



# Education Law Association

The premier source of information on education law

- Est. 1954 -



# ELA Notes

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## A Message from the ELA President:



Every New Year brings with it the promise of renewal and opportunity. As your new president, I'd like to reflect briefly on our organization's past and comment on our future. The Education Law Association began as NOLPE (the National Organization for Legal Problems in Education), in 1954, shortly after the U.S. Supreme Court handed down *Brown v. Board of Education*. It was a time of change, courage, and uncertainty for elementary, secondary, and higher education, and NOLPE was formed to meet a vital professional need for the exchange of ideas relative to school law matters.

ELA remains true to this legacy. It is the mission of ELA to be the premier forum for professionals interested in practical knowledge, scholarship, and interdisciplinary dialogue about legal and policy issues affecting education. To fulfill this mission, Dr. David Schimmel, recipient of the 2011 McGhehey Award, challenged our membership to consider ways in which ELA can promote "legal literacy," or legal learning. ELA provides a forum for such learning through its annual conference, through webinars/podcasts, through electronic and written publications, and through personal and professional relationships among its members.

ELA is a membership organization; it is the membership that gives the organization its strength, health, and vitality. Within its first six weeks as an organization, NOLPE had hundreds of members. These members came to the organization by word of mouth through the "buddy system." Today, our members come from all 50 states, two territories, and eight countries to

discuss the social, policy, and legal changes impacting nearly every aspect of schooling. Our members appear before the court, defend those in need, conduct research, publish key works, teach generations of leaders, navigate schools through fundamental change, challenge the status quo, create change. I encourage you to introduce ELA to your colleagues. ELA has an active mentoring program to help new members learn of the many resources available to them. By developing new relationships and adding new voices to our membership, dialogue is enriched, greater opportunities for networking and legal learning are created, and ELA is strengthened.

One of the original purposes of NOLPE was to strengthen forms of communication among its members. Today, to meet the social and informational needs of a new and diverse generation of members, the Board of Directors has made the use of technology a priority. ELA has sponsored numerous webinars on school law topics and will continue to develop more. ELA is also developing a library of podcasts and a resource folder of school law instructional materials for member use. Another way ELA is working to be useful to a growing membership is through the use of social networking. I encourage you to participate in our listserv, to "like" our Facebook page and join in the discussion moderated by Executive Director Cate Smith, to add your profile to LinkedIn and connect to ELA, or to "follow" ELA on Twitter. ELA is also actively working to network and collaborate with other professional organizations.

As a nonprofit organization, ELA operates on the funds it generates through membership dues, conference registration,

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[www.educationlaw.org](http://www.educationlaw.org)

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*Any opinions expressed or implied are those of the guest authors and may not represent official positions of the Education Law Association.*

## A Message from the Executive Director:



*Happy 2012!*

Thank you to all who attended the 2011 ELA Annual Conference! We hope you noticed the positive changes implemented in the past couple of years! In 2010, we added a poster session to include more presenters who had either not yet finished their research or needed presentation experience, and the session was added in such a way as to maximize attendance while not reducing our other programming. In 2011, we added a roundtable session for those topics that were either very specific or would be excellent as conversational, collaborative presentations. In addition, we introduced a rubric against which all conference presentation proposals are compared. This rubric is printed on the reverse side of the call for proposals. As a result, conference evaluations for 2011 were remarkably higher than just two years ago:

- “One of the best ELA conferences I’ve attended. Good mood in the air!”
- “Big thumbs up on the poster session and roundtables!”
- “As a new member, I found the conference to be excellent in terms of management, communication, and scheduling. The sessions were very informative, well-paced, and substantive.”
- “A much better balance between theory and practical application. It was great to have co-presenters who were able to present both sides of this during one session.”
- “Good to see more higher education participation. Thank you for striving to balance everyone’s needs.”

Moving forward, we have contracted our annual conferences several years ahead in order to take advantage of specials and counteract rising audio-visual and food & beverage costs. The cost of lodging at the 2012 conference will be more than \$35 less per night than the 2011 conference and will include internet access in both your room and

the meeting space! We have negotiated similarly low room rates for 2013 and 2014, and are extremely committed to controlling costs in this economy. We will continue to improve upon the conference and everything else we offer you because we value your membership!

This is the time of year for resolutions, and ELA is no exception. We have discovered through surveys and conference evaluations that we offer even more membership benefits than some of our members realize! Though we’ve put great effort into expanding your member benefits, we hereby resolve to better explain our member benefits and the ways they can be used to meet your needs and the needs of those you serve!

To help you prioritize the information we send to you, we have compartmentalized our emails, making it easier for you to identify which messages are most applicable to you. For example, our consolidated listserv offers conversations/announcements shared from the office, including *The School Law Blog* by Mark Walsh (courtesy of *Ed Week*), and will come from **ELA Listserv**. Your monthly mailing emails contain the latest information on the benefits of membership, as well as links to the most recent *School Law Reporter*, and will come from **Education Law Association** (distributed through Constant Contact). Emails that come from **Cate Smith** are meant specifically for you.

Be certain you receive the emails from Education Law Association, via Constant Contact. These emails are in a newsletter format and sometimes get caught in spam folders or blocked by filter settings. Even if you get all other emails from us, this monthly email may not reach you, so please check to be sure you receive an email from “Education Law Association” on the first of each month. We now attempt each month to call those blocked members so they will recognize we are trying to reach them.

More than ever before, we are dedicated to being your *premier source of information on education law!* ■

Cate K. Smith, J.D.  
Executive Director

## President's Column

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publication sales, and tax deductible donations. To ensure the long-term fiscal health of ELA, the Board of Directors has a duty to explore ways in which ELA can be positioned to be relevant to current and future generations of members. It will do that by developing new professional relationships, by using new technologies in useful ways, and by innovative and creative approaches to financial well-being. This year promises to be one filled with new opportunities for ELA! ■

Susan G. Clark, Ph.D., J.D.  
President

## Cate's Corner

### 2012 Conference Planning is Well Under Way!

Your conference co-chairs, Susan Bon and Lois Berlin, are already hard at work including your ideas in planning the next program and reaching out to solidify amazing feature speakers!

Although it may take two flight segments to get to Hilton Head, you will save more than \$35 per night compared to the 2011 conference and will have internet access in both your room and the meeting space! For those planning to drive to Hilton Head or rent a car, you'll receive free self-parking, and valet is less than \$10!

#### A list of the nearest airports/airlines:

- Hilton Head Island, SC (HXD): US Airways Express, 10 min from hotel
- Savannah, GA (SAV): American Eagle, Continental /United, Delta, US Airways, 35 min from hotel

If you're dedicated to Southwest Airlines, please note that the drive from Jacksonville, FL (JAX) or Charleston, SC (CHS) is approximately 2 hours. We anticipate that a majority of you will arrive via SAV, so we are working with a local shuttle company to offer discounted service to the Crowne Plaza Hotel.

More details forthcoming!



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## 2012 58th ELA Annual Conference

Hilton Head, SC | November 7-10, 2012  
Crowne Plaza Beach Resort  
[educationlaw.org/conferences.php](http://educationlaw.org/conferences.php)

Our annual conference provides a professional forum to discuss current education law issues with experts from around the world. The conference presentation format stimulates dialogue among attorneys, educators, and administrators and allows for specific role groups to share ideas and resources.

### The ELA Annual Conference addresses such K-12 and higher education topics as:

- Special Needs Students
- Sexual Harassment & Bullying
- Affirmative Action
- Technology in Education
- Student Records & Privacy
- IDEA
- First Amendment
- Community Colleges
- Fourth Amendment
- Equal Protection
- Due Process
- NCLB
- Title IX
- Sexual Orientation

Choose from the **highest-quality** breakout sessions, poster sessions, and roundtable discussions offered to gain the **latest information** and practical insight for furthering your successful career. Attend several large-group feature sessions presented by top scholars, government officials, practitioners, and members of the judiciary. **Network** among your colleagues in the role-alike sessions and the social functions to gain a complete and well-rounded **professional experience**.

See you in Hilton Head,  
South Carolina, in November!

Visit [educationlaw.org](http://educationlaw.org) today to submit your proposal!

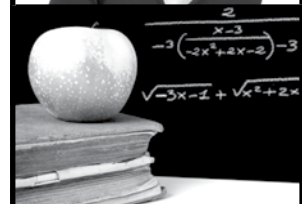
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## YOU

## A Legal Primer on Students with Acquired Brain Injuries under the IDEA and Section 504/ADA\*

Perry A. Zirkel, Ph.D., J.D., LL.M and Caroline Tisot\*\*

This two-part annotated outline presents the federal legislative, regulatory and case law specific to students with acquired brain injuries, which are generally recognized under two categories—traumatic brain injury (“TBI”) and nontraumatic brain injury (“nTBI”). In contrast, students with congenital or birth-induced brain injuries do not fit within the generally accepted definition of acquired brain injuries.

### Part I: Federal Legislation and Regulations

#### A. Individuals with Disabilities Education Act (IDEA)

##### IDEA Legislation and Regulations:

• Since its original version in 1975, the IDEA statutory definition of specific learning disability has explicitly listed as the “disorders included” the following:

perceptual disabilities, **brain injury, minimal brain dysfunction**, dyslexia, and developmental aphasia (20 U.S.C. § 1402(30))

The IDEA regulations merely repeat, without adding to, this language. (34 C.F.R. § 300.8(c)(10)(i)) However, they provide a complicated definition of specific learning disability (SLD).<sup>1</sup>

• In the 1990 amendments, Congress added TBI to the list of recognized classifications as follows:

20 U.S.C. § 1402(3)(A) IN GENERAL-The term ‘child with a disability’ means a child--

- (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), ... emotional disturbance, orthopedic impairments, autism,

**traumatic brain injury**, other health impairments, or specific learning disabilities; and

- (ii) who, who, by reason thereof, needs special education and related services.

The resulting regulations<sup>2</sup> not only repeat the second essential element of eligibility but also provide the following definition of TBI:

an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child’s educational performance. [TBI] applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. [TBI] does **not** apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma. (34 C.F.R. § 300.8(c)(12))

##### OSEP Interpretations

• In the Commentary accompanying the final regulations (57 Fed. Reg. 44,794 *et seq.* (Sept. 29, 1992), OSEP explained the following decisions regarding the specific wording of this definition in relation to input received in response to the proposed regulations:

- 1) not to add adverse effects on social emotional development:

It is not necessary to include a statement of adverse effects on social-emotional development

in the definition because social-emotional developmental consequences may be reflected in adverse effects on educational performance.

(*id.* at 44794)

- 2) the removal of “or [caused] by an internal occurrence such as a stroke or aneurysm”

It does not apply to injuries caused by internal occurrences, such as infections, tumors, fever, and exposure to toxic substances. Children whose educational performance is affected as a result of acquired injuries to the brain caused by internal occurrences may meet the criteria of one of the other disability categories, such as “other health impaired,” “specific learning disabilities,” or “multiple disabilities.” The definition of “traumatic brain injury” does include an acquired injury to the brain caused by the external physical force of near-drowning.

