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NAVIGATING THE PERFECT STORM:

When School Discipline and Criminal Prosecution Collide

When children with disabilities find themselves in trouble with school or the law, they need extra protection. Learn how to navigate the Perfect Storm while protecting your child, and their exposure, as best as you can. Strategies outlined in this article include:

- *Damage Control*
- *Getting your child out of the line of fire*
- *Putting together a defense team that includes your child's clinician*
- *Preserving your child's rights*
- *Ensuring that they are getting services and support in school*
- *Making the most of the disciplinary process including both the fact finding and manifestation phases*
- *The legal consequences of medication diversion*



Every parent of a student with ADHD dreads getting that call from the school that their child has been suspended for disciplinary reasons. Even more frightening is the potential for getting a call from the police that their child has been arrested. Each of these factors are stressful enough in their own right. However, even that stress can be magnified exponentially by press coverage, and community pressure. In light of recent tragic headlines, zero tolerance policies in our schools, and a heightened response from the administration and police, more students are being arrested at school which sparks both criminal prosecution and school disciplinary proceedings simultaneously. More often than not, these factors all come together like the forces of nature to create a perfect storm and must be navigated with great care. This article will ex-

amine the issues and suggest both proactive and responsive strategies to protect your child while you navigate the perfect storm.

Unfortunately, students with ADHD and co-occurring conditions are at a particularly high risk of initiating both the school discipline process and prosecution at the same time. Furthermore, the impulsive nature of students with ADHD puts them at a much higher risk of making the initial conduct worse, by saying and/or doing the wrong thing after the fact.

Discipline Under IDEA and Manifestation Determination

As a general proposition, all students who are suspended out of school for more than 10 days, cu-

mulative during an academic year, are entitled to a Superintendent's Hearing to determine whether or not they committed the offense that they are being suspended for. Students with a documented disability, however, are given an additional layer of protection than students who are not classified. If the suspension is less than 10 days cumulatively during the academic year, students who are classified and students who are not classified are treated the same way.

Once the suspension exceeds 10 days, students with IEP's and 504 Plans, have an additional layer of protection. After the factual hearing is held, a classified student then has the right to a Manifestation Determination. The IEP or 504 team is required to convene to determine whether or not the facts, as determined at the initial hearing, represent conduct that was a manifestation of the student's disability. Under the law, a student with a disability cannot be punished for displaying symptoms of their disability. This is not to say that a student with Tourette's Syndrome has a license to swear openly at school. What it means is that if the student exhibits behavior that is a clear and clinical manifestation of their disability, instead of being punished for their disability, the team must evaluate the behavior in the context of that disability and develop a plan to prevent it from happening in the future. It is important to note, in both school disciplinary proceedings and in the criminal justice system, that the disability is not an excuse or a defense. It is a mitigating factor in moving forward.

If there is no manifestation determination, then the student is treated the same way as a student without a disability. If a manifestation determination is made, then there are additional safeguards for the student. First the IEP or 504 plan must be examined to determine whether or not it is appropriate and has been followed. (See Sidebar on The Second Half of Advocacy). Second, the school is required to provide a Functional Behavioral Assessment of the student and to interpose a Behavioral Intervention Plan (BIP) to aide in preventing the conduct in the future. The only exception to this are when the behavior involves the possession of a firearm, illegal drugs, or causes serious physical injury to another student or school employee. In these cases, the student can be suspended up to a total of 45 school days, but is still entitled to the behavioral interventions mentioned.

Rules to Protect Your Child

Be Proactive Where You Can

Have Your Child Classified

If you believe your child has ADHD or other disability that puts them at risk for disciplinary, or criminal behavior, have them classified. If you try and fail, you may be able to use that to have them classified after the fact.

Educate Your Child About Diversion Consequences

Make sure they understand that their stimulant medication is a controlled substance and that **GIVING IS SELLING** under the law. They should safeguard their medication and **NEVER** share it with others.

When You Have To React

Contact An Attorney Immediately

Start with the attorney that represented you during the IEP process, if there was one. If not, then speak with someone who has experience with school discipline and criminal defense.

Get Your Child Out Of The Line Of Fire

Don't waste time arguing with school officials about the suspension or disciplining your child at school. Get them out of the school immediately.

Stop The Bleeding Immediately

You can't control what your child has done to begin this process, but you can do a lot to control what happens after you get the call. Voice an objection to any further questioning, and if possible, have an attorney do that for you. This also includes making sure your child does not discuss the facts in any way with anybody.

Make Sure Your Child Is Represented Legally At School And In Court

This is important even if you have to hire TWO (2) Attorneys.

