THE LEGALITIES OF BEHAVIOR STRATEGIES, FBAs AND BIPs WITHIN A THREE-TIER MODEL OF INTERVENTION

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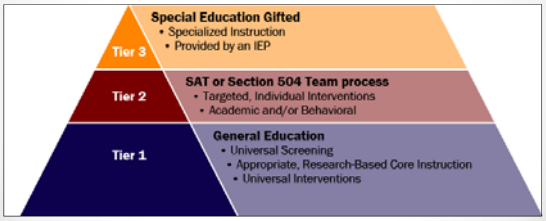
NM THREE-TIER MODEL OF STUDENT INTERVENTION



http://ped.state.nm.us/ped/RtI_intervention.html

STATE LAW

NMSA 1978, § 22-13-6(G) (2010)

"'Student assistance team' means a school-based group whose purpose, based on procedures and guidelines established by the department, is to provide additional educational support to students who are experiencing difficulties that are preventing them from benefiting from general instruction."

NMSA 1978, § 22-13-6 (F) (2010)

"'Response to intervention' means a multi-tiered intervention model that uses a set of increasingly intensive academic or behavioral supports, matched to student need, as a framework for making educational programming and eligibility decisions."

6.29.1.9(D) NMAC (2011)

"Student intervention system. The school and district shall follow a three-tier model of student intervention as a proactive system for early intervention for students who demonstrate a need for educational support for learning or behavior."

6.29.1.9(D)(1) NMAC (2011)

"In tier 1, the school and district shall ensure that adequate universal screening in the areas of general health and well-being, language proficiency status and academic levels of proficiency has been completed for each student enrolled. If data from universal screening, a referral from a parent, a school staff member or other information available to a school or district suggests that a particular student needs educational support for learning or behavior, then the student shall be referred to the SAT for consideration of interventions at the tier 2 level."

6.29.1.9(D)(2) NMAC (2011)

"In tier 2, a properly-constituted SAT at each school, which includes the student's parents and the student (as appropriate), shall conduct the student study process and consider, implement and document the effectiveness of appropriate research-based interventions utilizing curriculum-based measures."

6.29.1.9(D)(2) NMAC (2011)

"As part of the child study process, the SAT shall address culture and acculturation, socioeconomic status, possible lack of appropriate instruction in reading or math, teaching and learning styles and instructional delivery mechanisms in order to rule out other possible causes of the student's educational difficulties."

6.29.1.9(D)(2) NMAC (2011)

"When it is determined that a student has an obvious disability or a serious and urgent problem, the SAT shall address the student's needs promptly on an individualized basis, which may include a referral for a full, initial evaluation to determine possible eligibility for special education and related services consistent with the requirements of Subsections D-F of 6.31.2.10 NMAC and federal regulations at 34 CFR Sec. 300.300."

6.31.2.10(C)(1)(d) NMAC (2011)

"A parent may request an initial special education evaluation at any time during the public agency's implementation of tiers 1 and 2 of the three-tier model of student intervention. If the public agency agrees with the parent that the child may be a child who is eligible for special education services, the public agency must evaluate the child. If the public agency declines the parent's request for an evaluation, the public agency must issue prior written notice in accordance with 34 CFR Sec. 300.503. The parent can challenge this decision by requesting a due process hearing."

34 C.F.R. §300.503(a)

Prior written notice must be given a "reasonable time before the public agency—

1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or

2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child."

34 C.F.R. §300.503(b)

Required content of the prior written notice:

(1) A description of the action proposed or refused by the agency

(2) An explanation of why the agency proposes or refuses to take the action;

(3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;

(6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and

(7) A description of other factors that are relevant to the agency's proposal or refusal.

34 C.F.R. § 300.504(a)

"The procedural safeguards notice must be given to the parent at least once per year and under the following circumstances:

(1) Upon initial or parent request for evaluation;

(2) Upon receipt of the first State complaint under §§300.151 through 300.153 and upon receipt of the first due process complaint under §300.507 in a school year;

(3) In accordance with the discipline procedures in §300.530(h); and

(4) Upon request by a parent. "

6.29.1.9(D)(3) NMAC (2011)

"In tier 3, a student has been identified as a student with a disability or gifted under the state criteria for giftedness deemed eligible for special education and related services, and an IEP is developed by a properly-constituted IEP team, pursuant to Subsection B of 6.31.2.11 NMAC and federal regulations at 34 CFR Sec. 300.321."

6.29.1.9(D)(4) NMAC (2011)

"The department's manual, *the student assistance team and the three-tier model of student intervention*, shall be the guiding document for schools and districts to use in implementing the student intervention system."