(*id.* at 44842)

- 3) the removal of “mild,” “moderate,” and “severe”

[T]he degree of impairment is not a factor in determining whether a child has a [TBI]... [Rather it is a matter of 1) meeting the specified criteria of this classification and (2) evidencing] a need for special education and related services because of that ... impairment. The particular services provided to the child are determined on an individual basis. (*id.* at 44843)

• In subsequent policy letters, OSEP confirmed the boundaries of the definition of TBI, explaining 1) the deletion of “internal occurrence

such as a stroke or aneurysm” in the originally proposed regulation based on the meaning of TBI in professional practice and, thus, congressional intent, and 2) repeating this reminder about what is known in professional practice as nTBI:

Children whose educational performance is adversely affected as a result of acquired injuries to the brain caused by internal occurrences may meet the criteria of one of the other disability categories, such as “other health impairment,” “specific learning disability,” or “multiple disability.” (Letter to Harrington, 20 IDELR 23 (OSEP 1993); see also Letter to Cowles, 19 IDELR 979 (OSEP 1992); Letter to Kasten, 19 IDELR 928 (OSEP 1992) (similarly referring to the commentary accompanying the 1992 regulations to explain the exclusion in the last sentence)).

## Part II: Case Compilation

This compilation resulted from a comprehensive search of the following legal sources: 1) court decisions, 2) published<sup>3</sup> hearing officer/review decisions (designed in the parenthetical part of the citation by “SEA”<sup>4</sup>), 3) similarly published state complaint resolution process rulings (with the same SEA designation but footnoted differentiation), and 4) OCR letters of findings. We use the term “cases” generically herein to refer to these various sources rather than strictly to the sources in the first two source categories. The criterion for inclusion is that the case identified the IDEA- and/or § 504-covered student as having traumatic brain injury (TBI) or nontraumatic brain injury (nTBI). Thus, exclusions were 1) cases where the student had congenital brain abnormalities<sup>5</sup>; 2) cases where the student had either prenatal or unspecified perinatal brain injuries<sup>6</sup>; 3) cases where the role of any brain injury was so remote to have been negligible<sup>7</sup>;

and 4) class action suits where one of the plaintiffs happened to have the classification TBI.<sup>8</sup>

The framework for organization of the compilation is according to issue categories, such as eligibility and FAPE; within each such category, the cases are in direct chronological order. Each case entry consists of 1) the citation, 2) a brief blurb of the relevant facts, and 3) the issue ruling<sup>9</sup> by applicable legal forum (e.g., court, hearing officer, or OCR). Preceding each case entry is a letter designating the outcome for the particular issue(s) in question according to the following five-category scale:

***P*** = completely and conclusively for parent  
***P/S*** = largely and conclusively for parent  
***(P)*** = inconclusively for parent  
***(S)*** = inconclusively for school district  
***S/P*** = largely and conclusively for school district  
***S*** = completely and conclusively for school district.

Each citation consists of the 1) parties (in italics) followed by 2) volume number, reporter series, page number or—preceded by “¶”—case number, and 3) in parentheses, the abbreviation for the legal forum and year of decision. For cases that have issue rulings in more than one category, the second one contains an abbreviated case name followed by the Latin term *supra*.<sup>10</sup> To differentiate their stronger legal force than the other legal forums, the citations for court decisions are in bold font.

The case entries include, for the sake of economy of space, the following acronyms and abbreviations in that are additional to those provided in the morning session:

ADA = Americans with Disabilities Act  
 ADHD = attention deficit hyperactivity disorder  
*aff’d mem.* = affirmed memorandum (i.e., appellate decision that, without a separate opinion, agrees with the lower court decision)

ALJ = administrative law judge (i.e., IHO who is an attorney and, typically, a full-time adjudicator)  
 AT = assistive technology  
 BIP = behavior intervention plan (aka behavior management plan)  
 ED = emotional disturbance  
 EEG = electroencephalogram  
 ESY = extended school year  
 IEE = independent educational evaluation  
 IHO = impartial hearing officer  
 LRE = least restrictive environment  
 MRI = magnetic resonance imaging  
 nTBI = non-traumatic brain injury<sup>11</sup>  
 OCR = Office for Civil Rights  
 OHI = other health impaired  
 OT = occupational therapy  
 PCA = personal care assistant  
*pro se* = “on one’s own” (i.e., proceeding without attorney representation)  
 PT = physical therapy  
 PTSD = post-traumatic stress disorder  
 SEA = state education agency (here, also separately refers to hearing or review officer decision)  
 SLT = speech/language therapy  
 TBI = traumatic brain injury

### A. Eligibility (including Child Find)

***S*** *Fulton County Sch. Sys.*, 29 IDELR 1031 (Ga. SEA 1999) Prior to 1995, Georgia did not use the classification of TBI, thus classifying this student as OHI. In 1995, when the district changed the student’s classification to TBI, the parent challenged the change in classification,

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## A Legal Primer

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unilaterally placed student in private school, and sought tuition reimbursement.

Held that the TBI classification of the student was appropriate.

**S** *Long Beach Unified Sch. Dist.*, 52 IDELR ¶ 114 (Cal. SEA 2009)

A 22-year-old student attending an adult education program to obtain a high school diploma claimed that the district denied him FAPE by failing to provide his parents procedural safeguards and to evaluate him for special education eligibility (i.e., child find<sup>12</sup>). Student had received the diagnosis of TBI in 2009 after reportedly experiencing head injuries, for which he received no medical attention, during his 9<sup>th</sup> grade year and without any notice to the district.

Held that the district had no obligation, based on California law, to provide IDEA services, including procedural safeguards notices to parents and child-find evaluation, for students who were not already in special education upon reaching the age of 19.

**S** *Cecil County Pub. Sch.*, 110 LRP 5522 (Md. SEA 2009)<sup>13</sup>

District provided a 504 plan for 17-year-old student with TBI but did not evaluate to determine eligibility under IDEA.

Ruled that complaint was unfounded; the district's IDEA eligibility evaluation had started and was still within required period for completion.

### **B. FAPE**

**P** *Brown v. Wilson County Sch. Dist.*, 747 F. Supp. 436 (M.D. Tenn. 1990)

District proposed an increase in instructional time for the homebound instruction that it provided to 21-year-old student with nTBI after

her behavior continued to deteriorate. Refusing district's proposed continuation of homebound services, the parents unilaterally placed her in a rehabilitative residential facility for persons with brain injury and sought tuition reimbursement.

Held that the parent was entitled to tuition reimbursement under the IDEA, because 1) the district's proposed IEP was not substantively appropriate (i.e., did not provide a "basic floor of opportunity") due to continued deterioration of behavior.

**S** *Milwaukee Pub. Sch.*, 20 IDELR 1427 (Wis. SEA 1994)

Parents of a 12 year-old student classified as TBI<sup>14</sup> requested compensatory education for procedural violations (e.g., district exceeded timelines for two IEPs and due process requests) that they claimed denied FAPE.

Held that the procedural violations were minor and, thus, did not constitute a denial of FAPE.

**P** *McMillan v. Cheatham County Sch.*, 25 IDELR 398 (M.D. Tenn. 1997)

The district's proposed program for 21-year-old student with TBI consisted of 6 hours of weekly therapy at an outpatient TBI facility, 10 hours of weekly homebound academic instruction, 2 hours of weekly psychological counseling, and vocational rehabilitation. Rejecting that proposal as a denial of procedural and substantive FAPE, the parents unilaterally placed the student at a 24-hour residential facility, seeking tuition reimbursement. Held that the district committed several prejudicial procedural violations that denied parents opportunity to fully participate in the student's educational

process (e.g., lack of written notice, lack of sufficient supervisor knowledge of student and the proposed placement, and no representative from the placement facility at IEP meeting).

**S** *Hollister Sch. Dist.*, 26 IDELR 632 (Cal. SEA 1998)

Parents of unilaterally placed 15-year-old student with TBI in a private residential facility for boys with ED sought secondary classification of ED, reimbursement for private placement, and reimbursement for various private assessments and therapies.

Held that 1) the student did not meet the criteria for ED; and 2) district's proposed placement in a regular education classroom with SLT, a BIP, and counseling services, was appropriate, thus denying the requested reimbursements.

**S** *Arlington Cent. Sch. Dist.*, 28 IDELR 1130 (N.Y. SEA 1998)

Parent of a 20-year-old student with TBI<sup>15</sup> and ED requested compensatory education based on allegedly inappropriate transition services for three years and allegedly inappropriate decision to graduate him from out-of-state residential program. The district refused to fund placement during course of the due process proceedings.

Held that the transition services that the district provided, which included on-the-job training programs and an apartment living program post-graduation, were appropriate and supported the district's decision to graduate him from the residential program.

**S** *Fulton County Sch. Sys.*, *supra* Prior to 1995, Georgia did not use the classification of TBI, thus classifying this student as OHI. In 1995, when the district changed

the student's classification to TBI, the parent challenged the change in classification, unilaterally placed student in private school, and sought tuition reimbursement.

Held that the district's IEP for the student met the procedural and substantive standards for FAPE.

**P** *Muscogee County Sch. Dist.*, 32 IDELR ¶ 48 (Ga. SEA 1999)

District proposed a program for a 16-year-old-female student with TBI that provided vocational components but employed teaching methodologies that had not been effective for her in past years.

Held that the proposed IEP was not appropriate under the IDEA due to the previous ineffectiveness of its methodologies for the student. The remedy was to require the district to 1) have a credentialed TBI/aphasia educator evaluate the student, and 2) consider the resulting recommendations in revising the pertinent portion of the student's IEP within 45 days.

**S** *Blackmon v. Springfield R-XII School Dist.*, 198 F.3d 648 (8th Cir. 1999)

District proposed placement for 3-year-old child diagnosed with an nTBI. Rejecting the proposed program, the parents unilaterally placed the child in in-home therapy from a private provider.

Held that the district's proposed program provided substantive and procedural FAPE, thus concluding that parents were not entitled to tuition reimbursement.

**S** *Mandy S. v. Fulton County Sch. Dist.*, 205 F. Supp. 2d 1358 (N.D. Ga. 2000), *aff'd mem.*, 273 F.3d 1114 (11th Cir. 2001)

Parent of a 21-year-old student with TBI sought relief, including tuition reimbursement for private placement in 1997-98 by alleging that district's IEPs from 1991-92 to 1997-98 did not meet the procedural and substantive requirements of FAPE, particularly with regard to transition services. Student dropped out of high school in 1997 and, after district denied her request for funding at business school, moved out of district.

Held that the relevant (i.e., recent) IEPs met the procedural and substantive standards for FAPE.

