



Where to Place Wally? A Special Education Due Process Hearing Case Study

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Abstract

The purpose of this manuscript is to provide the case study of a student with Emotional Behavioral Disorders (EBD) whose services were in dispute resulting in a due process hearing. Wally, age 12, resided with his mother and attended school in his local district. He had had a label of EBD since kindergarten. He had failed in multiple placements until his district tried a slow, careful process leading to full inclusion in the general education classroom. Following a year of success and a move to a new school, Wally again exhibited serious behavioral outbursts. At the District's expense and urging, his mother took him to a world famous psychiatric facility to obtain an evaluation. While there, he had serious aggressive outbursts and experienced a number of restraint and time-out situations resulting in his mother removing him without completion of the process. The District filed for hearing when Wally's mother refused to place him in a segregated facility for students with EBD and a return to the psychiatric hospital to complete the aborted evaluation to help determine where to place Wally

Keywords

Emotional Behavioral Disorders, Due Process Hearing, Poolaw, Honig, Placement

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Violence and aggression in schools is a major and ever growing concern to the public and to education professionals alike. There is a strong consensus among those who study schools that problems of student misconduct have increased enormously both in terms of seriousness and pervasiveness over the last two decades (Kauffman, 2005). The typical school response to an aggressive acting-out student is suspension or expulsion. However, there is little or no evidence that this type of strategy contributes to improved behavior or to overall school safety (Morrison & D'Incau, 2000; Skiba, 2000; Skiba & Peterson, 2000). Exclusions are often counterproductive in reducing problem behavior and frequently result in grade retention, dropping out of school, academic failure, and delinquency (Zhang, Katsiyannis, & Herbst, 2004). When the student has emotional and behavioral disorders (EBD) it becomes an even more troubling dilemma.

The Individuals with Disabilities Education Act (IDEA) has disciplinary provisions related to labeling behavior problems and to deciding on a course of action in light of whether or not the behavior is deemed to be the result of the student's disability. This should favor students with EBD because their behaviors are more likely to be linked to their disabilities and are therefore not subject to disciplinary exclusions (Katsiyannis & Maag, 1998; Skiba, 2002), however this is not the case. For a number of definition-related reasons, students with EBD have traditionally been underidentified (Merrill & Walker, 2004; Maag & Katsiyannis, 1998). Walker, Nishioka, Zeller, Severson and Feil (2000) found that under 94-142, school districts are often hesitant to label acting-out students as EBD for they believe it limits disciplinary options.

Among those given the EBD label, annual suspension from school rates climbed from 13% in the mid 1980s to 44% in 2004 (Wagner, Newman, Cameto, & Levine, 2004). Generally these students are suspended or expelled at rates double or triple the school population as a whole (Zhang, Katsiyannis, & Herbst, 2004).

From the advent of public schooling, many children with disabilities were systematically excluded from educational programs and services (Giordano, 2007). Court decisions led the way to publicly funded education for these students followed by federal legislative mandate. In *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania* (1971), the court determined that students with mental retardation in Pennsylvania were not receiving public education, a violation of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. In *Mills v. Board of Education* (1972), the

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court held that children with a range of disabilities, including behavioral problems, had been excluded from public education without due process. Together, these cases created a backdrop for special education legislation (Bon, Faircloth, & LeTendre, 2006), and in accordance with such rulings, Congress substantially changed existing laws, resulting in 1975's Education for All Handicapped Children Act, Public Law 94-142. This law is currently authorized as Individuals with

Disabilities Education Act (IDEA), Public Law 108-446 (U.S. Department of Education, 2004).

The reauthorization of IDEA in 1997 (IDEA Amendments, 1997) and issuance of the final regulations in 1999 (IDEA, 1999) reflected an attempt to provide greater flexibility on discipline matters concerning children with disabilities. Prior to this 1997 reauthorization, schools were guided by judicial interpretations of various provisions in IDEA. Specifically, in *Honig v. Doe* (1988), the court held that school administrators may not unilaterally exclude children who pose a danger or threat to others or to themselves and that students with disabilities who commit disruptive acts remain in their current educational placement while their case was under review. This prevented the school from expelling or sending a student to a more restrictive placement without parental concordance. The 2004 IDEA amendments (Individuals with Disabilities Education Act Amendments, 2004) revealed several changes with respect to placement in an interim alternative educational setting (IAES) when a child with a disability violates a code of student conduct (20 U.S.C. §615(k)). Congress responded to concerns about the disciplinary process by identifying special circumstances when a student can be removed to an IAES through shifting the burden from the district to the parents, permitting school district personnel to remove a child with a disability to an IAES unless the parent requests a hearing.