THE LAW ON MEDICATION

34 C.F.R. § 300.174 PROHIBITION ON MANDATORY MEDICATION

"The SEA must prohibit State and LEA personnel from requiring parents to obtain a prescription for substances identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)) for a child as a condition of attending school, receiving an evaluation under §§ 300.300 through 300.311, or receiving services under this part."

6.31.2.9(J) NMAC PROHIBITION ON MANDATORY MEDICATION

"Each LEA and other public agencies serving students with disabilities are prohibited from requiring parents to obtain a prescription for substances identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)) for a student as a condition of 6.31.2 NMAC 9 attending school, receiving an evaluation under 34 CFR Secs. 300.300 through 300.311, or receiving services under Part B of the IDEA. This prohibition shall be construed as provided in 34 CFR Sec. 300.174(b)."

NMPED DIRECTIVE (10/7/2005)

"At no time, and in no way, may LEA personnel state or suggest that a student with a disability or a suspected disability must obtain a prescribed medication that is covered by the Controlled Substances Act before that student may attend school, return to school, receive an evaluation for a suspected disability or receive special education and related services." http://ped.state.nm.us/ped/SEBdocuments/law/medication.memo.100705.pdf.

STATE GUIDANCE MANUAL

See New Mexico Public Education Department's "Response to Intervention Framework" (2014).

http://ped.state.nm.us/ped/RtIdocs/RtI_Manual%20_11.26.14.pdf.

6.29.1.9(D)(4) NMAC (2011)

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NM THREE-TIER MODEL OF STUDENT INTERVENTION

TIER 1: FOR ALL STUDENTS
Appropriate Core Instruction with Differentiation and Interventions

UNIVERSAL SCREENING

- General health and well-being
- English language/home language proficiency
- Academic Proficiency using multiple measures

Quoted from NMPED Response to Intervention Framework 2014, page 3.

CORE INSTRUCTION WITH DIFFERENTIATION AND INTERVENTIONS AS IDENTIFIED BY DATA

- Core Instruction for all students
- High-yield, instructional strategies
- Differentiated instruction
- Enrichment activities
- Culturally and linguistically responsive instruction
- Interventions as identified by data

Quoted from NMPED Response to Intervention Framework 2014, page 3.

SCHOOL-WIDE BEHAVIORAL SYSTEM WITH INTERVENTIONS AND POSITIVE SUPPORT

- School code of conduct
- Classroom rules
- School-wide behavioral programs
- Character/social skills programs
- Bullying prevention policy/programs
- Monitoring of office discipline referrals (ODRS) and attendance data
- School wellness policy

Quoted from NMPED Response to Intervention Framework 2014, page 3.

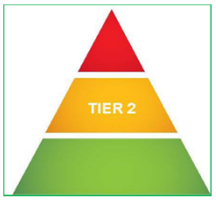
FOLLOW UP

The teacher continues to track student progress using formative, interim, and summative assessments; analyzes the data, and monitors student progress. If the data suggests that interventions have not been effective, teachers should implement different, evidence-based interventions that are likely to meet the student's needs. After at least two rounds of interventions (implemented with fidelity) and documented lack of sufficient progress, the student should be referred to Tier 2.

Quoted from NMPED Response to Intervention Framework 2014, page 5.

TIER 2: REFERRED STUDENTS

The Student Assistance Team Process



STUDENT DATA GATHERED AND ANALYZED

- Conducted by the SAT

SAT INTERVENTION PLAN

- Individualized, written plans
- Targeted, intensive interventions

BEHAVIORAL INTERVENTION PLAN (BIP)

- Functional Behavioral Assessment (FBA) conducted for diagnosis of behaviors
- Targeted, intensive, behavioral interventions

504 ACCOMMODATION

- Aligned to the Section 504 Manual

Quoted from NMPED Response to Intervention Framework 2014, page 9.

REFERRED STUDENTS

THE STUDENT ASSISTANCE TEAM PROCESS

The focus of Tier 2 is to provide strategic and individualized support for at-risk students (struggling or significantly advanced) for whom Tier 1 instruction and universal interventions prove insufficient. A school-based team called the Student Assistance Team (SAT) gathers all available data about a student who is not making sufficient progress in Tier 1, develops an hypothesis regarding a possible cause for the problem, and then designs an individualized SAT intervention plan and/or behavioral intervention plan (BIP), as necessary.

Quoted from NMPED Response to Intervention Framework 2014, page 10.