Coordinate Your Child's Defenses On All Fronts

Make sure that both attorneys freely communicate with each other and with your child's clinician to protect their exposure administratively as well as criminally.

Unfortunately, based upon their inherent impulsivity, many students with ADHD are at high risk for the aggravating circumstances of these exceptions. This can also be magnified by the opportunity and demand for stimulant medication by non ADHD students. Students and their parents need to know that under the law, there need not be any exchange of money for diversion to be considered a sale. Stimulant medication is a Schedule II controlled substance, and the **SHARING** of it is legally considered a **SALE**, and is prosecuted as a felony. In addition to diversion, many co-occurring conditions that present with ADHD can often magnify the risks of substance abuse. For instance, a 10 year follow up study at Harvard University study found that students with ADHD have a 50% higher risk of Substance Abuse Disorder, and when ADHD co-occurs with Conduct Disorder, that increased risk **TRIPLES***.

It is also important to note that the added protection of a manifestation determination only applies to students with disabilities. If a parent believes that their child has ADHD, and given their impulsivity or behavioral history, is at high risk for antisocial or criminal behavior in the future, it is important that they initiate the process to have them evaluated and document their disability. Being proactive here is very important. If the disability is not documented, and the disciplinary process has been commenced, the law provides that a parent can raise an undiagnosed disability and request an expedited evaluation and classification meeting by the Committee for Special Education after the fact. The practical problem here is that depending on the gravity of the conduct and in the wake of public pressure and criminal prosecution, it is significantly more difficult to have a student classified after the fact.

Arrest and Prosecution

Coordinated efforts between police and school officials has heightened in recent years to address growing community concerns about school safety. The behavior that students get suspended for is usually criminal in nature. As a result, a quicker response means quicker police action and a prosecutorial process that takes place concurrent with the school disciplinary process. All of this means that it is more crucial than ever before to act quickly to protect your child and

The Second Half of Advocacy

Like the treatment for ADHD and other co-occurring conditions, the best approach is a multi-faceted one. This is particularly important in a disciplinary situation. Here are some that parents need to keep in mind.

Behavior is Just as Important as Their Grades

If your child has a high grade point average, but has significant behavioral challenges that manifest in anti-social or criminal behavior at school, the administration will be quick to say that there is more to being a student than their grades. You should use the same rationale seeking services and support, especially since your child will be evaluated on that behavior.

Use the Student Handbook

Each year parents get a student handbook telling them what is required of their children and almost none of it addresses academics. If they are being evaluated based upon their behavior, then use those behavioral risks to get services and support.

Report Cards are Much More Than Grades

In addition to your child's grades, report cards always have a behavioral column that says things like "smart but talks out of turn", "confrontational" or "doesn't respect authority." If they are being evaluated on their report cards for that behavior, then deficits should also indicate the need for support.

Include Behavioral Support in the IEP

If behavior is the problem, seek a functional behavioral assessment and a behavioral intervention plan PROACTIVELY, if it is necessary. This will go a long way to head off problems in the future and may make a manifestation determination easier, if things do go horribly wrong.

Getting the IEP is Only Half the Battle

So much of advocacy focuses on getting the IEP, that parents breathe a sigh of relief when they get it. That is only the first step. Parents must be ever vigilant to make sure that the IEP is functionally appropriate and that it is being followed. Moreover, even if it was an appropriate IEP and it has been followed, your child's needs may very well change over time.

Build a Paper Trail

This is just as important for discipline as for other services. Many parents grimace at the disciplinary reports that come home and either deny or wish they didn't exist. It is important to respond to them and ask what can be done to head off this behavior in the future. Offer to help develop strategies for home and school and offer to work with the teachers. This will document the behavior as a pattern, but also your willingness to help and requests for behavioral strategies at the school level and laying the ground work for manifestation later on.

seek legal assistance to intervene immediately.

If an arrest occurs at school, there will certainly be a superintendent's hearing going on at the same time. If you have used an attorney or advocate during the IEP process, you should call them immediately. See if they feel comfortable representing your child in the criminal case, and if not, ask if they can recommend a criminal attorney, preferably one that they have a good working relationship with. It will be critical to get an attorney to intervene and stop any questioning that may be taking place at the school level. In some states, such as New York, a phone call from an attorney indicating their representation of a defendant, will serve to stop police questioning immediately. Even if the education attorney you call does not practice in criminal court, have them call the school and/or police and halt any further questioning and have them document it in writing by fax or email. You can't control what took place to start this process, but there is a lot you can do to limit the damage once the process begins.

