STUDENT RESTRAINT AND SECLUSION: A LEGAL UPDATE

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WHAT DO THE STATUTES SAY?

A. IDEA does not directly address the use of restraint or seclusion as a disciplinary tool. While the statute requires "positive behavior interventions and strategies" at certain times, it does not prohibit the use of techniques that might be viewed as aversive.

B. Section 504 does not address the use of restraint or seclusion with students.

C. State laws frequently address these issues. There may be state laws that apply to all students, or state laws that apply to students with disabilities. Most states have abolished the use of corporal punishment for any student, while a minority of states still permit it. Many states have adopted state laws or regulations pertaining to techniques involving any form or isolation or physical restraint.

WHAT HAS OSEP SAID ABOUT RESTRAINT, SECLUSION, OR OTHER AVERSIVE TECHNIQUES?

Letter to Trader, 48 IDELR 47 (OSEP 2006)

In answering an advocate‟s concern about recently enacted New York regulations allowing the use of aversive behavioral interventions, OSEP concluded that the state regulations did not conflict with the IDEA. While both the IDEA and the Part B regulations require a student's IEP team to consider using positive behavior intervention supports and strategies when the student's behavior interferes with learning, neither the statute nor the regulations prohibit the use of aversive behavioral interventions. Key Quote:

> Thus, while the Act requires that an IEP Team consider the use of positive behavioral interventions and supports, and as such, emphasizes and encourages the use of such supports, it does not contain a flat prohibition on the use of aversive behavioral interventions. Whether to allow IEP Teams to consider the use of aversive behavioral interventions is a decision left to each State.

Letter to Anonymous, 50 IDELR 228 (OSEP 2008)

In this 2008 letter, OSEP repeated much of what it said in the 2006 Letter to Trader 48 IDELR 47 (OSEP 2006). OSEP advised that the IDEA does not expressly prohibit the use of physical restraints or other aversives on students with disabilities. However, the use of aversives may be limited by either state law or the provisions of a particular student‟s IEP. Key Quote:

> If Alaska law would permit the use of mechanical restraints or other aversive behavioral techniques for children with disabilities served under IDEA, the critical inquiry is whether the use of such restraints or techniques can be implemented consistent with the child's IEP and the requirement that IEP Teams consider the use of positive behavioral interventions and supports when the child's behavior impedes the child's learning or that of others.

Letter to Dodd, 55 IDELR 20 (OSEP 2009)

Secretary of Education Arne Duncan communicated to Senator Dodd in this letter several key principles identified by the Department of Education for incorporation into proposed legislation regarding the restraint and seclusion of students. Those principles included preserving the dignity of the student, never using restraint or aversive techniques as a disciplinary tool or as punishment, never using restraint in manner that restricts a child‟s ability to breathe, training for staff members, review and update of school policies and procedures, and providing for notice to parents. Duncan emphasized the Department‟s overriding concern for the safety of children undergoing such techniques.

Letter to Chief State School Officers, 54 IDELR 101 (OSEP 2009).

Secretary Duncan, following review of the abusive incidents reported by the Government Accountability Office (GAP) asked states to review their seclusion and restraint policies and to revise those policies as needed to ensure safety of students and teachers. Secretary Duncan applauded the use of PBIS in his home state of Illinois and offered the following for consideration by states:

> My home State of Illinois has what I believe to be one good approach, including both a strong focus upon Positive Behavior Intervention and Supports (PBIS) as well as State regulations that limit the use of seclusion and restraint under most circumstances (see http://www.isbe.state.il.us/rules/archive/pdfs/oneark.pdf). The State's requirements, which I found to be extremely helpful as chief executive officer of the Chicago Public Schools, were described in testimony at the hearing. Illinois prohibits the use of seclusion or restraint for the purpose of punishment or exclusion, and allows trained staff to restrain students only in narrow circumstances. The State allows the use of isolated time out or physical restraint only in situations when it is absolutely necessary to preserve the safety of self or others; includes rules that must be followed when these techniques are used; and requires documentation of each incident to be provided to parents within 24 hours. Several other States have also adopted effective seclusion and/or restraint policies, but there are many jurisdictions that have not, leaving students and teachers vulnerable.

