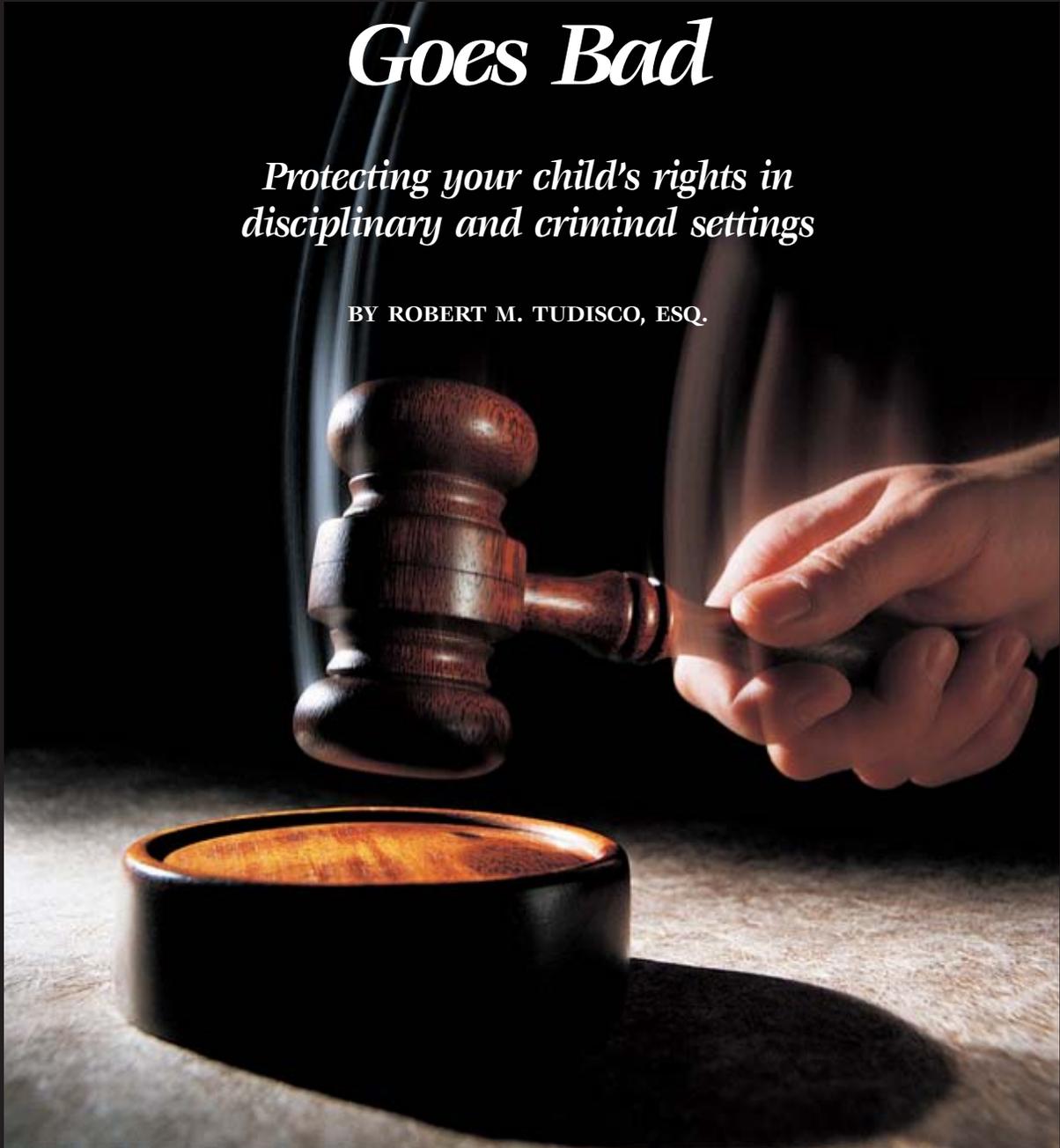


When **AD/HD**

Goes Bad

*Protecting your child's rights in
disciplinary and criminal settings*

BY ROBERT M. TUDISCO, ESQ.