The complexity of disciplinary procedures for students with disabilities is exemplified by the steps required to change a student's placement in response to violations of the school's disciplinary codes (Bon, Faircloth, & LeTendre, 2006). A school district's actions will be limited if parents disagree with a decision to change their child's placement

from the general education classroom, even if the decision is made based on the school's concerns about disruptive or aggressive behaviors. When parents and school districts disagree, a hearing officer may be asked to determine the ultimate placement of the child. If the parents request such a hearing, an impartial hearing officer must make the decision whether to place a student in an IAES, even for students who are substantially likely to injure themselves or others.

The purpose of this manuscript is to present the case study of a student with EBD whose services were in dispute resulting in a due process hearing. Authored by the hearing officer and a former district administrator, it illustrates the need for districts to use appropriate assessment procedures, to consider a student's previous programs and progress in planning an intervention and to clearly illustrate that exclusion of a student with EBD is often an inappropriate "service."

The Issues for Hearing

Wally's school district wanted to place him in a segregated special school for students with serious emotional disorders rather than in his neighborhood elementary school. The District also requested Wally complete a psychiatric evaluation at Psychiatrists Hospital before it would plan a program for him or allow him to attend school.

Background

Wally, a 12 year old, who had been provided with multiple interventions, assessments and placements during his school career was the center of a controversy regarding appropriate services. For seven years, this thin, average height, sandy-haired boy received varying forms of special education services. Upon beginning Kindergarten his

district identified him as a student with EBD and his first IEP stated that he would receive direct and indirect services in the general education classroom at School 1. A reward system for appropriate behavior and occasional pull-out for direct instruction in social skills did not alleviate Wally's violent behavior and his team agreed to move him to a Special Day Class (SDC) for students with EBD at another elementary, School 2. This more restrictive setting included a token economy, regular direct instruction of social skills, and both a "head-down at his desk" timeout and a timeout chair at the back of the room. Despite these, his behavior escalated and by the end of his first grade year the team amended his IEP to include the conditional procedures of manual restraint, mechanical or

Despite these [strategies], he behavior escalated and...the team amended his IEP to include manual restraint...mechanical locked restraint...

locked restraints, and time-out as appropriate to deal with increasing physical aggression.

In second, third and fourth grade Wally attended a segregated site, School 3, serving only students with EBD. Intermittently during those years, he was placed in a medical center's day treatment program because of aggression at home and at school—including assaults on his teachers. At School 3, Wally was in a highly structured environment that included a token economy, response cost, direct instruction of social skills, the use of exclusionary timeout, and the use of a level system that provided increased privileges for maintaining

appropriate behavior for periods of time. Program emphasis was on rule compliance, academic performance and social skills acquisition. In spite of the specialized setting, teachers, and services, dozens of reports were made of physical and verbal aggression directed at peers, the use of profanity, verbal threats, and insubordination toward staff. A typical day might include stabbing his teacher with a pencil and then throwing a chair at his aide. The team met again to plan for the next year, recognizing that even the most restrictive placement was failing.

During fourth grade a *Wechsler Intelligence Scale for Children-III* (Wechsler, 1991) was administered to Wally resulting in a Full Scale Score of 119, well above average. *The Woodcock-Johnson Psychological-Educational Battery, Part III* (Woodcock, McGrew, & Mather, 2001) showed Wally to be average in all areas except Written Language, where he was slightly below average.