In many cases, parents arrive at the school and will start to argue with school officials in an effort to ward off the suspension, or to discipline their own children in front of the principal or other school personnel. That is a huge mistake. The most important thing when this happens is to ***GET YOUR CHILD OUT OF THE LINE OF FIRE***. Get them out of the school. Nothing you do there is going to stop the suspension from happening and if an arrest will follow, or is in process, you should voice your objection to any questioning. Many times the school administration will seek to get a student to write a narrative admitting

guilt and apologizing to a teacher or other student for their conduct. ***DO NOT LET THIS HAPPEN***. That statement can be used against them in the prosecution.

It is also important to note that the "***LINE OF FIRE***" includes ***ANY*** statements, which include your child speaking, texting or emailing their friends about what has happened. All lines of communication need to stop immediately and go through the attorney. This is especially true if there is press coverage in the case. Denying your child's guilt if the press calls is a statement and a very slippery slope. Do not address any inquiries and make sure the attorneys know about them.

The Blurred Blue Line

Based upon recent public outcry for increased school safety, there is an increasing effort to involve the police in school activity. In the simplest cases that means a rapid response to a school alarm along with a thorough crisis intervention plan. In this case it is easier to distinguish between the school administration and police activity. This line has blurred as more and more schools hire off

duty police officers as security guards and even further with the hiring of hybrid personnel known as School Resource Officers (SROs). According to the Council for State Governments Justice Center, in 2013, 29 states introduced more than 90 bills related to SROs and other school police personnel**. These bills range in the powers given to SROs, but in most cases they are given "Peace Officer" status (a legal distinction which gives them powers of arrest), and in nearly all cases establish them as employees of the school district. This climate, while addressing concerns about school safety and re-

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sponse time, further blurs the lines between civilian and police action with respect to statements and searches. As a result, in order to protect their children, parents need to involve an attorney immediately.

I am a proponent of building partnerships with the school in order to move in a positive direction when it comes to educational advocacy. In disciplinary situations however, there is much more at stake. This is especially true where the police are, or may be, involved. Your child has rights that must be protected and preserved immediately as they risk exposure to a criminal record, or even incarceration. This process is inherently adversarial in nature. Any cooperation with the school, the police or prosecutors, must be decided and handled by an attorney. Students with ADHD are extremely impulsive, especially under stressful situations. Statements made without council, can severely limit an attorney's ability to protect them or control the damage.

Legal Coordination

If you need a criminal attorney to represent your child in the prosecution in addition to an educational attorney for the disciplinary process, make sure to facilitate contact between both attorneys and your child's clinician. It is important to educate the criminal attorney about your child's disability and to understand their actions. This can be an important mitigating factor in a plea bargain or sentencing later on. It is also important to understand that the superintendent's hearing is usually held within 5 days of the incident. Do not ignore the factual part of the Superintendent's Hearing simply because your child's guilt seems obvious. At the factual hearing, the attorney representing your child has the right to cross examine all of the witnesses that the school brings forward, which usually includes witnesses, victims, and, in many cases, school security officers and/or police officers. This is the only part of this stressful sit-

uation that gives your child an advantage. Cross examination of these key witnesses at this early stage is invaluable to the attorney in the criminal case. It is also important to include the criminal attorney in the loop for the Manifestation Determination. The determination and the subsequent BIP can be extremely useful to them in providing an understanding to the judge and prosecutor in the criminal case, and can go a long way toward mitigation, support services, or an appropriate placement which can make a huge difference.

Conclusions

While suspension and prosecution of your child are extremely stressful situations, an understanding of the process can be helpful in getting you to react quicker to protect them. If there is any concern that your child may have a disability that can lead to antisocial or criminal behavior, it is important to have them classified **BEFORE** their conduct puts them in the middle of a perfect storm. Make sure to involve attorney(s) to represent them in the suspension hearing as well as the criminal prosecution and have those attorneys work together and with your child's care provider. An understanding and active participation in both processes can go a long way to help navigating the storm. Being prepared will not prevent something unpleasant from happening, but it can mean the difference between navigating a mine field with a map in your hand, versus being chased through one while blindfolded..

**Does ADHD Predict Substance Use Disorders? A 10-year Follow-Up Study of Young Adults with ADHD, Timothy E. Wilens, M.D. et al, J AM Acad Child Adolescent Psychiatry. 2011; 50(6): 543-553. Doi:10.10116/j.jaac.2011.01.021*

***Officers in Schools: A Snapshot of Legislative Action, The Council of State Governments Justice Center, CSG Justice Center, New York, NY 2014.*