Letter to Anonymous, 57 IDELR 49 (OSERS 2010)

Assistant Secretary Alexa Posny responded to an inquiry regarding the Department"s position regarding the use of seclusion and restraints with students with disabilities in public schools. Posny noted that "the Individuals with Disabilities Education Act (IDEA) promotes the use of positive behavioral interventions and supports to address behavior that impedes learning; neither the IDEA nor other federal laws specifically prohibit the use of seclusion and restraint techniques in schools." Further, Posny stated that a "child's unique needs are the basis for determining what behavioral interventions and supports or behavioral management strategies are appropriate for the child and what interventions, supports, and strategies are included in the child's IEP."

WHAT HAS OCR SAID ABOUT RESTRAINT, SECLUSION, OR OTHER AVERSIVE TECHNIQUES?

Actions upheld as nondiscriminatory:

Florence (SC) County No. 1 Sch. Dist. 352 IDELR 495 (OCR 1987)

Even though the IEP forbade the use of corporal punishment, OCR found no violation of Section 504 because the physical restraint used by teachers and aides was for the purpose of preventing the student from harming himself or others.

Ohio County (WV) Public Schools 16 IDELR 619 (OCR 1989)

OCR found that a teacher's decision to have the student use the toilet was a response to an emergency situation, and not an attempt to disregard the IEP, which had eliminated toilet training from the educational program. Nor was the force used to restrain the student on the toilet excessive and as such there was no violation of Section 504.

Wells-Ogunquit (ME) School Dist. No. 18 17 IDELR 495 (OCR 1990)

The use of a physical restraint to subdue a student during a violent outburst as provided for in his IEP was not disciplining a learning disabled student differently than other students due to his disability and the district was not in violation of Section 504.

Gateway (CA) Unified Sch. District 24 IDELR 80 (OCR 1995)

OCR concluded the district was in compliance with Section 504 and Title II of the ADA because it properly followed the student's IEP and allowed him to eat lunch with his friends if his behavior was under control. Additionally, the student's behavior modification plan provided for physical restraint and as such, the use of restraint in response to the student‟s representations to school officials that he was going to harm himself was also not a violation of Section 504 or Title II.

South Lyon (MI) Community Schools, 55 IDELR 108 (OCR 2010)

OCR found that the District‟s restraint of the student did not constitute discrimination. In support, OCR commented that the student was restrained only when he presented a threat to himself or others and that all staff members involved in restraint of the student had been properly trained. OCR noted that the daily reports and discipline reports provided detailed accounts of the instances when the student was restrained, and staff interviews with OCR corroborated the written reports describing the types of behavior the student engaged in that resulted in his being restrained. They described the student's behavior as aggressive, physically dangerous, and in several instances as resulting in actual injury to students, teachers, and paraeducators. OCR found it significant that when the episodes of restraint increased, the District re-evaluated the student and revised the student‟s IEP and BIP. OCR noted that although the student's initial IEP and BIP included a restraint provision, the revised IEP and BIP did not include the same provision for restraint per the complainant's request. However, the District's restraint guidelines permit restraint "if students pose a threat to themselves or others based on their behavior," as do the Michigan restraint standards. Thus, the continued use of restraints as a last resort to secure the safety of the student and other students after October 12 was not done pursuant to the student's IEP as a related service under Section 504 but as an emergency safety measure that is applicable to all students. OCR therefore found no evidence to substantiate the complaint of discrimination.

Norwood Public Schools, 57 IDELR 23 (OCR 2011)

OCR concluded that a district's documentation and fidelity to its internal time-out procedures proved that it did not discriminate against a Maryland teenager even though it placed him in a time-out room 85 times during a single school year. OCR observed that it was undisputed that the district treated the student differently than his classmates. However, there was a legitimate basis for the treatment that was reflected in the district's records, and bolstered by its compliance with its own policies. Documentation showed that the student repeatedly engaged in behavior, including threatening staff members, hitting students, and throwing objects, that under the district's behavior learning support program, warranted use of the timeout room. Based on our investigation we have determined that there is insufficient evidence that the District discriminated against the Student on the basis of disability with respect to the repeated timeouts, suspensions, and was not denied a FAPE.