Prior to the fall of fifth grade, Wally's team met to plan for the new year. At the behest of his mother and because even the most restrictive placement was failing to improve Wally's behavior, a new program was planned that used integration in a general education setting, a self-identified motivator was used to reinforce his good behavior. The new plan was to integrate Wally into the general education program at a new elementary building, School 4. The team agreed that Wally would go to School 4 and receive 30 minutes of instruction per day in the library. The rest of the day he would attend School 3. Wally was told if he went a week with no physical aggression, his time at School 4 would be increased to 60 minutes. When he reached 60 minutes he was told if he went 5-days with no physical aggression he would be given 30 minutes in a regular 5th

grade classroom in addition to the hour in the library. Each week, his time in the regular classroom was increased until the special education placement at School 3 was faded entirely and full time integration in general education 5th grade at School 4 was achieved. No incidents of violence or dangerous behavior were reported during this period. The following comments appeared on his periodic review at the end of the 5th grade year:

Wally does a good job with complying with teacher directions. He may need a couple reminders, but usually follows through with what was asked. His verbal interactions with peers overall have been great. Overall Wally has been doing great with decreasing inappropriate physical reactions. There have been a few occasions with he and a peer have engaged inappropriately physically but finding appropriate ways to cool off has been Wally's strongest area.

It was clear that this gradual process of mainstreaming Wally was effective. School staff reported there were minor verbal incidents but no major incidents. Wally worked with the class in which he was placed, did some homework, and the majority of time, he followed class procedures.

During the summer after 5th grade Wally's family moved and he began 6th grade at School 5. Because of his success in 5th grade, his mother refused any special education programming at School 5. Wally was soon suspended for aggressive behavior. In late October of that year the District admitted that inadequate planning had been undertaken for the move and services were needed in School 5. Before planning could begin, Wally's family moved again. Instead of

sending him to his new neighborhood school, School 6, with special education services of any type, the district multidisciplinary team discounted the successful year at School 4 and instituted homebound services while proposing sending Wally to a residential program for students with EBD (School 7). The District also offered to pay for an assessment at the prestigious Psychiatrists Hospital (PH).

Wally's mother visited the residential program and rejected it, but agreed to the assessment at PH's Learning Disabilities Program. She also requested the District institute the successful School 4 program at School 6. Wally started the program in the library and was integrated in the general education program in early spring. The rest of his time was spent homebound. Wally's EBD teacher at School 4 prepared a video that included various suggestions and pointers about how to work effectively with Wally for the training of the School 6 staff.

Wally's behavior was good in the homebound program and in the time he spent at School 6. The School 6 special education teacher described him as a "very pleasant student who was a hard worker, eager to please. He liked to be in control of his environment. He was...very creative." She stated she liked him and personally saw no aggressive or acting out behavior.

Precipitating Incident

On a Tuesday, Wally was brought to the PH by his mother to complete the recommended evaluation and the next day, an incident occurred. Wally refused to comply with the assessor's verbal requests to sit in a quiet area and quickly became verbally threatening. Security was called but Wally refused verbal directives to calm down. He was subsequently removed to a time-out room

where he began kicking and then punched a security guard in the face. When he calmed enough to come out, he saw his mother in the next room and ran toward her, colliding with a nurse. They both fell down. A staff member called for help, thinking that Wally had attacked the nurse. Four security guards grabbed Wally and one knelt on his back to restrain him. Following the incident, Wally had bruises on his back, arms, and legs, and broken blood vessels underneath his arm.

The next day, PH staff again tried to complete the assessment however they asked that Wally be removed for jingling his keys after being told to stop. Two security guards took him to the ground and then escorted him physically to the locked time-out room. Again he had bruises on his back and arms, a rug burn on his knees and forehead, and his knees were swollen as a result of the restraint. When released from time-out, Wally went to another building looking for his mother but was surrounded by five guards in uniforms with gloves, utility belts, a club, and handcuffs. As the guards approached, Wally became upset and blurted out an obscenity. Wally started crying, cowered on the floor and cried for his mother who was physically pulled away by one of the nurses. His mother finally broke free, rejoined Wally, and escorted him off the PH grounds and then home.

Hearing Issue

The District proposed the residential program at School 7 as Wally's placement, but his parent did not accept it. Subsequently the District requested an expedited hearing based on the parent's refusal to send Wally to School 7 and her refusal to return Wally to PH to complete his evaluation. Wally's parent requested that Wally be placed in School 6, his neighborhood school, with support

services that would allow him to be educated in the general education environment. The District's rationale for this proposed placement was Wally's history of aggression compounded by the severe aggression he exhibited at PH. District staff testified that what happened at PH made them afraid for their safety and the safety of other children.

Case Law Basis for the Decision and Both Sides' Positions

Federal law guarantees all students a free appropriate public education in the least restrictive environment and guarantees an appropriate evaluation to help determine placement issues. Wally was a 12-year old child with disabilities as defined by statute and was entitled to special education services appropriate to his needs pursuant to the Individuals with Disabilities Education Act (IDEA), Public Law 108-446 (U.S. Department of Education, 2004).

