PARENTAL AGREEMENT

- ❑ If the behavior is a manifestation, the student must be returned to the placement from which the student was removed.
- ❑ Two exceptions to this:
 - First, “special circumstances” cases (see Tool #5).
 - Second: “unless the parent and the LEA agree to a change of placement as part of the modification of the BIP.”
That’s Tool #2!

TOOL #2: DISCIPLINARY REMOVAL?

Q. "When the parent(s) of a child and the school personnel are in agreement about the child's change of placement after the child has violated a code of student conduct, is it considered to be a removal under the discipline provisions?"

A. "No, if the parent(s) of a child and the school district agree to a specific change in the current educational placement of the child."

OSERS Q and A: 52 IDELR 231 (2009).

WHERE TO?

- ❑ Tool #2 usually involves a change of placement to an MRE (More Restrictive Environment) such as a self-contained behavior unit.
- ❑ Or it could be to an MRE for just part of the day.

NOTICE....

- ❑ "...agree to a change of placement **as part of the modification of the BIP.**"
- ❑ It sounds like the BIP is changed first; then the placement is changed in order to properly implement the BIP. If there is no BIP, it's premature to use Tool#2.

PARENTAL AGREEMENT

- ❑ Parental agreement to a change of placement after a disciplinary incident should be voluntary, informed, genuine.
- ❑ Make sure parents understand that they do not have to agree to what the school is proposing.



TOOL # 3

EDUCATIONAL CHANGE OF PLACEMENT
WITHOUT AGREEMENT

BASICS OF TOOL #3

- ❑ This is the counterpart to Tool #2. Again, it is for a “change of placement.”
- ❑ Again, the behavior is a manifestation of disability, and so the C.O.P. is “educational” rather than disciplinary.
- ❑ A change of placement to an MRE to focus on behavior is an option.

TOOL #3: EDUCATIONAL C.O.P. WITHOUT PARENTAL AGREEMENT

- ❑ Schools always have the option of proposing a change of placement to a more restrictive environment (MRE).
- ❑ This should ONLY be done if the disability causes the misbehavior.
- ❑ Like any C.O.P., this requires parental agreement, or a willingness to defend the decision in hearing.

HOW TO THINK ABOUT TOOL #3

- ❑ Moving a student to a MRE is an admission of failure, since the goal is to serve the student in the LRE.
- ❑ To justify this, school must be able to show that:
 - ❑ 1) the current placement is not working;
 - ❑ 2) we have made good faith, consistent efforts to enable the student to succeed in LRE, and
 - ❑ 3) the MRE offers services likely to improve student performance.

Before using this Tool, ask the Three Questions.....

THE THREE QUESTIONS

1. Is it worth fighting over?
 2. Are we legally defensible?
 3. Is the staff united on this?
- Best practice: Ask them in reverse order.





TOOL # 4
EXPEDITED HEARING

HONIG v. DOE....REVISITED

- ❑ Remember that SCOTUS ruled that even when a student is likely to hurt someone, the school may not “unilaterally” change the student’s placement over parental objection.
- ❑ But the school can seek an “expedited hearing.” That’s Tool #4.

TOOL #4: HOW THIS HAPPENS

- ❑ Tool #6 (Disciplinary Removal) is not available because IEP Team concludes that behavior is a manifestation of disability. Tool #2 is not available because parents do not agree to a change of placement; nor do we have “special circumstances” (Tool #5).
- ❑ Thus the student must be returned to the current placement.
- ❑ School administration deems this imminently dangerous, and thus employs Tool #4, seeking an “expedited hearing.”

TOOL #4: THE REGS

- ❑ If the school “believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others” it “may appeal **the** decision by requesting a hearing.” 34 CFR 300.532(a).

THE DILEMMA FOR THE LAWYER

- ❑ How do you prove that injury is “substantially likely” if injury has not already occurred?
- ❑ If injury already occurred, the school may be able to use Tool #5 instead of Tool #4. Was the injury “serious”? Was a weapon used?
- ❑ Tool #5 is quicker and easier to use.



WHERE DO WE GO?

- ❑ The school can seek an expedited special education hearing.
- ❑ Or it can seek a “Honig Injunction” from a local district judge.
- ❑ Either way, the burden of proof is high.