Actions found to be discriminatory:

Portland (ME) School District, 352 IDELR 492 (OCR 1990)

In a rare intervention by OCR in an individual case justified by "extraordinary" conduct, a teacher who unilaterally decided to strap a profoundly retarded student into a chair without disciplinary action or IEP meeting violated the student's right to FAPE.

Oakland (CA) Unified School District, 20 IDELR 1338 (OCR 1990)

Since evaluations and assessments had determined that the behavior was related to his disability, taping the mouth of an 18-year-old student with mental retardation for excessive talking was to be a violation of the regulations of Section 504 and Title II of the ADA.

Springfield (IL) School District, 55 IDELR 206 (OCR 2010)
Student A was accused of assaulting an employee and was ultimately expelled for this offense. Because an expulsion is considered a significant change in placement under Section 504, the District was required prior to imposing the expulsion to conduct a manifestation determination to ascertain whether Student A's misconduct was related to his disability. The District did not do so in this case; rather than convening a team of knowledgeable people to conduct a manifestation determination prior to expelling Student A, the Principal unilaterally determined that Student A's misconduct was not related to his disability and decided no manifestation determination was required.

Accordingly, OCR determined that the District failed to implement proper evaluation and placement procedures in December 2009, when it expelled Student A without conducting a manifestation determination meeting, in violation of the Section 504 regulation, at 34 C.F.R. § 104.35, and consequently also failed to provide Student A with a FAPE, as required by 34 C.F.R. § 104.33; when it failed to adhere to the requirements of 34 C.F.R. § 104.35.

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WHAT HAVE THE COURT CASES SAID ABOUT RESTRAINT, SECLUSION, OR OTHER AVERSIVE TECHNIQUES?

Hayes v. Unified Sch. Dist. No. 377 669 F. Supp. 1519 (D. Kan. 1987)

Finding that the amendment is applicable only to convicted criminals, the court found that parents could not bring an Eighth Amendment challenge to the imposition of time-out and therefore defendants' motion for summary judgment was granted on that issue.

Metzger v. Osbeck, 841 F.2d 518 (3d Cir. 1988)

The suit alleged that the teacher/coach put his arm around the neck and shoulders of a student while verbally admonishing him over the use of foul language. The suit alleged that the student had to stand on his toes due to the pressure on his chin, that he lost consciousness and fell face down onto the floor. The teacher/coach denied any ill intent, but the court ruled that the jury would have to decide. Key Quotes:

> A decision to discipline a student, if accomplished through excessive force and appreciable physical pain, may constitute an invasion of the child"s Fifth Amendment liberty interest in his personal security and a violation of the substantive due process prohibited by the Fourteenth Amendment.
>
> Even if physical reinforcement of a teacher"s verbal admonitions is pedagogically appropriate and condoned by school disciplinary policy, we believe a reasonable jury could find that the restraints employed b y Osbeck, if responsible for the student"s loss of consciousness, exceeded the degree of force needed to correct Metzger"s alleged breach of discipline and the substantial injuries sustained by Metzger served no legitimate disciplinary purpose. If the jury is persuaded that Osbeck employed those restraints with the intent to cause harm, Osbeck will be subject to liability for crossing the "constitutional line" separating a common law tort from a deprivation of substantive due process.