State Rule 3525.4400, subpart 3 provided the criteria with regard to decisions concerning educational placement stating that the educational needs of the child shall be determinative. However, there shall be a presumption that, among alternative programs of education, to the maximum extent appropriate, a primary placement in a regular public school class and program with appropriate special education services is preferable to removal from the general education classroom. A proposed action that would result in the child being removed from a general education program may be sustained only when, and to the extent, that the nature or severity of the disability is such that education in the program with the use of special education services cannot be accomplished satisfactorily, and there is indication that the child will be better served with an alternative program or service.

The District argued that IDEA does not necessarily require a school district to exhaust all possible services before choosing an alternative to mainstreaming (Poolaw v. Bishop, 1995). In Poolaw, a student's former school district had provided a variety of supplemental aids and services coupled with varying degrees of placement without success and as a result, placed the student in a residential facility 280 miles from his home. In Wally's case, District's legal argument was based in large part on Poolaw that *stated there is tension between the IDEA's clear preference for mainstreaming and its requirements that schools provide individualized programs tailored to the specific needs of each disabled child that must be balanced.*

In Poolaw, four factors were used to help determine whether the school's decision to remove a child with disabilities from the general education classroom and place him in a special education environment violated IDEA. The judge in Poolaw, cited the considerations he used, based in part on Sacramento City School District v. Rachel H.(1994) (1) the educational benefits of full-time placement in the regular classroom; (2) the nonacademic benefits of such placement; (3) the effect the disabled child has on the teacher and children in the regular class; and (4) the costs of mainstreaming the child.

IDEA's preference for mainstreaming was not found to be an absolute commandment. The judge stated,

the language of 20 U.S.C. ' 1412(5)(B) only requires mainstreaming "to the maximum extent appropriate" and provides that "when the nature or severity of the handicap is such that education and regular classes with the use of sup-

plementary aids and services cannot be achieved satisfactorily" the student may be removed to a special education environment.

The District contended that Wally's behavior at PH demonstrated this was the situation.

The District also cited Clinton County R-III School District v. C.J.K. (1995) the U.S. District Court Judge denied a relief to "stay put" in a case where the disabled student had repeatedly threatened school officials and students, exploded in anger while at school, thrown and violently pushed furniture and other objects, and made teachers physically afraid of him. The judge cited *Honig v. Doe*, (1998) and stated "the Supreme Court has authorized an exception to the "stay put" requirement, when the school officials can establish that the current placement is "substantially likely to result in injury to either the disabled child or to others."

The parent argued that the incident at PH was the result of a unique set of circumstances and should not be used to project Wally's behavior in a site where he was already demonstrating success. The argument was made in *Light v. Parkway C-2* (1994), that a district seeking to remove an allegedly dangerous disabled child from his educational placement must show that maintaining the child is substantially likely to result in injury and that the district has done all that it reasonably can to reduce the risk the child will cause injury.

Ruling

The Independent Hearing Officer found the District had failed to meet its burden of proof on either issue of this expedited hearing. His order stated:

1. Placement will be in School 6, following the guidelines already established in School 4

and the procedures and accommodations as described in the training tape. The starting point for integration should be a step involving services in the school library, a special education classroom, and a general education classroom. As Wally's behavior progresses, he should be phased into the general education setting. If challenging behavior occurs, then he would move back a step on the plan, until he reached the criterion for moving forward again. It was clear from prior success that the District had an excellent integration plan and skilled service providers to implement it. The District must put it in place in the new environment.

2. A functional behavioral assessment (FBA), at the District's expense, is to be conducted by a mutually agreeable agent. The FBA must aim at identifying the function, of Wally's noncompliant and aggressive behaviors. As part of this, the antecedents or triggers for his challenging behaviors as well as the consequences maintaining his behavior are to be identified.

The FBA was to be accomplished by charting his behavior each day— including antecedents and consequences (also called collection of ABC data), interviews with the parent and direct service providers to identify what is triggering and what is maintaining any inappropriate behaviors that are identified, a review of effectiveness of previously implemented techniques, and finally, an experimental manipulation of his environment (this is called a functional analysis of behavior). This description served as a guide to the parties in selecting an agent to complete the assessment.