DECISION CONSIDERATIONS:

The SAT must be careful not to unduly delay referring to Tier 3 a student who may have a highly-suspected disability or giftedness or who is in a clear academic or behavioral crisis. At the same time, the purpose of the SAT process and intensive interventions is to reduce unnecessary referrals to Tier 3.

Quoted from NMPED Response to Intervention Framework 2014, page 14.

CONTINUED…

In order to move a student to Tier 3, one of the following must be true:

- The student has been unresponsive to Tier 2 evidence-based interventions based on progress monitoring data.
- The student has a clear disability or has a disabling condition that significantly restricts a major life activity, long or short term, as determined by the evaluation team, and thus requires a Section 504 eligibility consideration.

Quoted from NMPED Response to Intervention Framework 2014, page 11 & 12.

TIER 3: IDENTIFIED STUDENTS
Special Education and Gifted Students

ELIGIBILITY DETERMINATION EVALUATION PROCESS

- Formal assessment and initial evaluation
- Eligibility determination

INDIVIDUALIZED EDUCATION PROGRAM

- Specially-designed instruction
- Related Services
- Special education
- Gifted education
- FBA/BIP if warranted

Quoted from NMPED Response to Intervention Framework 2014, page 16.

SECTION 504 OF THE REHABILITATION ACT ("SECTION 504") AND THE AMERICANS WITH DISABILITIES ACT ("ADA")

SECTION 504 AND THE ADA

- Section 504 of the Rehabilitation Act (Section 504) and the Americans with Disabilities Act (ADA) are nondiscrimination statutes.
- Section 504 (enacted in 1975) applies only to entities receiving federal funds. The ADA (enacted in 1990) extended the protections to other entities including the private sector.
- When applied to public schools, Section 504 and the ADA share the same standards.
- Section 504 and the ADA were amended in 2008 to provide greater coverage.

SECTION 504 AND THE ADA PROHIBIT DISCRIMINATION BASED ON DISABILITY

"Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C.A. § 12132.

CHILD FIND UNDER SECTION 504

Section 504 has a Child Find requirement as follows:

> A recipient that operates a public elementary or secondary education program or activity shall annually:
>
> (a) Undertake to identify and locate every qualified [disabled] person residing in the recipient's jurisdiction who is not receiving a public education; and
>
> (b) Take appropriate steps to notify [disabled] persons and their parents or guardians of the recipient's duty under this subpart.

34 C.F.R. § 104.32.

FEDERAL DISTRICT COURT DISCUSSES SECTION 504 AND CHILD FIND

"Although the statutory language is framed as a negative prohibition on discrimination, the regulations clarify that a school district has an affirmative duty to identify, locate, and evaluate all children with disabilities in order to ensure that they receive a FAPE. 34 C.F.R. §§ 104.32." *Kimble v. Douglas County Sch. Dist. RE-1* (D. Colo. 2013).

DUTY TO EVALUATE AND DETERMINE ELIGIBILITY UNDER SECTION 504

The District must evaluate a child (consider eligibility) for Section 504 when it:

- Suspects that a student's physical or mental impairment substantially limits a major life activity, long or short term.

"DISABILITY" UNDER SECTION 504

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12102(1)

MAJOR LIFE ACTIVITIES

Caring for Oneself		**Performing Manual Tasks**
Seeing	**Hearing**	**Eating**
Sleeping	**Walking**	**Standing**
Lifting	**Bending**	**Speaking**
Breathing	**Learning**	**Reading**
Concentrating	**Thinking**	**Communicating**
	Working	

DISREGARD MITIGATING MEASURES

"The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures…" 42 U.S.C. § 12102(4)(E)(i).

(This language from the 2008 Amendments is a complete and deliberate reversal of Supreme Court precedent.)

MITIGATING MEASURES

(I) 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;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications. 42 U.S.C. § 12102(4)(E)(i).

WHAT IS NOT A MITIGATING MEASURE?

Ordinary eyeglasses and contact lenses. 42 U.S.C. § 12102(4)(E)(i)(I).

EPISODIC, IN REMISSION

"An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." 42 U.S.C. § 12102(4)(D)."

INTERPRETATIVE GUIDANCE

"The definition of 'disability' … shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter." 42 U.S.C. § 12102 (4)(A)

Congressional intent: "The question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."

INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)

INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)

IDEA guarantees:

- A free appropriate public education (FAPE) to all students with disabilities
- In the least restrictive environment (LRE)

CHILD FIND UNDER THE IDEA

"The IDEA requires each state to have in effect policies and procedures to ensure that-- All children with disabilities residing in the State… and who are in need of special education and related services, are identified, located, and evaluated." 34 C.F.R. § 300.111(a)(1)(i).