**S** *CJN v. Minneapolis Pub. Sch.*, 323 F.3d 630 (8th Cir. 2003)

Parent unilaterally placed third-grade student with nTBI at a private school due to disagreement with district's disciplinary techniques, seeking tuition reimbursement under the IDEA.

Held that district provided FAPE due to evidence of academic progress that suggested that the student's IEP managed his behaviors and allowed him to learn, thus denying tuition reimbursement.

**P** *Shrewsbury Pub. Sch.*, 103 LRP 25903 (Mass. SEA 2003)

After funding private placement for six months for a fourth grader with nTBI, the district proposed an IEP for placement in district. The parents objected to this proposal, claiming that the IEP did not provide FAPE, seeking continued funding for the private placement and compensatory education for 15 minutes per day of lost time due to transportation schedule. Held that the district's proposed placement did not meet the

substantive for FAPE in the LRE.

**P** *Richmond Elementary Sch. Dist.*, 104 LRP 4695 (Cal. SEA 2003)

After unilaterally placing 12-year-old student with TBI at a nonpublic private school specializing in students with TBI, parents sought tuition reimbursement and reasonable living expenses for student and parent, claiming that the district's proposed placement failed to provide procedural and substantive FAPE under the IDEA.

Held that the district's proposed IEP failed to meet the procedural and substantive standards for FAPE under the IDEA.

**P** *Lincoln & Lincoln-Sudbury Pub. Sch.*, 104 LRP 6414 (Mass. SEA 2004)

Parents of 16-year-old student with nTBI alleged denial of FAPE for three school years and the four summers, requesting reimbursement for their unilateral placement during the latest summer and compensatory education in the form of residential placement for an extensive period.

Held that the district's IEPs for the entire period did not meet the substantive standard for FAPE.

**P** *Rim of the World Unified Sch. Dist.*, 104 LRP 44822 (Cal. SEA 2004)

Parents sought continued funding of 10-year-old student who had stroke at birth and subsequent seizure disorder, classified as TBI,<sup>16</sup> at private school for students with TBI, claiming that district's proposed program did not offer procedural or substantive FAPE. In addition to continued funding, the parents sought reasonable living expenses

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for both the student and parent due to distance of the private school from home.

Held that the district's proposed program did not meet the procedural or substantive standards for FAPE.

**S** *Capistrano Unified Sch. Dist.*, 42 IDELR 99 (Cal. SEA 2004)  
The district proposed placement of a 17-year-old student with nTBI in an adult transition program, including a quiet sparsely decorated classroom and an aide for behavioral support, after a three-week transition period. The parents disagreed, claiming that the proposed placement was inadequate to meet his sensory processing and behavioral needs and that the transition period was too short.

Held that 1) the district's proposed placement was appropriate to meet his behavioral and sensory needs, and 2) the length of time to transition to the new placement was adequate.

**P** *Decatur City School Sys.*, 106 LRP 21080 (Ga. SEA 2005)  
Parents of 16-year-old student with nTBI claimed that district's proposed placement did not offer procedural or substantive FAPE, requesting reimbursement for the cost of aides and private evaluations, compensatory education, and prospective placement at a specific private residential center.

Held that 1) the district committed prejudicial procedural violations including predetermination of the IEP, and 2) the IEP also did not meet the substantive standard of FAPE based on several defects, including lack of transition plan and related services. The remedy included prospective residential placement at

public expense, but not at the particular facility that the parents had chosen.<sup>17</sup>

**S** *J.P. v. Enid Pub. Sch.*, 53 IDELR ¶ 112 (W.D. Okla. 2009)

Parent of high school student with TBI claimed that district had failed initially to identify the student as eligible under IDEA and to provide FAPE due to inadequate information in the IEP, seeking compensatory education for the initial period and tuition reimbursement for the unilateral out-of-state private placement.

Held that district met the substantive standard for FAPE, thus precluding the parent's successive claims for compensatory education and tuition reimbursement.

**S** *Stanley C. v. Metro. Sch. Dist. of Sw. Allen County Sch.*, 628 F. Supp. 2d 902 (N.D. Ind. 2009)

Parents of 15-year-old student with nTBI (due to a stroke at 3 months of age) sought tuition reimbursement, compensatory education, and attorney's fees after unilaterally placing the student in a private school and also opting for private vision therapy, OT, PT, and SLT in lieu of the related services that the district had offered.

Held that the district's proposed IEP was procedurally and substantially appropriate.

**S** *Charitho Sch. Dist.*, 110 LRP 2794 (R.I. SEA 2009)

Parent unilaterally placed six-year-old with TBI in private school without providing prior notice to the district, subsequently seeking tuition reimbursement.

Held that the district's placement met the procedural and substantive standards for FAPE and, in the alternative, that the parent was not entitled

to tuition reimbursement for failing to provide timely notice without meeting the safety exception.

**S** *Dep't of Educ., State of Hawaii*, 109 LRP 54700 (Hawaii SEA 2009)

Parents of student with TBI alleged that district's placement and IEPs were not appropriate both substantively (e.g., inappropriate placement, unqualified teachers, lack of meaningful progress) and procedurally (e.g., IEP goals and FBA timelines), seeking a private residential placement prospectively and compensatory education retrospectively.

Held that the placement and IEPs met both the procedural and substantial standards for FAPE, thus denying the requested remedies.

**P** *Prince George's County Pub. Sch.*, 110 LRP 5530 (Md. SEA 2009)<sup>18</sup>

Parents of 18-year-old student with TBI who attended a public separate special education school claimed that district had committed various violations, including failure to complete evaluations and IEPs within the mandated timelines and to maintain documentation of IEP meetings.

Ruled that district had committed the four alleged violations, thereby denying FAPE. Ordered corrective action, including 1) implementing the IEP immediately, 2) holding an IEP meeting within 45 days, and 3) investigating and reporting back to the SEA whether timeline violations constituted a pattern.<sup>19</sup>

**S** *Stallings v. Gilbert Unified Sch. Dist.*, 2009 WL 3165452 (Ariz. Ct. App. 2009)

Parents of severely disabled 21-year-old student with TBI objected to district's plan to move student from his public high school to a specialized

private placement that was farther from his home. The parents claimed that the commute was detrimental to his fragile health and that his current public high school was the LRE.

Held that where student was not making progress in current high school placement, his high level of need compromised the staff's availability for other students, the student would be able to tolerate the slightly longer commute in minutes, and the district's proposed private placement was appropriate.

**P** *Morgan Hill Unified Sch. Dist.*, 110 LRP 24090 (Cal. SEA 2010)

Parent, on behalf of an 18-year-old student classified with TBI,<sup>20</sup> claimed that district denied student procedural and substantive FAPE by failing to complete assessments in a timely manner and sought compensatory education for related services (PT and vision orientation/mobility therapy) and reimbursement for an AT device, educational materials (e.g., books, note cards), and a whole array of other equipment and services

Held that district violated denied FAPE by not completing assessments within the applicable 60-day deadline, not providing the child with a current IEP, and failing to furnish the child with various needed services.

### **C. Related Services<sup>21</sup>**

**S** *DeKalb County Sch. Dist.*, 21 IDELR 426 (Ga. SEA 1994)  
Parents requesting a full-time aide for 18-year-old student with TBI claimed that all but two members of the IEP team agreed that an aide was necessary, thus constituting

an enforceable agreement. Parents further claimed that at mediation the IEP team members agreed to allow majority rule.

Held that in the absence of a consensus, there was no enforceable agreement for an aide in the IEP.

**S** *Wright v. Saco Sch. Dep't*, 18 IDELR 505 (Me. Super. Ct. 1991), *aff'd*, 610 A.2d 257 (Me. 1992)

Parents voluntarily placed a nine-year-old student with TBI, who needed PT and OT, at a parochial school. They objected to the district's provision of these services away from the parochial school as being disruptive to the child's education.

Held that the state regulation that required provision of special education and related services to parochial school students with disabilities at a religiously neutral, i.e., public school, site was a defensible interpretation in light of the First Amendment's Establishment Clause.<sup>22</sup>

**S** *Los Angeles Unified Sch. Dist.*, 26 IDELR 618 (Cal. SEA 1997)

Parent of an 8-year-old student with TBI disagreed with district's discontinuation of PT services and also sought reimbursement for neuropsychological and OT IEEs and for expert witness fees.

Held that student was no longer in need of PT services.

**P** *Cranston Sch. Dep't*, 109 LRP 53420 (R.I. SEA 2009)

Parents of an 8-year-old student with cerebral palsy due to brain injury claimed that the district had denied FAPE by not providing properly trained 1:1 aide.

Held that the district denied FAPE by not providing a properly trained 1:1 aide, ordering an IEP meeting to be held within 10 days to facilitate a plan to ensure that the student has a properly trained 1:1 aide (with specifications for the training).

### **D. Discipline**

**S** *Manteca Unified Sch. Dist.*, 50 IDELR ¶ 298 (Cal. SEA 2008)  
A 17-year-old student with nTBI and PTSD assaulted another student. The team determined that the assault was not a manifestation of her disability. The parent objected to the presence of the district's attorney at the manifestation determination meeting and otherwise challenged district's procedure for manifestation determination as frivolous.

Held that 1) the student's behavior was not a manifestation of her disability, 2) the IDEA allows the district (and the parent) to bring an attorney to the manifestation determination meeting, and 3) the district's determination procedures were not frivolous.

### **E. Compensatory Education**

**P** *Council Rock Sch. Dist.*, 32 IDELR ¶ 80 (Pa. SEA 2000)  
After protracted disagreement with district concerning implementation of student's IEP, parents unilaterally placed 15-year-old student with TBI in private school, seeking tuition reimbursement and compensatory education. The district, which formerly agreed to provide summer tutoring, did not do so following the parents' unilateral change of placement.

Held that parent was entitled to 10 days of compensatory education due to district's

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*S/P* failure to implement its agreement for a summer tutor. *Shrewsbury Pub. Sch., supra*  
After funding private placement for six months for a fourth grader with nTBI, the district proposed an IEP for placement in district. The parents objected to this proposal, claiming that the IEP did not provide FAPE, seeking compensatory education for an extended period due to alleged denial of FAPE, including but not limited to shortened school days due to the transportation schedule.  
Held that district must continue funding the private placement for an additional three months as compensatory education beyond the period of the current IEP.

*S/P* *Lincoln & Lincoln-Sudbury Pub. Sch., supra*  
Parents of 16-year-old student with nTBI alleged denial of FAPE for three school years and the four summers, requesting reimbursement for their unilateral placement during the latest summer and compensatory education in the form of residential placement for an extensive period.  
Held that the district must provide compensatory education in the form of placement in an approved private residential school chosen that parents had chosen but only for one year, including a summer, rather than the much more extensive period the parents had requested. The parents lost their reimbursement claim for the first summer on equitable grounds, and the intensive nature of the residential placement limited the period of the compensatory award to less than a month-for-month or year-for-year calculation.