3. Wally was not required to return to PH for a assessment. There was no evidence presented to indicate that he had a learning disability. The actions taken at PH seemed

counter to any procedure designed to allow for a valid assessment of any type.

4. Following the completion of the school year, the parties are to conduct an IEP meeting, consider the data from the FBA, and to evaluate Wally's performance from this point to the end of the school year. This assessment will include information from the success or failure of Wally's integration into School 6.

Where to Place Wally?

The year following the hearing, the FBA was completed for Wally. It resulted in only slight changes to his program. One primary finding was that inclusion in the general education setting was a potent reinforcer for Wally and that inclusion contingent on the absence of aggressive behavior resulted in a reduction of his aggressive outbursts. The district completed the gradual integration program and Wally finished 6th grade successfully at School 5. The district and Wally's mother jointly planned for his successful inclusion in 7th grade at his neighborhood junior high.

While Wally had shown himself to be aggressive in school and in the community, he had not been aggressive or had outbursts in an education setting where staff followed the procedures outlined in his behavior support plan. Behavior is different in different settings and though Wally had done poorly in restrictive settings, legal precedent was on his side in terms of current placement. He must be given an opportunity to succeed, or fail, in the general education environment, his history in that environment mandated it. This is the very essence of IDEA and the reason LRE protection exists. It was the "legal" decision. It should not be taken as precedent that general education or full inclusion is the

appropriate outcome for all or even most students with EBD.

The inclusion of students with disabilities in general education classrooms is one of the most controversial issues in education (Hallahan & Kauffman, 2003; Kvale & Forness, 2000). Inclusion of students with EBD is particularly controversial (Landrum, Tankersley, & Kauffman, 2003). The controversy is not generated by the idea that some students with EBD should be in general education but the concept that all such students should be so accommodated (Wang, Reynolds, & Walberg, 1988) and that options ranging from part-time “pullout” programs to self-contained classes and separate schools—are clearly unjust, if not illegal (Stainback & Stainback, 1991). Advocates of full inclusion make little or no reference to the various disability categories or degree of disability and forward the regular classroom in the neighborhood school as the placement for all children (Kauffman, 2005). The cascade of services model (Deno, 1973) has been embraced by many for almost 40 years and was created to provide environments that are conducive to appropriate behavior and educational opportunity (Jakubecy, Mock, & Kauffman, 2003). It is unlikely it can be provided without a continuum of services (Kauffman, Bantz, & McCullough, 2002).

Implication for Practice

Few techniques that are successful with students with EBD are unique, most are the same as used for many other students; rather it is the precision, duration, and intensity of how they are delivered (Landrum, Tankersley, & Kauffman, 2003). Many students with EBD would probably benefit from regular classrooms in which the appropriate techniques are used effectively however observational studies suggest that most regular

classrooms are not characterized by the strategies known to be effective with these students (Lloyd & Kauffman, 1995). Very significant changes in what teachers know and do will be required before regular classroom teachers are prepared to create the minimum conditions necessary for the success of students with EBD while also providing an appropriate program for other students (Fuchs, 1991).

Knowing what is needed to help students is not the same as being able to provide it. The resources that school districts lack are most often human resources, particularly properly trained personnel with the time necessary to address students' problem behaviors effectively and there is also a lack of appropriate settings in which intensive, sustained, and often highly personalized services can be provided (Henderson, 2005). Every child in the EBD category must be treated as an individual and must be educated in a way that best fits his or her needs in the most appropriate setting. The question for Wally or for any student is what educational services are required? This must precede the question as to where the services should be located (Crockett & Kauffman, 1999).

Identifying appropriate services should be achieved through assessment. Multidisciplinary teams must review previous interventions, document successful and unsuccessful strategies, and collect data to design a program that is appropriate in providing an education from which the student may benefit (Signore-Buhl, LeBlanc, & McDougal, 2006). Implications from this case can be drawn regarding the everyday work of school personnel. Each school professional must stress the importance of evaluating programs to the multidisciplinary teams and stress the importance of using evidence-based interventions. Essential information with regard to the

importance of monitoring and evaluating the outcomes of interventions that have already been implemented must be provided. A professional must take the lead in designing methods of program evaluation that meet the needs of a particular situation rather than automatically moving a student to a more restrictive environment if someone feels threatened or fears that the student will fail.

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