

By Robert M. Tudisco, Esq

EVERY PARENT OF A STUDENT WITH ADHD dreads getting a call notifying them that the child has been suspended from school for disciplinary reasons. Even more frightening is the potential for getting a call from the police that the child has been arrested. Each scenario is stressful enough in its own right; that stress can be magnified by press coverage and community pressure.

In light of recent tragedies, zero tolerance policies, and heightened response from school administrations and police, more students are being arrested at school—sparking both criminal prosecution and school disciplinary proceedings simultaneously. More often than not, these factors come together to create a perfect storm that must be navigated with great care. What issues do you need to understand? What proactive and responsive strategies can you use to protect your child?

Unfortunately, some students with ADHD and co-occurring conditions are at particularly high risk of behaviors that initiate the school discipline process and prosecution simultaneously. Furthermore, impulsivity puts students with ADHD at a much higher risk of making the initial conduct worse, by saying and/or doing the wrong thing in the aftermath.

The Perfect

When School Discipline and Criminal

Discipline under IDEA and manifestation determination

All students who are suspended from school for more than ten cumulative days during an academic year are entitled to a Superintendent's Hearing to determine whether they committed the offense for which they are being suspended. Students who are classified for special education under IDEA, however, are given an additional layer of protection. If the suspension is less than ten cumulative days during the academic year, students who are classified for special education and students who are not classified are treated the same way.

Once the suspension exceeds ten days, students who are classified under IDEA for special education services 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 team must convene to determine whether 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 the disability. This is not to say that a student with Tourette 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 his or her disability, instead of being punished for a disability, the IEP team must evaluate the behavior in the context of that disability and develop a plan to prevent the behavior from happening in the future. **NOTE: In both school disciplinary proceedings and in the criminal justice system, the disability is not an excuse or a defense. It is a mitigating factor in moving forward.**



Storm

Prosecution Collide

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.

If there is no manifestation determination, then the student is treated the same way as an unclassified student. If a manifestation determination is made, then there are additional safeguards for the student. First, the IEP must be examined to determine whether or not it is appropriate and has been followed. Second, the school is required to provide a Functional Behavioral Assessment of the student and to interpose a Behavioral Intervention Plan to aid in preventing the conduct in the future. The only exception to this is in circumstances which include the possession of a firearm, illegal drugs, or causing serious physical injury to another student or school employee. In these cases, the student can be suspended up to a total of forty-five school days.

Unfortunately, based upon their inherent impulsivity, many students with ADHD are at a high risk for

these circumstances. This can also be magnified by the demand for stimulant medication from students who do not have ADHD. Students and 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 ten-year follow-up study at Harvard found that students with ADHD have a fifty percent higher risk of substance abuse disorder, and when ADHD co-occurs with conduct disorder, that increased risk *triples*.

Note also that the added protection of a manifestation determination does not apply to unclassified

BONUS MATERIALS

Available in the digital edition:

DOWNLOADABLE:

Rules for Protecting Your Child or Adolescent in a Perfect Storm

SIDEBAR:

The Second Half of Advocacy

students or students with 504 plans. If parents believe their child has ADHD and is at high risk for antisocial or criminal behavior (given their impulsivity or behavioral history), it is important that the parents initiate the process to have the child diagnosed. Being proactive here is very important. If not, 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 local Committee for Special Education (or equivalent) after the fact. Depending on the gravity of the conduct—and factoring in public pressure and criminal prosecution if those occur—it is usually significantly more difficult to have a student classified after the fact.



Coordinated efforts between police and school officials have heightened in recent years to address growing community concerns about school safety. A quicker response means quicker police action and a prosecutorial process that takes place concurrent with the school disciplinary process. It is more crucial than ever before to act quickly to protect your child and seek legal assistance to intervene immediately.