Hassan v. Lubbock ISD, 55 F.3d 1075 (5th Cir. 1995)

Hassan was a 6th grader on a field trip with his classmates to the local juvenile detention center. Due to persistent misbehavior while on the field trip, school officials locked Hassan in an "intake room" for about 50 minutes. The intake room had a bed and a toilet but was otherwise bare, with a metal door that had a glass partition. Detention center employees monitored Hassan while he was locked up and the teacher came by to check on him. At the conclusion of the tour, the other students were escorted past the intake room and were told to "look at Hassan." Back at school, Hassan was required to tell the class about his behavior, the punishment, and what he had learned from the experience. The Circuit Court held that school officials and center employees were entitled to qualified immunity from personal liability. Among other reasons, the court concluded that there was no constitutional violation:

> We perceive no constitutional violation inherent in the detention of Hassan in the Center‟s intake room. The room was relatively large with 80 square feet of space and was furnished with a toilet and a bed and had a glass partition in the door. Although Hassan could not leave the room, he was not otherwise physically restrained. He remained under adult supervision and protection.
> We also conclude that Hassan‟s punishment was within the range of discretion afforded school officials and that the punishment bore a rational relationship to the goal of providing a valuable and safe educational experience for the other 102 children.
>
> Hassan insists, and we do not disagree, that more appropriate means of punishment were available to the school officials. This argument, however, lacks persuasive force. That a better punishment may have been available does not establish that the punishment administered was unconstitutional.

Heidemann v. Rother 24 IDELR 167; 84 F.3d 1021 (8th Cir. 1996)

The use of a blanket wrapping technique upon a 9-year-old with severe mental and physical disabilities was not an unreasonable bodily restraint which violated the student's constitutional rights to substantive and procedural due process. Likewise since the employees implementing the technique were following the recommendations of a licensed professional therapist the defendants in the Section 1983 action were all entitled to qualified immunity. A Section 504 claim was struck down for similar reasons.

"Use of an aversive, restrictive technique should be considered only after a documented showing that less restrictive techniques are ineffective. At that point, the aversive method should be used only in conjunction with a non-restrictive method of addressing the problem behaviors."

The parent in this case produced expert testimony to establish that the technique as used was inappropriate. A licensed Physical Therapist, serving as an expert for the parents in this case stated as follows:

> *The practice of wrapping a child in a blanket to promote calm and relaxation is not a widely used practice, and should only be performed in a certain fashion and under appropriate circumstances. Since I have become licensed as a physical therapist, I have attempted its use on only 2 or 3 children, each for a period of a month or two.*
>
> *The use of a blanket to provide relaxation is not a therapeutic technique, but is used to prepare the child for therapy. When used, the blanket should be folded over the child so that it enfolds them, and should be left on the child for a maximum of ten (10) minutes. The purpose of this method is to decrease excessive external stimuli so that the child can participate in and receive therapy and instruction. Leaving the blanket on the child for more than a ten (10) minutes period is inappropriate because the presence of the blanket ceases to serve its purpose once the child is accustomed to it.*

> *The standard course of practice in this field for inducing relaxation prior to therapy would also include the use of other methods in lieu of blanket wrapping. For example, excessive external stimuli can be relieved by redirecting the child, or by removing the child to a quieter environment.*
>
> *In my opinion, wrapping a child in a blanket so tightly that they cannot move, and leaving the child so wrapped for an hour would constitute restraint, and would clearly fall outside of the scope of the appropriate use of the method, that being blanket wrapping.*

Another expert for the parents said this:

> *Based upon my review ... it is my opinion that the blanket wrapping technique was used on Cherry Heidemann as a behavior management tool. The technique was used in order to produce physical restraint to address behaviors such a kicking, hitting and biting. As such, this technique would be recognized by behavior analysts as an aversive behavior management technique.*
>
> *Prior to the use of an aversive behavior management tool, it is necessary that data be collected as a baseline on the behaviors in question. It is necessary to use these data to first develop behavior management programming using non-restrictive techniques. Data must be collected to determine the effectiveness of those techniques.*
> *Use of an aversive, restrictive technique should be considered only after a documented showing that less restrictive techniques are ineffective. At that point, the aversive method should be used only in conjunction with a non-restrictive method of addressing the problem behaviors.*
>
> *Aversive behavior management techniques such as the one used on Cherry Heidemann must be utilized appropriately and with the aforementioned safeguards. Aversive methods are subject to abuse and misuse, and when used inappropriately or for convenience of staff persons prove harmful and detrimental to the health and well being of the child subjected to such treatment.*