*(P)* *Prince George's County Pub. Sch., supra*  
Parents of 18-year-old student with TBI who attended a public separate special education school claimed that district had committed various violations, including failure to complete evaluations and IEPs within the mandated timelines and to maintain documentation of IEP meetings.  
One of the remedies in the correction action plan was for the IEP team to "determine the nature and amount of compensatory services or other remedy, necessary to redress the loss of services that have resulted from the [identified] violations."

*P/S* *Morgan Hill Unified Sch. Dist., supra*  
Parent, on behalf of an 18-year-old student classified with TBI, claimed that district denied student procedural and substantive FAPE by failing to complete assessments in a timely manner and sought compensatory education for related services (PT and vision orientation/mobility therapy) and reimbursement for an AT device, educational materials (e.g., books, note cards), and a whole array of other equipment and services.  
Held that district must provide the clear majority but not all of the requested compensatory education services. Specifically, the order was for 102 hours of AT/augmentative communication consultation/direct service; 82 hours of consultation and/or direct instruction from a teacher of the visually impaired; 82 hours of direct orientation and mobility services; and 82 45-minute PT sessions.

### F. Tuition and IEE Reimbursement

*P* *Brown v. Wilson County Sch. Dist., supra*  
District proposed an increase in instructional time for the homebound instruction that it provided to 21-year-old student with nTBI after her behavior continued to deteriorate. Refusing district's proposed continuation of homebound services, the parents unilaterally placed her in a rehabilitative residential facility for persons with brain injury and sought tuition reimbursement.  
Held that the 1) the district's proposed IEP was not substantively appropriate, and 2) the unilateral placement, a specialized behavioral therapy program for persons with TBI, was appropriate. Thus, the parent was entitled to tuition reimbursement.

*S* *Atascadero Unified Sch. Dist., 27 IDELR 1163 (Cal. SEA 1998)*  
Parents of an 18-year-old student with TBI sought reimbursement for transportation to a language center that he attended after school for additional instruction.  
Held that the additional instruction was not necessary for the student to receive FAPE; thus, the district was not obligated to provide reimbursement for the transportation expenses.

*P/S* *McMillan v. Cheatham County Sch., supra*  
The district's proposed program for 21-year-old student with TBI consisted of 6 hours of weekly therapy at an outpatient TBI facility, 10 hours of weekly homebound academic instruction, 2 hours of weekly psychological counseling, and vocational rehabilitation. Rejecting that proposal as

a denial of procedural and substantive FAPE, the parents unilaterally placed the student at a 24-hour residential facility, seeking tuition reimbursement. Held that 1) the district committed several prejudicial procedural violations that denied parents opportunity to fully participate in the student's educational process, and 2) the parent's unilateral placement was necessary to ensure student's safety, thus entitling the parents to tuition reimbursement "to the extent that such expenditures were reasonable."

**P** *Los Angeles Unified Sch. Dist., supra*

Parent of an 8-year-old student with TBI disagreed with district's discontinuation of PT services and also sought reimbursement for neuropsychological, OT IEEs, and expert witness fees. Held that the parent was entitled to reimbursement for IEEs due to inappropriateness of district's evaluation.

**S** *Council Rock Sch. Dist., supra*

After protracted disagreement with district concerning implementation of student's IEP, parents unilaterally placed 15-year-old student with TBI in private school, seeking tuition reimbursement and compensatory education. The district, which formerly agreed to provide summer tutoring, did not do so following the parents' unilateral change of placement.

Held that parents were not entitled to tuition reimbursement based on the equities step; the district had been responsive to parent requests and had taken corrective measures after student's grades dropped, whereas parents had been

unreasonable in their demands (e.g., extent of accommodations and provision of a full-time special education teacher).

**P** *Richmond Elementary Sch. Dist., supra*

After unilaterally placing 12-year-old student with TBI at a nonpublic private school specializing in students with TBI, parents sought tuition reimbursement and reasonable living expenses for student and parent, claiming that the district's proposed placement failed to provide procedural and substantive FAPE under the IDEA.

Held that 1) the district's proposed IEP failed to provide student with procedural and substantive FAPE under the IDEA, 2) the nonpublic private school was appropriate, and 3) the reimbursement must include reasonable living expenses for student and one parent.

**P** *Rim of the World Unified Sch. Dist., supra*

Parents sought continued funding of 10-year-old student who had stroke at birth and subsequent seizure disorder, classified as TBI,<sup>23</sup> at private school for students with TBI, claiming that district's proposed program did not offer procedural or substantive FAPE. In addition to continued funding, the parents sought reasonable living expenses for both the student and parent due to distance of the private school from home.

Held that 1) the district's proposed program did not provide procedural or substantive FAPE and that 2) the nonpublic private school was appropriate, and 3) district must provide reimbursement for reasonable living expenses

and continue funding the private placement.

**P** *Lincoln & Lincoln-Sudbury Pub. Sch., supra*

Parents of 16-year-old student with nTBI alleged denial of FAPE for three school years and the four summers, requesting reimbursement for their unilateral placement during the latest summer and compensatory education in the form of residential placement for an extensive period.

Held that the district must reimburse for the latest summer due to the district's failure to provide ESY.

**P** *Decatur City School Sys., supra*

Parents of 16-year-old student with nTBI claimed that district's proposed placement did not offer procedural or substantive FAPE, requesting reimbursement for the cost of aides and private evaluations, compensatory education, and prospective placement at a specific private residential center.

Held that parents were entitled to reimbursement for aides and IEEs based on denial of FAPE.

**S** *Stanley C. v. Metro. Sch. Dist. of Sw. Allen County Sch., supra*

Parents of 15-year-old student with nTBI (due to a stroke at 3 months of age) sought tuition reimbursement, compensatory education, and attorney's fees after unilaterally placing the student in a private school and also opting for private vision therapy, OT, and PT in lieu of the related services that the district had offered.

Held that the parents were not entitled to reimbursement for vision therapy, OT, and PT where the district offered them these services but they opted instead for private prac-

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titioners.

**S** *Chariho Sch. Dist., supra*  
Parent unilaterally placed six-year-old with TBI in private school without providing prior notice to the district, subsequently seeking tuition reimbursement.

Held that the regardless of whether the district had met the standards for FAPE, the parent was not entitled to tuition reimbursement for failing to provide timely notice without meeting the safety exception.

**S** *Hollister Sch. Dist., supra*  
Parents of unilaterally placed 15-year-old student with TBI in a private residential facility for boys with ED sought secondary classification of ED, reimbursement for private placement, and reimbursement for various private assessments and therapies.

Held that district was not required to reimburse private OT therapy where the evidence was preponderant that the student did not need OT services to achieve an educational benefit

**S/P** *Morgan Hill Unified Sch. Dist., supra*

Parent, on behalf of an 18-year-old student classified with TBI claimed that district denied student procedural and substantive FAPE by failing to complete assessments in a timely manner and sought compensatory education for related services (PT and vision orientation/mobility therapy) and reimbursement for AT device, educational materials (e.g., books, note cards), and a whole array of other equipment and services.

Held that the parent was entitled to reimbursement for the AT device, which was a small amount compared to

the various other requested reimbursements.

### G. Money Damages

**S** *McMillan v. Cheatham County Sch., supra*

The district's proposed program for 21-year-old student with TBI consisted of 6 hours of weekly therapy at an outpatient TBI facility, 10 hours of weekly homebound academic instruction, 2 hours of weekly psychological counseling, and vocational rehabilitation. Rejecting that proposal as a denial of procedural and substantive FAPE, the parents unilaterally placed the student at a 24-hour residential facility, seeking tuition reimbursement. Held that the additional requested remedy of compensatory damages was not available where the district's "violations did not amount to a gross or egregious violation of the IDEA."<sup>24</sup>

**S** *J.L. v. Ambridge Area Sch. Dist., 622 F. Supp. 2d 257 (W.D. Pa. 2008), further proceedings, 52 IDELR ¶ 156 (W.D. Pa. 2009)*<sup>25</sup>

Alleging denial of FAPE, parents of child with TBI sought, among other forms of relief, money damages under the IDEA, § 504, and the ADA. Held that money damages are not available under the IDEA.

### H. Representation Issues

**S** *Los Angeles Unified Sch. Dist., supra*

Parent of an 8-year-old student with TBI disagreed with district's discontinuation of PT services and also sought reimbursement for neuropsychological and OT IEEs and for expert witness fees.

Held that the IDEA does not provide for expert witness fees.<sup>26</sup>

**S** *Wenger v. Canastota Cent. Sch. Dist., 146 F.3d 123 (2d Cir. 1998), cert. denied, 526 U.S. 1025 (1999), on remand, 41 IDELR ¶ 5 (N.D.N.Y. 2004)*<sup>27</sup>

Parent of 15-year-old student with TBI, who was in persistent vegetative state, alleged that district failed to implement student's IEP, discriminated against student, and violated parent's Fourteenth Amendment due process rights. The parent sued for punitive damages and compensatory education. After extended litigation, student was beyond age 21. Rejected parent's IDEA claim based on *pro se* status.<sup>28</sup>

**(P)** *L.L. v. Vineland Bd. of Educ., 128 F. App'x 916 (3d Cir. 2005)*

Parent of student with TBI filed *pro se* complaint against board of education, seeking fees and costs for lay advocate's advocacy and consultation services pursuant to the IDEA. Federal district court granted summary judgment<sup>29</sup> for the district, concluding that advocate engaged in unauthorized practice of law. Held that issue of whether lay advocate had engaged in unauthorized practice of law entailed factual issues that required a full trial.

**S** *Stanley C. v. Metro. Sch. Dist. of Sw. Allen Sch., supra*

Parents of 15-year-old student with nTBI (due to a stroke at 3 months of age) sought tuition reimbursement, compensatory education, and attorney's fees after unilaterally placing the student in a private school and also opting for private vision therapy, OT, PT, and SLT in lieu of the related services

that the district. Parents also requested attorney's fees. Held that an award of attorney's fees requires that the parents be the prevailing party, which they were not in this case.

**P/S** *B.R. v. Lake Placid Cent. Sch. Dist.*, 52 IDELR ¶ 74 (N.D.N.Y. 2009)

After obtaining a consent decree in resolution of their due process issues, the parents of a student with TBI filed in court for attorney's fees. The district argued that the parents were not the prevailing party under the IDEA.

Held that because the consent decree resolved most of the issues in their favor, the parents qualified for attorneys' fees but at a reduced hourly rate because their requested amount was not reasonable in terms of the locally prevailing rate.

**I.** Adjudicative Issues

**S** *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123 (2d Cir. 1998), cert. denied, 526 U.S. 1025 (1999), on remand, 41 IDELR ¶ 5 (N.D.N.Y. 2004)<sup>30</sup>

Parent of 15-year-old student with TBI, who was in persistent vegetative state, alleged that district failed to implement student's IEP, discriminated against student, and violated parent's Fourteenth Amendment due process rights. The parent sued for punitive damages and compensatory education. After extended litigation, student was beyond age 21.