TOOL # 5

“Special Circumstances” Removal



TOOL #5: “SPECIAL CIRCUMSTANCES”

- ❑ Principals can order removal to IAES (Interim Alternative Educational Setting) for up to 45 school days without regard to manifestation in three cases:
 - Carrying or possessing a weapon;
 - Knowingly possessing, using, selling or soliciting the sale of illegal drugs;
 - Inflicting “serious bodily injury.”

TOOL #5: MDR?

- ❑ Even in cases of “special circumstances” the IEP Team must conduct an MDR.
- ❑ However, the outcome of the MDR does not drive the placement decision. Student can go to IAES regardless.
- ❑ MDR should inform revision of the BIP.
- ❑ Note: offense must take place at school or school function.

NOTICE THE DEFINITIONS

- ❑ “Drugs” does not include alcohol.
- ❑ Nor does it include being “under the influence.”
- ❑ Federal law does not require proof that possession of a weapon was “knowing,” but state law or local policy may.

WHAT IS A SERIOUS BODILY INJURY?

A bodily injury that involves:

1. Substantial risk of death;
2. Extreme physical pain;
3. Protracted and obvious disfigurement;
4. Protracted loss or impairment of the function of a bodily member, organ or mental faculty.

18 U.S.C. 1365(h)(3).

TOOL # 6

Disciplinary Change of Placement



TOOL #6: DISCIPLINARY CHANGE OF PLACEMENT

- ❑ The school can propose disciplinary action in excess of 10 consecutive school days.
- ✓ Must be based on violation of the code of conduct.
- ✓ Must be equal treatment with non-disabled student.
- ✓ Must NOT be a manifestation of disability.

TOOL #6: PROCESS

- ❑ School officials determine that the student violated code of conduct.
- ❑ IEP Team conducts manifestation determination.
- ❑ If behavior is NOT a manifestation, disciplinary removal occurs, but....
- ❑ School must continue to provide appropriate services.

TOOL #6: THE REGULATION

“For disciplinary changes in placement...if the behavior that gave rise to the violation of the school code is determined **not** to be a manifestation.....school personnel may apply the relevant disciplinary procedures....**in the same manner and for the same duration** as the procedures would be applied to children without disabilities, **except** as provided in paragraph (d) of this section.”
34 CFR 300.530(c). (The “**except**” refers to the duty to provide FAPE).

WHAT HAPPENS FIRST?

- ❑ Tool #6 is a two-step process:
 - 1) General education due process;
 - 2) IEP Team action to do manifestation determination and determine appropriate services.
- ❑ Best practice: do it in that order.
- ❑ This gives the IEP Team more information about the incident; allows for the parent and school to have adequate time to prepare for meeting.

TIMING

- ❑ The MDR must be done within ten school days from the date when the decision was made to change placement.
- ❑ That's usually two weeks.
- ❑ Consider: principal decides to seek a C.O.P. on September 10. You would have until September 24 to conduct the MDR.
- ❑ Why is that important to know? SEE NEXT SLIDE!!



TIMING OF THE IEP TEAM MEETING AND MDR

- ❑ Parents are entitled to written notice of the IEP Team meeting a reasonable number of days in advance.
- ❑ Never assume the parent will waive that requirement. Never pressure the parent into waiving the notice requirement.
- ❑ Also: the staff needs time to prepare for the MDR by investigating the incident, conducting the due process hearing, and reviewing the student's records.



TOOL # 7
10-Day “FAPE-Free Zone”



TOOL #7: FAPE FREE ZONE

- ❑ It is not a denial of FAPE to fail to serve a student for ten school days, cumulatively, through the school year.
- ❑ No services are required, so long as non-disabled students would be treated the same for similar misconduct.
- ❑ See 34 CFR 300.530(b) and (d)(3).
- ❑ Count your days!

TOOL # 8
Short Term Removal
After FAPE-FREE Zone



QUESTIONS PRINCIPALS ASK

- Do I get another ten days?
- Does the clock start over?
- Can we create a "FAPE-Free Zone Bank"?



ANSWER

- The clock does not start over, and you may not create a FAPE-Free Zone Bank.
- But you do get another ten days.
- Note well: they are not FAPE-Free.
- And you can't do it unilaterally.

AUTHORITY TO GO BEYOND FFZ

A single regulation incorporates Tool #7 and Tool #8.

Tool #7: "School personnel...may remove a child with a disability who violates a code of student conduct...for not more than 10 consecutive school days...."

HERE IS THE REST OF IT...