Faced with this evidence, the court acknowledged that this was an area where professional judgments may differ, but that was not enough for the court to rule in favor of the parents:

> Although plaintiffs have submitted affidavits showing that other professionals in the field would not have recommended the use of blanket wrapping in this particular case or in the manner applied in this case,[6] we hold that plaintiffs' submission of evidence on summary judgment was insufficient to create a genuine dispute as to whether the blanket wrapping treatment represented *a substantial departure from accepted professional judgment, practice, or standards* in the care and treatment of Cherry. Accordingly, defendant Joy is protected by qualified immunity as a matter of law. A decision to the contrary, we

> believe, „would restrict unnecessarily the exercise of professional judgment as to the needs‟ of special students such as Cherry. (Emphasis added).

Brown v. Ramsey, 121 F.Supp.2d 911 (E.D.Va. 2000)

Teachers obtained a summary judgment in their favor in a case involving the use of a "basket hold" on an elementary age student with Asperger‟s Syndrome.

> While the court appreciates the sincerity with which the Browns have pursued a remedy for the alleged abuse suffered by Daniel, like other courts that have considered these issues, there is nothing before the Court to suggest that the alleged actions of Ramsey and Hart were anything other than a disciplinary measure within the sound discretion of the teacher.

M.H. v. Bristol Board of Education, 169 F.Supp.2d 21 (D.C. Conn. 2001)

Suit was brought by the parents of a student with a severe cognitive disability alleging that the use of physical and mechanical restraints violated IDEA, the constitution and state law. The court denied the school district‟s motion for summary judgment. Key Quote:

> Specifically, the court is without facts concerning the circumstances of when physical and mechanical restraint was necessary for the safety of M.H. or others, whether each of the individual defendants followed the prescribed rules for using restraints, and whether the defendants received adequate training to use such restraints in an appropriate manner. In addition, the defendants have not provided the court with sufficient information about the individual defendants‟ level of expertise and experience for the court to conclude that they were each "competent, whether by education, training, or experience, to make the particular decision [regarding M.H.]." Youngberg v. Romeo, 102 S.Ct. 2452 (1982).

CJN by SKN v. Minneapolis Pub. Schs. 38 IDELR 208 (8th Cir. 2003)

In upholding a lower court decision that a student with lesions in his brain and a long history of psychiatric illness was not denied FAPE in part because of the increasing use of restraints in response to his aggressive behavior, the court refused to create a rule prohibiting the use of physical restraints and time-outs because the proper use of such techniques "may help prevent bad behavior from escalating to a level where a suspension is required. . ."

Doe v. State of Hawaii Department of Education, 334 F.3d 906 (9th Cir. 2003)

The vice-principal taped the student‟s head to a tree for disciplinary purposes. The court held that the vice-principal was not entitled to qualified immunity in a suit alleging constitutional violations.

> At the time that Keala taped him to the tree, Doe‟s only offense had been "horsing around" and refusing to stand still. There is no indication that Doe was fighting or

> that he posed a danger to other students. Doe was eight years old. Taping his head to a tree for five minutes was so intrusive that a fifth grader observed that it was inappropriate. There is sufficient evidence for a fact finder to conclude that Keala‟s conduct was objectively unreasonable in violation of the 4th Amendment.

P.T. v. Jefferson County Bd. Of Educ. 46 IDELR 3 (8th Cir. 2006) *unpublished decision*

An Alabama district appropriately considered the safety of the students on the school bus when it decided to go forward with the use of a safety harness on an 11-year-old nonverbal student with autism and as such did not deny the student FAPE.