Rejected student's IDEA claim based on mootness.

**P** *Arlington Cent. Sch. Dist.*, supra

Parent of a 20-year-old student with nTBI and ED requested compensatory education based

on allegedly inappropriate transition services for three years and allegedly inappropriate decision to graduate him from out-of-state residential program. The district refused to fund placement during course of the due process proceedings.

Held that district must continue to fund the child's residential placement during the proceedings under the IDEA's "stay put" provision.

**S** *Mandy S. v. Fulton County Sch. Dist.*, supra

Parent of a 21-year-old student with TBI sought relief, including tuition reimbursement for private placement in 1997-98 by alleging that district's IEPs from 1991-92 to 1997-98 did not meet the procedural and substantive requirements of FAPE, particularly with regard to transition services. Student dropped out of high school in 1997 and, after district denied her request for funding at business school, moved out of district.

Court rejected consideration of 1) early IEPs due to expiration of statute of limitations and 2) the subsequent reimbursement claim for lack of standing due to moving out of district.

**S** *Emory v. Roanoke Sch. Dist.*, 432 F.3d 294 (4th Cir. 2005)

Seeking tuition reimbursement and compensatory education, a 24-year-old former student with TBI claimed that the district had not provided FAPE during the 1992-1993 school year, which resulted in a private placement in hospital setting funded by father's insurance sought tuition reimbursement. Summarily rejected FAPE claim due to 1) IDEA two-year statute of limitations, and 2)

student's lack of standing (e.g., no cognizable injury).

**S** *Green ex rel. J.G. v. Dist. of Columbia*, 45 IDELR ¶ 240 (D.D.C. 2006)

After obtaining not only a hearing officer decision that the district denied FAPE to her 17-year-old-son with TBI and ADHD and that he was entitled prospectively to placement in a private special education school, but also, via an agreement with the district, compensatory education, the parent appealed, seeking a more extensive ruling.

Held that 1) where the parent had obtained ruling that the district denied FAPE, the hearing officer's failure to address or find the other alleged violations for the same denial of FAPE was harmless error, and 2) where the parent had agreed upon compensatory education with the district, her claim for this relief was moot.

**S** *J.P. v. Enid Pub. Sch.*, supra

Parent of high school student with TBI claimed that district had failed initially to identify the student as eligible under IDEA and to provide FAPE due to inadequate information in the IEP, seeking compensatory education for the initial period and tuition reimbursement for the unilateral out-of-state private placement.

Held that the parent exceeded the statute of limitations for child find complaint, thus precluding compensatory education.

**(P)** *Suggs v. Dist. of Columbia*, 679 F. Supp. 2d 43 (D.D.C. 2010)

Parent of 10-year-old student with suspected TBI due to two falls in early childhood claimed that district had not conducted necessary evaluations

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(specifically, MRI and EEG) to determine existence of TBI. Ruled that remand to the IHO was necessary where the record was incomplete and the IHO's decision was cursory.

**S** *In re: Student with a Disability*, 110 LRP 31766 (N.Y. SEA 2010)

Parent of student with TBI unilaterally placed child in private school for the 2006-2007 school year and filed for due process in 2009 to obtain tuition reimbursement, claiming denial of FAPE. After IHO ruled in favor of parent, the district appealed to review officer, seeking dismissal due to statute of limitations expiration.

Held that the two-year period starts when parent knew or should have known that district did not provide FAPE, which in this case resulted in reversing the award of tuition reimbursement to the parent.

### J. Other Legal Bases

**P** *Mansfield (WA) Sch. Dist. No. 207*, 22 IDELR 1050 (OCR 1995)

Parents of a 3<sup>rd</sup> grade student with TBI from infancy filed complaint with OCR claiming that the student was not receiving a FAPE. District had placed the student in regular education class despite academic functioning that was two years below grade level and disruptive/aggressive behaviors that resulted in his daily removal from the classroom. Additionally, the district had made changes in placement (reduction in regular education and length of school day) and behavior management decisions without IEP team revision.

OCR determined that the district violated the FAPE

requirements under § 504 and Title II of the ADA. The district entered into voluntary corrective action to restore compliance.

**S** *Roberts v. Kindercare Learning Ctr.*, 86 F.3d 844 (8th Cir. 1996)

Adoptive parents of four-year-old boy with multiple disabilities arising from TBI (abuse) challenged private preschool program's ability to condition his admission on the parental provision of a PCA. The parents claimed that the daycare center's refusal to hire a PCA for their son was in violation of the ADA.

Held that to require the daycare center to provide a PCA would be an undue fiscal burden under the ADA.

**S** *K.U. v. Alvin Indep. Sch. Dist.*, 166 F.3d 341 (5th Cir. 1998)

Parents of a 14-year-old student with TBI alleged discrimination and retaliation under § 504 and sought money damages under § 1983 for alleged violations of Fourteenth Amendment due process and equal protection and First Amendment expression.

Held that 1) the evidence failed to show that the district did not follow proper § 504 procedures regarding student's suspensions or that the student received low grades because of discrimination, thus falling short of the "bad faith or gross misjudgment" standard for § 504 claims; and 2) the § 1983 claim based on the First and Fourteenth Amendments lacked any factual foundation.

**S** *Wenger v. Canastota Cent. Sch. Dist.*, *supra*

Parent of 15-year-old student with TBI, who was in persistent vegetative state, alleged that district failed to implement student's IEP, discriminated against

student, and violated parent's Fourteenth Amendment due process rights. The parent sued for punitive damages and compensatory education. After extended litigation, student was beyond age 21. Rejected parent's § 504 claim based on lack of bad faith, and their Fourteenth Amendment claim based on lack of denial of FAPE.

**S** *Robertson v. Arlington Cent. Sch. Dist.*, 229 F.3d 1136 (2d Cir. 2000)

District placed 8-year-old student with nTBI (due to stroke at 18 months of age) in a special education classroom where another student allegedly abused her. Parents sought money damages under § 1983 based on Fourteenth Amendment substantive due process.

Held that the parent's claim failed where district lacked actual or constructive knowledge of the alleged abuse.

**P/S** *Washoe County (NV) Sch. Dist.*, 108 LRP 53655 (OCR 2008)

Parent filed OCR complaint investigation primarily alleging that the district violated § 504 by denying student with TBI a 1:1 aide that would enable him to receive training in the community and secondarily claiming that the district failed to protect student from harassment by other students. Found that the lack of provision of a 1:1 aide to accompany student on community-based instruction trips was a denial of FAPE under § 504, but that the harassment of student by other students lacked substantiation. The district entered into a voluntary settlement agreement to amend its aide hiring/assignment procedures.

**(P) J.L. v. Ambridge Area Sch. Dist., supra**

Alleging denial of FAPE, parents of child with TBI sought, among other forms of relief, money damages under the IDEA, § 504, and the ADA. Held that parents could be entitled to money damages under § 504 and the ADA depending on the evidence, even without showing intentional discrimination.<sup>31</sup>

**P Madison County (AL) Sch. Dist., 52 IDELR ¶ 111 (OCR 2009)**

Parent of a 17-year-old student with TBI due to cheerleading accident claimed procedural violations of § 504 with regard to eligibility determination, including 1) failure to promptly act on her request for a § 504 evaluation, and 2) denial of her participation in eligibility process.

Found that the district violated § 504 by failing to consider relevant information in making eligibility determination and excluding parent (i.e., someone “knowledgeable about student”) from the eligibility determination meeting. The district entered into a voluntary resolution agreement to take various corrective actions, including in-service training and revised policy/procedures.

state law—via a severe ability-achievement discrepancy, response to intervention, or alternative research-based approach, and 2) an exclusion for “learning problems that are primarily the result of ... motor disabilities.” (34 C.F.R. §§ 300.8(c)(10) and 300.307-300.311)

<sup>2</sup> They also define the remaining classifications—e.g., other health impairment (OHI) means “having limited strength, vitality, or alertness ... that—(i) Is due to chronic or acute health problems ...; and (ii) Adversely affects a child’s educational performance. (*id.* § 300.8(c)(9)).

<sup>3</sup> Although several states provide their hearing or review officer decisions on the SEA website, the only national publication that provides a sampling of these decisions is the INDIVIDUALS WITH DISABILITIES LAW REPORT (IDELR). LRP Publications also offers Special Ed Connection®, which is an electronic database with additional cases; the citations for these additional decisions have the designation “LRP” rather than “IDELR.”

<sup>4</sup> “SEA” generally refers to the state education agency; however, in the particular context of case citations, it refers to a hearing/review officer or complaint investigation decision, because the SEA has supervisory responsibility for both processes.

<sup>5</sup> See, e.g., *Tiffany K. v. Valparaiso Cmty. Sch.*, 104 LRP 2458 (N.D. Ind. 2002); *Cavanagh v. Grasmick*, 75 F. Supp. 2d 446 (D. Md. 1999).

<sup>6</sup> See, e.g., *M.S. v. Mullica Hill Bd. of Educ.*, 263 F. App’x 264 (3d Cir. 2008); *Kenton County Sch. Dist. v. Hunt*, 384 F.3d 269 (6th Cir. 2004).

<sup>7</sup> See, e.g., *Warner v. Indep. Sch. Dist. No. 625*, 134 F.3d 1333 (8th Cir. 1998); *Artis v. Dist. of Columbia*, 534 F. Supp. 2d 15 (D.D.C. 2008); *Tuscaloosa County Bd. of Educ.*, 29 IDELR 435 (Ala. SEA 1999).

<sup>8</sup> See, e.g., *N.T. v. New York City Bd. of Educ.*, 41 IDELR ¶ 208 (E.D.N.Y. 2004).

<sup>9</sup> “Issue ruling” here refers to the legal forum’s decision specific to the listed issue, not to the entire case.

<sup>10</sup> “Supra” in Latin means “above.” Here, it is a cross-reference meaning see above for the first listing of this case, which provides the full citation.

<sup>11</sup> Although not appearing in the IDEA, § 504, or the IDEA, nTBI is used here in basic distinction from TBI as the other professionally recognized category of acquired brain injuries.

<sup>12</sup> “Child find” here refers to the district’s duty to evaluate a child upon having reason to suspect IDEA eligibility. This individual meaning is different from collective child find, which is the duty to locate eligible children in general.

<sup>13</sup> This ruling was the result of an SEA complaint investigation, not a due process hearing.

<sup>14</sup> The proper diagnosis should have been nTBI because the cause was encephalitis.

<sup>15</sup> The correct classification should have been nTBI.

<sup>16</sup> Technically, the classification should have been nTBI.

<sup>17</sup> The hearing officer also had granted other relief including compensatory education and related services reimbursement, but the district did not challenge these matters in this review officer case.