Parents dread receiving a call from the school notifying them that their child has gotten into serious trouble and faces disciplinary measures requiring suspension, expulsion, or even criminal prosecution. When the child has a disability such as attention-deficit/hyperactivity disorder (AD/HD) and one or more co-occurring conditions, the chances of getting that call are much higher, and the situation is much more complex. Preventive interventions will go a long way toward reducing the risk of behavioral tragedies, so it is crucial for parents to be proactive about the services or accommodations the child needs in an educational setting.

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If that phone call ever comes, parents need to know how to react as quickly as possible to preserve and protect their child's rights. Parents need to understand the disciplinary process from both an administrative and criminal perspective in order to adequately protect their child. The best way to prepare for the worst-case scenario is to understand the law with respect to the school discipline process and how it may interact with the juvenile criminal justice system.

The disciplinary process

Under the Individuals with Disabilities Education Act (IDEA), a child who is suspended for more than ten consecutive school days is entitled to a hearing before a local school superintendent or hearing officer. The student has a right to be represented by counsel at this initial hearing, which is conducted to determine whether the student committed the offense as charged.

A student classified under IDEA with a disability, such as AD/HD, has an additional protection. After the factual hearing takes place, a child with a disability is entitled to what is known as a manifestation hearing. This hearing is held to determine whether the student's conduct in the incident was related to, or resulted from, the disability. The thinking behind this is that a student should not be punished because of his or her disability.

If such a relationship is found, the law further requires the school to conduct a Functional Behavioral Assessment (FBA) of the student, and to impose a Behavioral Intervention Plan (BIP) to address the conduct for which the student is being disciplined. The law also requires the Committee for Special Education (CSE) to review the student's Individualized Education Program (IEP) to see if it is appropriate, being complied with, and whether any modifications are necessary.

Both parents and attorneys representing the student must stress that a disability, such as AD/HD, is not an excuse for inappropriate or illegal behavior, and that neither the student nor the family is seeking to hide behind the disability. Public perception of the "excuse theory" makes many school districts reluctant to find a nexus between the behavior and the disability, even when it is relatively obvious. Parents and attorneys should stress that recognizing the disability and its manifestation is helpful to explain why the behavior occurred and, more importantly, to prevent it from happening again in the future. Taking this position is much more constructive, as it offers the school district the ability to acknowledge the disability in an effort to address security concerns about the rest of the students and staff in the future.

Parents should also be aware of exceptions to the law. If the offense involves drugs, a

It is important to note that for most children with AD/HD, juvenile delinquency and legal problems do not occur. But for some families it is part of the daily struggle when conduct disorders are present.

WHEN AD/HD GOES BAD

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weapon, or serious physical injury to another student or school staff, punishment such as suspension, expulsion, or alternative placement can be given; however, the behavioral assessment and the intervention plan are still required. The school district is still required to provide a Free Appropriate Public Education (FAPE) to the child, notwithstanding suspension, expulsion or even incarceration.

To protect their child's rights, it is recommended that parents retain an attorney to represent the student during this disciplinary process. The attorney should have a background and full understanding of special education law and the student's needs. Preventive interventions will minimize the chances that behaviors will recur or escalate. A well-informed attorney or advocate working with the parents and the CSE at the earliest stages of the process will improve the outcome for the child and minimize the potential for future disciplinary or even criminal proceedings.

The criminal process

If the nature of a child's disability and/or conduct rises to the level of criminal activity, the situation becomes much more complex, as circumstances may necessitate criminal prosecution in addition to the disciplinary action at school. Then parents should take care to involve an attorney with a background in criminal law, in order to protect and preserve the student's constitutional and legal rights during the disciplinary process at school and during the criminal prosecution. For example, much discovery can take place during the disciplinary process that may aid in the representation of the child in the criminal case, such as testimony of a victim, teacher and/or police officer.