- ❑ Tool #8: “and for **additional removals** of not more than 10 consecutive school days in that same school year **for separate incidents** of misconduct” as long as those removals do not create a “change of placement.” 34 C.F.R. 300.530(b)(1).
- ❑ Notice: same school year, 10 more days.

TOOL #8: SHORT TERM REMOVALS AFTER FFZ: DUTY TO SERVE

- ❑ “After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any SUBSEQUENT days of removal the public agency must provide services to [enable the child to participate in the general curriculum and progress toward meeting IEP goals].” 34 CFR 300.530(b)(2).
- ❑ So there are more days...but they are not FAPE Free.

LIMITS ON TOOL #8

- ❑ “Subsequent days of removal” must be accompanied by services—they are not FAPE-Free.
- ❑ This is not “unilateral” action: Principal must consult with a teacher about what services are needed.
- ❑ And the school must determine if this “subsequent” removal, combined with earlier removals, has created a “change of placement.”

“PATTERN”

- ❑ The definition of “pattern” features three components.
 - More than 10 days;
 - Similar behavior;
 - Proximity.
- ❑ Consider giving “proximity” some definite parameters—like “more than 10 days within a 90-day window.”

TOOL #8 MIGHT BE USED AS AN INTERIM MEASURE

- ❑ By Feb 2, Jason's FAPE Free Zone is gone. All 10 days have been used.
 - That day, he assaults a teacher.
 - Deadline for conducting MDR: Feb 16 (10 school days).
 - What are we going to do with Jason in the meantime?
- ❑ Tool #8: **ASSIGNMENT** pending IEP Team meeting.

TOOL # 9

Leadership at the Non-Consensus IEP Team Meeting



TOOL #9: LEADERSHIP AT THE NON-CONSENSUS IEP TEAM MEETING

- ❑ Many of these tools require IEP Team action.
- ❑ Many of those meetings will end in non-consensus.
- ❑ The Team can come to closure without consensus, but that process requires leadership.
- ❑ Remember that in special ed, leaders listen first; then lead.
- ❑ The leader takes responsibility for clear communication with the parent.

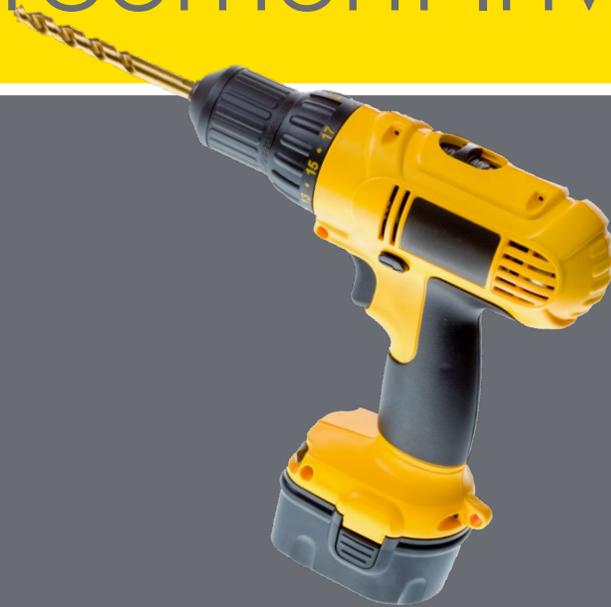
WHEN CONSENSUS IS NOT ACHIEVED

- ❑ When the team fails to come to consensus, the school is supposed to take the action that it deems appropriate; parents have the opportunity and the burden of challenging that action.
- ❑ There are only two parties at the meeting. When there is a “tie vote” the school’s position prevails, subject to parent challenge.



TOOL # 10

Law Enforcement Involvement



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TOOL #10: LAW ENFORCEMENT

- ❑ IDEA expressly acknowledges that school officials can report alleged crimes to law enforcement.
- ❑ As OSERS notes in the Q and A: "Under most State and local laws, school personnel must report certain crimes that occur on school grounds to the appropriate authorities."

TOOL #10: CONTROVERSY

- ❑ Schools are getting much criticism over the use of criminal procedures, like ticketing and citations, for minor offenses.
- ❑ No one questions the authority of the school to file criminal charges for serious misconduct.



TOOL #10: SENDING THE RECORDS

- ❑ When reporting a possible crime, you must send copies of the “special education and disciplinary records” for consideration by the authorities to whom you report.
- ❑ But this transmission of records must be in conformity with FERPA. Therefore, you must have parental consent, or fit within an exception to parental consent.

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