<sup>18</sup> This ruling was the result of an SEA complaint investigation, not a due process hearing.

<sup>19</sup> For the inconclusive outcome regarding the remedy of compensatory education, see the subsequent entry for this case.

<sup>20</sup> The student was actually nTBI, because the cause of his brain injury was the malfunction of a pump to mitigate the effects of glycogen storage disease when student was age 3.

<sup>21</sup> For additional related-services cases, see the Tuition Reimbursement category.

<sup>22</sup> This case is at marginal in its categorization due to its unusual issue and legal basis.

<sup>23</sup> Technically, the classification should have been nTBI.

<sup>24</sup> More recently, the case law has established an overwhelming majority view that money damages are not available under the IDEA.

<sup>25</sup> The subsequent ruling cited here awarded compensatory education for the time prior to the IDEA’s enactment of a statute of limitations.

<sup>26</sup> At the time, the law was unsettled on this third issue, but the Supreme Court subsequently held that the IDEA does not require districts to provide prevailing parents with expert witness fees, thus confirming the hearing officer’s ruling in this case. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006).

<sup>27</sup> For similarly unavailing litigation concerning a previous IEP for the same student, see *Wenger v. Canastota Sch. Dist.*, 979 F. Supp. 2d 146 (N.D.N.Y. 1997), *aff’d mem.*, 208 F.3d 204 (2d Cir. 2000), *cert. denied*, 531 U.S. 1019 (2000).

<sup>28</sup> The Supreme Court recently decided that parents may proceed *pro se* in federal court under the IDEA. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007).

<sup>29</sup> Summary judgment refers to the court deciding one or more issues without a trial.

<sup>30</sup> For similarly unavailing litigation concerning a previous IEP for the same student, see *Wenger v. Canastota Sch. Dist.*, 979 F. Supp. 2d 146 (N.D.N.Y. 1997), *aff’d mem.*, 208 F.3d 204 (2d Cir. 2000), *cert. denied*, 531 U.S. 1019 (2000).

<sup>31</sup> This Third Circuit approach is the minority view, with most courts requiring a higher standard, such as gross misjudgment or callous indifference.

## Endnotes

\* Education Law Into Practice is a special section of the EDUCATION LAW REPORTER sponsored by the Education Law Association. The views expressed are those of the author and do not necessarily reflect the views of the publisher or the Education Law Association. Cite as 268 Ed.Law Rep. [17] (Aug. 4, 2011).

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<sup>1</sup> The definition, in relevant parts, includes 1) inadequate progress in one or more of 8 enumerated areas determined—depending on

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**2011 ELA Award Winners**

All award winners below were recognized at the 2010 ELA conference.

**M.A. McGhehey Award**

**David M. Schimmel, J.D.**

Professor, University of Massachusetts at Amherst,  
School of Education, Amherst, MA

**George Jay Joseph Education Law Writing Award**

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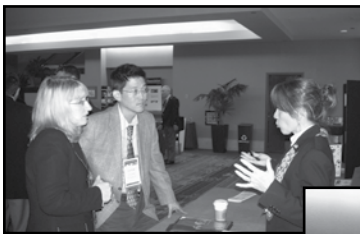
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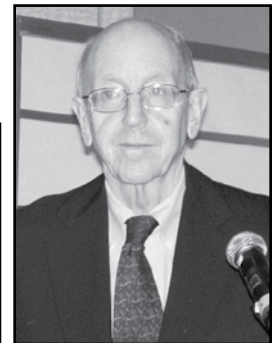
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# Education Law Into Practice

## Restraint of Students in Schools\*

**Ralph D. Mawdsley, J.D., Ph.D. and Allan Osborne, Ed.D.\*\***

### Introduction

In May 2009, the U.S. General Accountability Office (GAO) reported to the U.S. House of Representatives Committee on Education and Labor that no federal laws existed restricting the use of seclusion and restraints in public and private schools and, at the state level, the laws were widely divergent.<sup>1</sup> The GAO

found hundreds of cases of alleged abuse and death related to the use of seclusion and restraints on school children during the prior two decades and, in examining ten cases that led to criminal convictions, found that those cases shared the following themes:

children with disabilities who were restrained and secluded, often in cases where they were not physically

aggressive and their parents did not give consent; restraints that blocked air to the lungs; teachers and staff not trained on the use of seclusions and restraints; and teachers and staff from five of the ten cases who continued to be employed as educators.<sup>2</sup> Four examples of reviewed cases revealed the following information:<sup>3</sup>

Examples of Case Studies GAO Examined Victim information	School	Case details
Male, 14, diagnosed with post traumatic stress	Texas public school	230 lb. teacher placed 129 lb. child facedown on floor and lay on top of him because he did not stay seated in class, causing his death. Death ruled a homicide but grand jury did not indict teacher.  Teacher currently teaches in Virginia.
Female, 4, born with cerebral palsy and diagnosed as autistic	West Virginia public school	Child suffered bruising and post traumatic stress disorder after teachers restrained her in a wooden chair with leather straps—described as resembling a miniature electric chair—for being “uncooperative.”  School board found liable for negligent training and supervision; teachers were found not liable, and one still works at the school.
Five victims, gender not disclosed, aged 6 and 7	Florida public school	Volunteer teacher’s aide, on probation for burglary and cocaine possession, gagged and duct-taped children for misbehaving. No records that school did background check or trained aide.  Aide pled guilty to false imprisonment and battery.
Male, 9, diagnosed with a learning disability	New York public school	Parents allowed school to use time out room only as a “last resort,” but school put child in room repeatedly for hours at a time for offenses such as whistling, slouching, and hand waving. Mother reported that the room smelled of urine and child’s hands became blistered while trying to escape.  Jury awarded family \$1,000 for each time child was put in the room.

The GAO Report served to focus attention on the use of restraint regarding students who are disruptive or who refuse to obey teacher or administrator instructions. To date, the Third,<sup>4</sup> Fourth,<sup>5</sup> Fifth,<sup>6</sup> Sixth,<sup>7</sup> Seventh,<sup>8</sup> Ninth,<sup>9</sup> Tenth,<sup>10</sup> and Eleventh Circuits<sup>11</sup> have applied the Fourth Amendment's reasonableness standard to seizures of students in non-punishment cases to prevent harm to themselves, other students, or school staff.<sup>12</sup> In many of the cases, the students restrained had been evaluated to have a disability.<sup>13</sup>

As of this writing, no federal statute concerning student restraint exists and students allegedly abused by teachers are left to pursue claims under substantive due process, federal statutes (such as § 504 or ADA), or state law negligent hiring, supervision, or retention claims. This article examines the challenges that students allegedly abused by school personnel face in suing school district personnel and their school board employers.

## Restraint in the Classroom

A recent Eleventh Circuit decision, *T.W. v. School Board of Seminole County Florida*,<sup>14</sup> illustrates the legal barriers encountered when a student with disabilities seeks to sue a teacher. The facts in *T.W.* are extensive and concern a five-foot, 150 pound student diagnosed with pervasive developmental disorder (*T.W.*) and a six-foot, 300 pound classroom teacher (*Garrett*). Although the facts involving *Garrett* and *T.W.* only extend from May, 2004 to the end of the calendar year, *Garrett* had been a teacher in another school in the district prior to May, 2004 where "an escalating problem [of parental complaints] with *Garrett*"<sup>15</sup> and four administrative unsuccessful investigations of parent complaints had led to her being transferred in 2000 to the school where *T.W.* was to be enrolled as a student in May, 2004. Unfortunately, the principal at the new school had not been advised of the concerns about student abuse that had

led to the transfer and "no one [had] advised [him] to monitor *Garrett* for potential abuse."<sup>16</sup>

The Eleventh Circuit observed that *Garrett* had completed two courses on physical restraint techniques and was certified in crisis prevention intervention. The court of appeals also identified five separate occasions where "*Garrett* used physical force against *T.W.*"<sup>17</sup> On the first occasion, in spring 2004, when *T.W.* became upset and refused to go to the cool down room after having been verbally provoked by *Garrett*, the teacher "put *T.W.* on the floor with his face to the ground, straddled him so that her pelvic area was on top of his buttocks, and pulled his arms behind his back."<sup>18</sup> After five minutes, *T.W.* was released without having suffered any physical injuries. During the second occasion in fall 2004, *T.W.* refused to perform a task as directed by *Garrett* and when he began swinging his arms at her, *Garrett* forced *T.W.* to the floor and pulled his right leg up against the back of his left leg, holding *T.W.* in that position for two to three minutes. On the third occasion in fall 2004, *T.W.* refused to stop scratching an insect bite on his arm that had become red and raw looking and *Garrett*, for about three minutes, forced *T.W.* against the table, held his arms behind his back, and placed her weight against his back to hold him in that position. When he resumed scratching the insect bite, *Garrett* escorted *T.W.* to the cool down room where she went into the room with him, closing the door behind her, and *T.W.*'s screams were heard along with furniture being moved in the room. When *T.W.* exited the room, his hair and clothing were disheveled and he was yelling that *Garrett* had hurt him. *T.W.*'s mother sent a note to the school the next day asking why *Garrett* had twisted her son's arm, but a witness outside the room was not able to testify to what had happened in the room when the door was closed. During the fourth incident in fall 2004, *Garrett* held *T.W.*'s hands behind his back as she walked him to the cool down room. The fifth incident involved *Garrett* placing *T.W.* in the cool

down room, turning out the lights in the room and sitting in front of the door so *T.W.* could not exit. When *T.W.* left the room, *Garrett* stuck out her foot to trip *T.W.* A psychologist's evaluation of *T.W.* revealed that he had been traumatized by *Garrett* had exhibited symptoms of post traumatic stress syndrome. Because *T.W.* did not feel safe at school he eventually dropped out, but not before a final incident where "*Garrett* had used her full body weight to restrain a student on top of his desk and had held the student's head down so that his neck was against the edge of his desk, which caused his eyes to swell and his lips to turn blue."<sup>19</sup> *Garrett* was suspended from her teaching responsibilities with pay and was charged with child abuse, but resigned shortly thereafter.<sup>20</sup> A jury found her guilty of one count of child abuse but the court withheld adjudication.