If possible, parents should seek an attorney well-versed in both criminal and special education law to represent their child in both proceedings. If that is not possible, it is important to consult with attorneys from both disciplines and have them work together to make sure that the student's rights are protected throughout both aspects of the case.

Unfortunately, many parents are reluctant (or unable) to hire two attorneys. Many view the criminal case as much more important, with good reason, and fail to involve someone who will work with the school district to pre-

vent the activity from recurring in the future. Moreover, as the legal profession becomes more specialized, it is rare to find attorneys who are comfortable representing the child in both areas.

If a family is unable to afford an attorney, the court is required to appoint an attorney to represent the child in the criminal proceeding at no cost. If that is the case and the attorney has no background in special education law, then parents should consider retaining an attorney with that expertise to either represent their child in the school proceedings or to consult with the criminal attorney about special education law. Another less costly alternative is to retain a criminal defense attorney or have one appointed to handle the criminal aspect, and work with an advocate to maximize the result in the educational aspect of the case. It is critical to acknowledge that there are two separate proceedings taking place and to have counsel in one form or another for both.

Preparing for a crisis

As a criminal defense attorney, I have always been frustrated that I get called upon too late, when things have already gone horribly wrong. I have represented many adolescents over the years in criminal matters stemming from conduct at school. An overwhelming majority of those cases involve a child with AD/HD and another co-occurring condition. In most cases, the disability is either the initial cause of the incident, or acts to exacerbate its scope. Another pattern that I see all too often is that the student's IEP or 504 plan is either not adequately designed or not adequately implemented. So many incidents could be avoided if the services or accommodations were appropriate. Many incidents stem from boredom to impulsivity to the need for an alternative placement. For these reasons, it is imperative for parents to be proactive.

If you are a parent whose child is at risk for this kind of situation, it is crucial to understand your child's needs and make sure that the IEP or 504 plan addresses them adequately. If you feel you are too emotionally involved to be objective, an education consultant/advocate can help to ensure that your child's needs are met and to minimize the chances that antisocial, or even criminal, behavior will occur.

While having an educational consultant/advocate work with your family and your school at the earliest possible stages of your



Conference Notes

Robert M. Tudisco, Esq., will present *Practical Strategies for Effective Student Advocacy* at CHADD's annual conference in Washington, D.C., Nov. 7-10, 2007. Visit www.chadd.org for more information.

Retaining an Attorney



Here are some tips to guide parents toward retaining an attorney who will protect the child's rights in all aspects of an incident.

1. Contact your child's mental health provider. While many people don't retain attorneys in advance, if your child has special needs, his or her therapist or psychiatrist may have worked with an attorney for a patient in the past. This will also be helpful in ensuring that the doctor and the attorney will work together during the process.

2. Do some research. Contact your local bar association, family attorney, support group or family court to get the names of attorneys who have experience representing students with disabilities in criminal cases.

3. Use the materials the school gives you. When an incident happens, the district is required to give the parents procedural safeguard notices. These notices will include places to contact for low-cost legal or advocacy services. Make use of them.

4. Ask questions. What experience, if any, has the attorney had with clients in a criminal and/or an educational setting? Does the attorney understand your child's disability? Will the attorney be comfortable advocating for your child? Will the attorney be comfortable working with your child's doctors and/or advocate?

5. Have your child's history available and organized. It is crucial to have counsel in place with a working knowledge of your child and the disability as soon as possible. Records that are ready to go will minimize the time required for the attorney to represent your child intelligently.

child's education may minimize the chances of ever getting that call, it may not prevent it altogether. If the situation arises, understanding the nature of the proceedings may mean the difference between navigating a mine field with a map in your hands and being chased through one blindfolded. It is important to take the appropriate steps to ensure the best possible protection for your child at all stages of the disciplinary process and/or criminal prosecution. While unpleasant to think about in advance, being prepared for a crisis will give

you a better chance to help your child put this experience behind him or her—and more importantly, to learn from it and get his or her future back on a positive track. ■

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