Arrest and prosecution

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If an arrest occurs at school, there will certainly be a superintendent's hearing at the same time. If you used an attorney or advocate during the IEP process, you should call that person immediately. See if he or she feels comfortable representing your child in the criminal case, and if not, ask for a recommendation for a criminal attorney, preferably one with whom your attorney has a good working relationship. It will be critical to get an attorney to intervene and stop any questioning that may take place at the school level. In some states, such as New York, a phone call from an attorney indicating his representation of a defendant will serve to stop police questioning immediately. If the education attorney you call does not practice in criminal court, you should have him 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 they begin to discipline their own children right there at the school in front of the principal or other school personnel. That is a huge mistake. The most important thing at that time 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 ad-

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

It is also important to note that the "line of fire" includes *any* statements—which includes your child speaking, texting, or emailing their friends about what has happened. All lines of communication need to stop immediately and go through the attorneys. 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, and it is easier to distinguish between the school administration and police activity. This line has become more blurred as more and more schools hire off-duty police 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 twenty-nine states introduced more than ninety bills related to SROs and other school police personnel. These bills range in the powers given to SROs, but in most they are given peace officer status (a legal distinction which gives them powers of arrest), and in nearly all establishes them as employees of the school district. This further blurs the lines between civilian and police action with respect to statements and searches, and 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 counsel can severely limit an attorney's ability to protect them or even control the damage.

Legal coordination

If you also need a criminal attorney to represent your child, 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. This can be an important mitigating factor in a plea bargain or sentencing.

The superintendent's hearing is usually held within five 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 the witnesses the school brings forward, which usually includes witnesses, victims, and in many cases school security officers or police officers. This is the only part of this stressful situation 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 Behavioral Intervention Plan can be extremely useful to them in providing an understanding to the judge and prosecu-

tor in the criminal case, and can go a long way toward mitigation, support services, or an appropriate placement that can make a huge difference for the child or adolescent.

Navigate with understanding

While suspension and prosecution of your child are extremely stressful situations, understanding the process can help you react more quickly to protect your child. If you have any concern that your child might have a disability that can lead to antisocial or criminal behavior, it is important to have the child classified BEFORE the child's conduct puts the child in the middle of a perfect storm.

If such an event ever does happen, be sure to involve attorney(s) to represent the child in the suspension hearing as well as the criminal prosecution and have those attorneys work together and with your child's care provider. Your understanding of and active participation in both processes can help you navigate the perfect storm. Being prepared will not prevent something un-

pleasant 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. 🎯

Robert M. Tudisco is a practicing attorney, nonprofit consultant, and motivational speaker. He is also an adult diagnosed with ADHD. He is a former member of CHADD's national board of directors, former chair and current member of CHADD's public policy committee, and a member of Attention's editorial advisory board. He is a nationally recognized resource for the media on issues involving special education law and disability advocacy as well as the impact of ADHD and co-occurring conditions on the juvenile and criminal justice systems. Tudisco received his JD at Fordham University Law School and served four years as an assistant district attorney in Bronx County, New York.

ADDITIONAL READING

Timothy E. Wilens, MD, et al. "Does ADHD Predict Substance Use Disorders? A 10-year Follow-Up Study of Young Adults with ADHD," in *Journal of the American Academy of Child and Adolescent Psychiatry*. 2011; 50(6): 543-553. doi:10.1016/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.



Feel like you're
losing focus?

You could be experiencing symptoms of **Attention Deficit Hyperactivity Disorder (ADHD)**.

Learn more about a medical research study evaluating an investigational medication for adults with ADHD.

Researchers are studying this investigational medication to gain more information about its safety and tolerability. If you qualify, you will take the investigational medication once daily for 12 months.

To pre-qualify for this study, you must be:

- Between 18 and 55 years of age
- Experiencing symptoms of ADHD or diagnosed with ADHD

All study-related visits, tests, and medication will be provided to participants at no cost. In addition, reimbursement for travel and related expenses may be provided.

To learn more, contact:
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