*T.W.*'s mother was unsuccessful in all three counts: a § 1983 claim against the school district for deliberate indifference to *Garrett*'s intentional or reckless conduct; a § 504 disability discrimination claim under the Rehabilitation Act of 1973; and, a state law claim for negligent hiring, supervision, or retention. Regarding the first claim, the Eleventh Circuit held that *Garrett*'s conduct qualified as corporal punishment under state law and, in the absence of evidence that the treatment of *T.W.* was "conscious shocking," the plaintiff had no Fourteenth Amendment substantive due process claim. Even though *Garrett*'s treatment could have caused serious injury, such as asphyxiation, and *Garrett* could have restrained *T.W.* in a less harmful manner, "the amount of force at issue here was [not] totally unrelated" to the need for the use of force.<sup>21</sup> While the appeals court was careful to declare that it "[did] not condone the use of force against a vulnerable student on several occasions over a period of months, ... no reasonable jury could conclude that *Garrett*'s use of force was obviously excessive in the constitutional sense."<sup>22</sup> Concerning the § 504 claim, the plaintiff had failed to establish deliberate indifference by

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## Restraint of Students in Schools

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the school because school officials and the state professional licensure board had investigated complaints but had never been able to sustain a claim of a constitutional violation. In addition, the school board could not be liable under a respondeat superior theory since “no reasonable jury could conclude that Garrett intentionally discriminated against T.W. solely by reason of his disability.”<sup>23</sup> The Eleventh Circuit did not address the plaintiff’s negligence claim.

A dissenting Eleventh Circuit judge took issue with the majority’s finding of law that Garrett’s use of force was necessary and justifiable and even if her actions were “inappropriate” they were not of sufficient duration or degree to rise to the level of a constitutional violation. The dissent observed that “the disagreement in this record as to what happened, how it happened, and why it happened is a matter which must be left to a jury to resolve.”<sup>24</sup>


In a different kind of restraint case, an Alabama federal district court case, in *D.D. v. Chilton County Board of Education*,<sup>25</sup> reached the same conclusion as the Eleventh Circuit regarding a four-year-old child placed by a special education teacher in a Rifton chair, a specially designed chair with straps to restrain students whose conduct presents a risk to themselves or others. In this case, a student “diagnosed [with] Pervasive Development Disorder, Attention Deficit/Hyperactivity Disorder, Impulse Control Disorder, and Mood Disorder”<sup>26</sup> had been placed in the chair after he had repeatedly kicked students, the pre-school teacher and the classroom aides. Apparently, the student enjoyed sitting in the chair and, because it was near the end of the school day, the teacher strapped him in the chair and placed the chair in the hallway outside the classroom door. The total amount of time in the chair was no more than ten minutes.

Unfortunately, D.D.’s mother appeared on the scene at this time and found her child strapped in the chair, crying and alone. Although D.D. subsequently was assigned to another pre-school teacher, no disciplinary action was taken against the original pre-school teacher since an investigation revealed that her conduct had accorded with school district policy. The mother shortly thereafter moved out of the school district.

The outcome in *D.D.* was the same as *T.W.* Finding no substantive due process violation for excessive corporal punishment, the district court observed that,

[a]pplying an objective standard to the facts that D.D. was a young child who was receiving special education services, was restrained at both the waist and the feet, was shoeless, and was left alone in the hallway while restrained for a few minutes, and considering the totality of the circumstances including that D.D. had previously been disruptive, had engaged in kicking behaviors, that D.D. had accepted the option to sit in the Rifton chair, and that he did not sustain any physical injury as a result of the restraint, the court concludes that Alford’s actions were not excessive as a matter of law and were a reasonable response to D.D.’s behavior.<sup>27</sup>

In response to the plaintiff parent’s procedural due process claim that she had received no notice regarding the use of restraints, the district court declared that, “actions in restraining D.D. to a chair while [the teacher] moved him to the hallway, and while waiting for his mother whose arrival she anticipated within ten minutes, even when viewed in a light most favorable to the non-movant, are not a sufficient deprivation of liberty or bodily integrity so as to require advance notice and a hearing.”<sup>28</sup> Summary judgment was granted as to plaintiff’s IDEA claim since, once she moved outside the school district, it had

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no obligation under the IDEA to provide an IEP. However, worth noting is that the school district had never provided, as requested by *D.D.*'s mother, a behavior plan as part of the original IEP. Although a behavior plan was provided following the Rifkin chair incident, one assumes that the mother could (and, probably should) have sought an administrative due process hearing when the plan was not provided at her request. Finally, the federal district court dismissed plaintiff's state law claims for assault and battery without prejudice.

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### Implications and Conclusion

Only two cases, *T.W.* and *D.D.* accurately reflect that students with disabilities, especially those students diagnosed with behavioral disorders, are the school population most vulnerable to unnecessary or excessive restraints. Applying state law rules concerning corporal punishment to students with disabilities, is, one can argue, simply making an end run around the IDEA. Whether specific federal or state laws addressing student restraints will appear soon is difficult to say, but what is clear is that the current constitutional remedies are unlikely to produce changes in the use of restraints. At best, the changes will be ad hoc and not systemic in the sense that schools with poor parent participation will have fewer incentives to change teacher behaviors.

*D.D.* suggests that the forum for addressing the use of restraints is through the IEP and Behavioral Intervention Plans (BIPs) which can serve to structure the kinds of restraints that are permissible, as well as identifying the point at which a parent must be contacted regarding the use of restraints. Including provisions prescribing the use of physical restraint in IEPs or BIPs may give school personnel protection from suits for damages in the event that parents later sue those who have used physical restraints on their children. Proper training in the use of physical restraints also provides school districts

and personnel with a degree of protection from liability if students are injured during restraints. It is less likely that students will be injured while restrained by trained personnel inasmuch as properly trained educators are more apt to administer restraints properly and use only the minimum amount of restraint necessary to control disruptive students. In one such case, a federal trial court in Virginia dismissed a suit filed against a teacher and a classroom aide by the parents of a student who had been restrained after determining that the student had not been injured during the restraint.<sup>29</sup> The student's IEP allowed the use of physical restraint in situations where the student exhibited behavior that could endanger himself or others. In another situation the Eighth Circuit concluded that the use of a blanket wrapping technique recommended by a licensed physical therapist to calm a student did not violate a student's clearly established right to be free from unreasonable bodily restraint.<sup>30</sup> Courts have been cognizant of the fact that physical restraints may be required to protect students and staff from danger. In the Virginia case discussed above the court observed that the student's IEP specifically provided for restraints to be used when he became a danger to himself or others. In another case, a federal trial court in Texas dismissed an action brought against school personnel who had wrapped an out-of-control student in a blanket for safety reasons.<sup>31</sup> In holding that the parent had not alleged a violation of a clearly established Fourth Amendment right, the court explained that the student's substantive due process rights did not give her the right to be free from restraints used to control her outbursts in order to prevent harm to herself and those responsible for her education.

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### Recommendations for Practice

In the absence of comprehensive state guidelines regulating the use of physical restraint, school authorities

are advised to develop physical restraint policies of their own. Having such policies in place may help to protect personnel from liability. Following are recommendations regarding the content of those policies.

- Schools should form crisis teams that will respond to situations where students are out of control and may require physical restraint. At a minimum the crisis team should consist of two individuals who will restrain the student and a witness who can observe and document the restraint. It is also recommended that additional personnel, such as a school nurse or other health professional who could monitor the student's health and a counselor who could try to calm the student, should be included on crisis teams.
- All members of a school's crisis team, as well as other personnel who may be required to participate in physical restraints, should be properly trained in the use of nonviolent interventions and physical restraint techniques. Training should be ongoing.
- All instances of physical restraint should be witnessed and documented. Documentation should include a description of the student's behavior that prompted the restraint, efforts made to deescalate the situation, a description of the type of restraint used (i.e. holds), and a description of the student's behavior and reaction to the restraint. Any injuries suffered by either the student or staff should be documented.
- Physical restraint should be discontinued as soon as possible, but only when it is clear that the student is no longer a danger to himself/herself or others.
- If at any time during the restraint the student exhibits significant physical or emotional distress, medical assistance should be sought. The student's parents should be notified immediately that this has occurred.

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## Restraint of Students in Schools

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- Parents and appropriate school administrators should be notified whenever a student has been physically restrained.
- Policies should identify a maximum time limit for restraints and should spell out procedures that are to be followed if that time limit is reached and the student is still not in control.
- Following each instance of physical restraint, crisis team members should review their actions to determine if all procedures were followed properly.
- Provide counseling to other students who may have witnessed and been traumatized by the restraint.

school building. Physical restraints may be administered only by school personnel who have been given this in-depth training. 603 C.M.R. § 46 (2008).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Shuman v. Penn Manor Sch. Dist.*, 422 F.3d 141, 148 [201 Ed. Law Rep. [459]] (3d Cir. 2005) (detention of male student, who had sexually harassed female student, in a school conference room for several hours following questioning by assistant principal held to be reasonable for Fourth Amendment purposes).

<sup>5</sup> *Wofford v. Evans*, 390 F.3d 318, 325-27 [193 Ed. Law Rep. [701]] (4<sup>th</sup> Cir. 2004).

<sup>6</sup> *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1079 [100 Ed. Law Rep. [862]] (5<sup>th</sup> Cir. 1995).

<sup>7</sup> *S.E. v. Grant County Bd. of Educ.*, 544 F.3d 633, 641 [238 Ed. Law Rep. [28]] (6<sup>th</sup> Cir. 2008).

<sup>8</sup> *Wallace v. Batavia School Dist.* **101**, 68 F.3d 1010, 1013-14 [104 Ed. Law Rep. [132]] (7<sup>th</sup> Cir. 1995).

<sup>9</sup> *Preschooler II v. Clark County School Bd. of Trustees*, 479 F.3d 1175, 1182 [217 Ed. Law Rep. [51]] (9<sup>th</sup> Cir. 2007).

<sup>10</sup> *Couture v. Bd. of Educ. of Albuquerque Pub. Schs.*, **535 F.3d 1243, 1255** [235 Ed. Law Rep. [721]] (**10<sup>th</sup> Cir. 2008**).

<sup>11</sup> *Gray v. Bostic*, 458 F.3d 1295 [211 Ed. Law Rep. [701]] (11<sup>th</sup> Cir. 2006).

<sup>12</sup> For a summary of case law up to 2009, see Sean Croston, *Incorporating Fourth Amendment Standards in a Model Policy for School Officials Use of Force to Restrain and Detain Students*, 2009 B.Y.U. EDUC. & L.J. 39, 60 (2009).

<sup>13</sup> In a related matter, courts have not found Fourth Amendment violations in situations where school personnel have used time-out rooms, particularly when such a strategy was outlined in the students' IEPs. See, e.g. *Couture v. Bd. of Educ. of Albuquerque Pub. Schs.*, 535 F.3d 1243 [235 Ed. Law Rep. [721]] (10<sup>th</sup> Cir. 2008).

<sup>14</sup> 610 F.3d 588 [258 Ed. Law Rep. [481]] (11<sup>th</sup> Cir. 2010).

<sup>15</sup> *Id.* at 594.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 595.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 597.

<sup>20</sup> A search of the computer in Garrett's classroom revealed that she likely "suffered from both sexual masochism and sexual sadism" and, according to a psychologist, her verbal and physical abuse of her students was "consistent with someone whose private sadistic sexual practices spilled over into the classroom setting." *Id.*

<sup>21</sup> *Id.* at 601.

<sup>22</sup> *Id.* at 602.