CHILD FIND EXTENDS TO STUDENTS WHO HAVE BEEN REMOVED FOR DISCIPLINARY REASONS

If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under § 300.530, the evaluation must be conducted in an expedited manner. 34 C.F.R. § 300.534(d)(2)(i).

THERE MAY BE DISCIPLINARY PROTECTIONS FOR STUDENTS NOT DETERMINED ELIGIBLE

- "A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this part if the public agency had knowledge (as determined in accordance with paragraph (b) of this section) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred." 34 C.F.R. § 300.534(a)

"HAD KNOWLEDGE" CRITERIA

- "A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred —

(1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

(2) The parent of the child requested an evaluation of the child pursuant to §§ 300.300 through 300.311; or

(3) The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency." 34 C.F.R. § 300.534(b).

"HAD KNOWLEDGE" EXCEPTIONS

- "A public agency would not be deemed to have knowledge under paragraph (b) of this section if —

(1) The parent of the child —

(i) Has not allowed an evaluation of the child pursuant to §§ 300.300 through 300.311; or

(ii) Has refused services under this part; or

(2) The child has been evaluated in accordance with §§ 300.300 through 300.311 and determined to not be a child with a disability under this part." 34 C.F.R. § 300.534(c).

DUTY TO EVALUATE UNDER THE IDEA

The District must evaluate a child for special education when it:

- Suspects a disability; and
- Suspects a need for special education.

Under State law, unless there is an "obvious disability or a serious and urgent problem," there is not a suspected need for special education until the student has been unresponsive to Tier 2 evidence-based interventions based on progress monitoring data.

IDEA ELIGIBILITY

"Child with a disability means a child evaluated in accordance with §§ 300.304 through 300.311 as having [an intellectual disability], a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services." 34 C.F.R. § 300.308(a).

FAPE MANDATE

- "A free appropriate public education must be available to all children residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school, as provided for in § 300.530(d)." 34 C.F.R. § 300.101(a).
- The IDEA requires that the IEP Team meet to revise the IEP as appropriate to address "[a]ny lack of expected progress toward the annual goals described in §300.320(a)(2), and in the general education curriculum, if appropriate." 34 C.F.R. § 300.324(b)(1)(ii)(A).

DUTY TO ADDRESS BEHAVIOR IN THE IEP

- The IEP Team must — "In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior…." 34 C.F.R. § 300.324(a)(2)(i).
- "Public agencies are strongly encouraged to conduct functional behavioral assessments (FBAs) and integrate behavioral intervention plans (BIPs) into the IEPs for students who exhibit problem behaviors well before the behaviors result in proposed disciplinary actions for which FBAs and BIPs are required under the federal regulations." 6.31.2.11(F)(1) NMAC.

DUTY TO ADDRESS BEHAVIOR IN THE CONTEXT OF DISCIPLINARY CHANGE OF PLACEMENT

Determination that behavior was a manifestation [no special circumstances]. 34 C.F.R. § 300.530(f)(1).	Determination that behavior was not a manifestation or when special circumstances exist (drugs, weapons, serious bodily injury). 34 C.F.R. § 300.530(d)(1)(ii).
If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must— (1) Either— (i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or (ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior…	A child with a disability who is removed from the child's current placement pursuant to paragraphs (c) [authority to remove for behavior that is not a manifestation of the disability], or (g) [authority to remove for up to 45 school days for special circumstances] of this section must— … (ii) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur.

IEP IMPLEMENTATION

- 34 C.F.R. § 300.323(d)(1): "Each public agency must ensure that … the child's IEP is accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation."
- 34 C.F.R. § 300.323(d)(2): "Each public agency must ensure that …each teacher and provider described in paragraph (d)(1) of this section is informed of—
  - (i) His or her specific responsibilities related to implementing the child's IEP; and
  - (ii) The specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP."

LEAST RESTRICTIVE ENVIRONMENT

The IDEA requires that "to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5)(A).

WHAT ABOUT DISCIPLINE?

- No such thing as expulsion "to the street"
- Ten day rule
- "Manifestation determinations" are required before long-term disciplinary actions or cumulative short-term removals that constitute a disciplinary change of placement
- There are "special circumstances" (drugs, weapons, serious bodily injury)

The information in this handout was created by Walsh Gallegos Treviño Russo & Kyle P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, consult an attorney.