<sup>23</sup> *Id.* at 604.

<sup>24</sup> *Id.* at 609-10 (Barkett, J., dissenting).

<sup>25</sup> 701 F. Supp. 2d 1236 [258 Ed. Law Rep. [596]] (M.D. Ala. 2010).

<sup>26</sup> *Id.* at 1238.

<sup>27</sup> *Id.* at 1242.

<sup>28</sup> *Id.* at 1244.

<sup>29</sup> *Brown v. Ramsey*, 121 F. Supp. 2d 911 [149 Ed. Law Rep. [392]] (E.D. Va. 2000). The court, noting that there was nothing to suggest that the teacher's actions were anything other than a disciplinary measure within the teacher's sound discretion, held that the restraint did not violate the student's substantive due process rights.

<sup>30</sup> *Heidemann v. Rother*, 84 F.3d 1021 (8<sup>th</sup> Cir. 1996).

<sup>31</sup> *Doe v. S & S Consolidated Indep. Sch. Dist.*, 149 F. Supp. 2d 274 [155 Ed. Law Rep. [370]] (E.D. Tex. 2001).

### Endnotes

\* Education Law Into Practice is a special section of the EDUCATION LAW REPORTER sponsored by the Education Law Association. The views expressed are those of the author and do not necessarily reflect the views of the publisher or the Education Law Association. Cite as 268 Ed. Law Rep. [1] (Aug. 4, 2011).

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<sup>1</sup> GAO, *SECLUSIONS AND RESTRAINTS, Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers*, Testimony Before the Committee on Education and Labor, House of Representatives, May 19, 2009 (GAO-09-719T). [www.gao.gov/highlights](http://www.gao.gov/highlights) (last visited, Nov. 20, 2009). Massachusetts is one state that has very strict regulations on the use of physical restraint in the public schools. Those regulations mandate school authorities to notify parents and file written reports with the commonwealth's Department of Education on every physical restraint that lasts longer than 20 minutes or that causes an injury to a student or staff member that requires medical intervention. These regulations also require training for all staff members in the school system's physical restraint policies and in-depth training in the use of physical restraint for designated staff members in each

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## Cyberbullying and Sexting

Given the fact that the technology of communication, particularly via devices such as smart phones and laptops, makes it easier for everyone to be in contact with others at all times, it is not surprising that students have devised unanticipated and unintended uses for technology in their daily lives. Many of these applications raise significant legal implications for school administrators and other educational leaders, especially since it is difficult to monitor and control all uses of communication technology by students. One of the more recent, but arguably most troublesome, misuses of technology involves sexting, an emerging form of cyberbullying, the practice of sending and/ or posting sexually explicit text messages and/or images via cell phones and other hand held devices. The consequences of sexting may be personal, but just as significantly may involve punishments covered by school rules and/ or the law.

This commentary explores the legal issues that sexting and other forms of cyberbullying present in a school setting. After reviewing the background on the phenomenon of cyberbullying and sexting and examining recent legal developments involving student sexting, the authors present recommendations for educational administrators as they develop policies and procedures designed to respond to the growing problem of student cyberbullying.

From *Cyberbullying and Sexting: Recommendations for School Policy* by Charles J. Russo, J.D., Ed. D., Allan G. Osborne, Jr., Ed.D., and Kelli Jo Arndt, Ph. D. Mr. Russo is Panzer Chair

in Education and Adjunct Professor of Law at the University of Dayton (Ohio). He is a past president of the Education Law Association. Mr. Osborne is Retired Principal, Snug Harbor Community School, Quincy, MA. He is a past president of the Education Law Association. Ms. Arndt is Assistant Professor and School Counseling Clinical Coordinator in the School of Education and Allied Professions at the University of Dayton.

## Response to Intervention

The professional literature concerning response to intervention (RTI) is extensive and is not limited to its use for identification of students with specific learning disability (SLD). However, it lacks a comprehensive and objective compilation of the pertinent legal sources, which are exclusive to SLD identification.

This commentary provides an annotated synthesis of the law specific to RTI in the context of eligibility for special education under the Individuals with Disabilities Education Act (IDEA) and corollary state statutes and administrative codes. "Law" in this context consists of legislation, regulations, case law, and—at the outermost—margin, agency interpretations. For each of the successive sources of law, the commentary provides the key points along with the specific citations.

From *RTI and the Law* by Perry A. Zirkel, Ph.D., J.D., LL.M. Mr. Zirkel is University Professor of Education and Law, Lehigh University, Bethlehem, PA. He is a past-president of the Education Law Association.

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*A Legal Primer on Students with Acquired Brain Injuries under the IDEA and Section 504/ADA* is the first of the two articles appearing in this edition of ELA notes. This offering is co-authored by Perry A. Zirkel, Ph.D., J.D., LL.M., and Caroline Tisot, a school psychologist with the Bucks County Intermediate Unit in Doylestown, Pennsylvania. The second article, *Restraint of Students in Schools*, is the product of a joint effort by Ralph D. Mawdsley, J.D., Ph.D., and Allan Osborne, Ed.D.

Professor Zirkel and Ms. Tisot provide a “two-part annotated outline present[ing] the federal legislative, regulatory and case law specific to students with acquired brain injuries.” In August of 2010, this tandem made a presentation to the Low Incidence Institute at the Nittany Lion Inn in State College, Pennsylvania on this topic. This presentation, *A Legal Primer on Students with Traumatic Brain Injury (TBI) and Other Acquired Brain Injury (ABI) Under the IDEA and Section 504/ADA*, is available at <http://tinyurl.com/ELAJan12-1>.

The National Dissemination Center for Children with Disabilities (NICHY) at <http://tinyurl.com/ELAJan12-2> offers a fact sheet containing information and resources for those interested in learning more about TBI. The U.S. Department of Health and Human Services Administration provides a PDF document entitled *Building Capacity of Educators to Serve Students with TBI: A Regional Team Approach* at <http://tinyurl.com/ELAJan12-3>.

Readers interested in information on the evaluation and provision of services to students challenged by TBI may wish to access the following -

- The Minnesota Department of Education – Division of Special Education’s 2004 publication

entitled *TBI Special Education Evaluation and Services for Students with Traumatic Brain Injury: A Manual for Minnesota Educators*. Available at <http://tinyurl.com/ELAJan12-4>.

- *Developing Functional Individual Education Plans (IEPs) for Students with Acquired Brain Injuries* by Ronald C. Savage, Ed.D. Available at <http://tinyurl.com/ELAJan12-5>.
- *Under Identification of Students with TBI for Special Education* – available from the Center on Brain Injury Research and Training (CBIRT) at <http://tinyurl.com/ELAJan12-6>.

In this issue’s second article, *Restraint of Students in Schools*, Drs. Mawdsley and Osborne examine “the challenges that students allegedly abused by school personnel face in suing school district personnel and their school board employers.” The article opens with a reference to the U.S. Government’s Accountability Office’s May 19, 2009, report to the U.S. House of Representatives Committee on Education. A PDF version of the full 62-page report may be accessed at <http://tinyurl.com/ELAJan12-7>. The Secretary of Education’s subsequent July 31, 2009, letter to Chief State School Officers encouraging each state to review their current policies and guidelines regarding the use of restraints and seclusion techniques in schools and, if appropriate, develop or revise them to ensure the safety of students, is available at <http://tinyurl.com/ELAJan12-8>.

In 2009, the Council of Parent Attorneys and Advocates also documented nearly 180 reports of abuse in school in *Unsafe in the Schoolhouse* (<http://tinyurl.com/ELAJan12-9>). The National Disability Rights Network’s report, *School is Not Supposed to Hurt:*

*An Investigative Report on Abusive Restraint and Seclusion in the Schools*, and follow-up report *School is Not Supposed to Hurt: Update on Progress in 2009 to Prevent and Reduce Restraint and Seclusion in Schools* are both available for download at <http://tinyurl.com/ELAJan12-10>.

*The Use of Physical Restraint Procedures in School Settings* provides policy recommendations of the Council for Children with Behavioral Disorders (CCBD) regarding the use of physical restraint procedures in schools. This document is available at <http://tinyurl.com/ELAJan12-11>.

The U.S. Department of Education’s February 2010 *Summary of Seclusion and Restraint Statutes, Regulations, Policies and Guidance by State and Territory: Information as Reported to the Regional Comprehensive Centers and Gathered from Other Sources* is available at <http://tinyurl.com/ELAJan12-12>.

The Association of University Centers on Disabilities (AUCD) at <http://tinyurl.com/ELAJan12-13> advocates for legislation that aims to reduce and prevent the use of restraint, seclusion and other aversive behavioral interventions for students with disabilities and increase the use of positive behavioral supports. The AUCD’s site affords access to information on legislation, resources, letters and related links. On April 6, 2011, Rep. George Miller (D-CA) introduced H.R. 1381, the *Keeping All Students Safe Act* to limit the harmful use of restraint and seclusion in schools. Readers may stay abreast on the status of this legislative initiative via <http://tinyurl.com/ELAJan12-14>.

It is the author’s hope that Internet resources identified in this column will serve as a useful supplement to the valuable information provided by our authors. ■

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## When Bullies Come to School: Legal and Practical Guidance

**Thursday, February 2, 2012 | 1:00 p.m.\* EST**

The latest studies and guidance on bullying and cyberbullying, focusing on the constitutional and practical issues involved in reventing, disciplining, and addressing bullying and cyberbullying.

**Presenters:**

- Lynn Rossi Scott, J.D.: Shareholder, Brackett, and Ellis, P.C., Fort Worth, TX
- Wayne Haglund, J.D.: Partner, Haglund Law Firm, Lufkin, TX

## Response to Intervention (RtI): Implementation and Legal Issues

**Thursday, February 9, 2012 | 4:00 p.m.\* EST**

This webinar will address the important issues of the appropriate identification of students with specific learning disabilities and the increased accountability for student achievement. RtI is an effective model of school reform growing in popularity that can be used to positively impact the achievement of many of the underachieving subgroups in the student population.

**Presenters:**

- Stanley L. Swartz, Ph.D.: Professor of Education, Department of Educational Leadership Curriculum, California State University, San Bernardino, CA
- Cathleen A. Geraghty-Jenkinson, Ph.D.: Lecturer in School Psychology, University of California, Riverside, CA

## Gun Control on College and University Campuses

**Thursday, February 23, 2012 | 2:00 p.m.\* EST**

In the Wake of *District of Columbia v. Heller* and *McDonald v. City of Chicago*, this webinar will devote special attention to the question of state preemption of local government (including states and universities) entering the field; state constitutional protections related to keeping and bearing arms; and the level of scrutiny this right enjoys under the Second Amendment and State Constitutional counterparts.

**Presenters:**

- Lewis M. Wasserman, J.D.: Associate Professor, Educational Leadership and Policy Studies, University of Texas at Arlington, Arlington, TX

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