Couture v. Albuquerque Public Schools, 50 IDELR 183; 535 F.3d 1243 (10th Cir. 2008)

The court granted qualified immunity to individual defendants who were sued over constitutional claims arising from the use of time out and various physical punishments holding that, as a matter of law, the actions of the educators were reasonable and the due process interests of the student were not implicated. Key Quotes:

> The educators‟ response was particularly reasonable given that the timeouts we expressly prescribed by M.C.‟s IEP as a mechanism to teach him behavioral control. The IEP, which was developed by educational specialists in conjunction with M.C.‟s mother, and to which she agreed in writing, sets forth educational and behavioral methods that M.C.‟s classroom teachers were required to follow. Neglecting to follow the IEP—including failure to use the prescribed timeouts—could have exposed the teachers to liability.
>
> While the timeouts were not as effective as the teachers hoped, the continued employment of timeouts over a two-month period was reasonable. If we do not allow teachers to rely on a plan specifically approved by the student‟s parents and which they are statutorily required to follow, we will put teachers in an impossible position—exposed to litigation no matter what they do.

C.N. v. Willmar Public Schools, ISD No. 347, 53 IDELR 251 (8th Cir. 2010).

The 8th Circuit Court of Appeals upheld the decision of the District Court, finding the school district was not liable for the teacher‟s conduct toward the student. In so doing, the Court stated:

> We have held that an authorized professional‟s treatment of a disabled person within the state‟s care is reasonable if his or her actions are "not a *substantial departure* from accepted professional judgment, practice, or standards." *Heidemann v. Rother*, 84 F. 3d 1021, 1030 (8th Cir. 1996). Here, C.N.‟s IEP authorized the use of restraints and seclusion and we agree with the district court that the IEP "set the standard for accepted practice." And although J.N. contends she objected to the use of those methods, she did not request a hearing to challenge those methods while C.N. attended school in the District. Because C.N.‟s IEP authorized such methods, Van Der Heiden‟s use of those and similar

> methods like the thinking desk, even if overzealous at times and not recommended by Ardhoff, was not a substantial departure from accepted judgment, practice or standards and was not unreasonable in the constitutional sense.

Waukee Community School District v. Douglas and Eva L., 51 IDELR 15 (S.D.La. 2008)

The court affirmed an ALJ decision in favor of the parents, holding that the IEP denied FAPE and the placement was not in the LRE. The court acknowledged that a BIP need not be reduced to writing and that there are no substantive standards for a BIP in the law. However, the court found that the substantive problems with the behavioral plan, as set out by the ALJ, rendered the IEP inappropriate under the Rowley standard. Much of the case deals with excessive amounts of time in time-out and excessive use of restraint. The court also concluded that the district made a procedural error by failing to provide prior written notice that it was using restraint on a regular basis. However, the absence of regular education teachers at two IEP Team meetings was harmless error. With regard to LRE, the court found that the district erroneously applied a standard of inclusion based on the student‟s ability to perform "on par" with non-disabled peers, without first taking into account what supplementary aids and services might be helpful. Key Quote (with regard to the restraint issue):

> The Appellants argue that a prior written notice is not required before the implementation of every modification in a teaching strategy or intervention. While this may be true, a significant change to the implementation of a behavioral modification strategy, such as the continued use of restraint to effectuate a planned intervention, constitutes a change to the provision of a free appropriate public education to Isabel for which notice is required.

O.H by Ortega v. Volusia County School Board 50 IDELR 255 (M.D. Fla., 2008)

Allegations that a student with autism was confined to a dark bathroom as punishment for off-task behaviors were enough to support a Section 1983 claim against a special education teacher. Finding that summary judgment was premature at this juncture, the District Court concluded that the parent pleaded a violation of the student's due process rights. In determining whether corporal punishment "shocks the conscience" and violates a student's due process rights, District Courts within the 11th U.S. Circuit Court of Appeals consider two factors. The first is whether the amount of force used was "objectively ... obviously excessive." The second factor is whether the person inflicting the punishment subjectively intended to use excessive force when it was foreseeable that serious bodily injury could result. In considering the excessiveness factor, the court acknowledged that the teacher needed to redirect the student's off-task behaviors but that the teacher's alleged actions of strapping the student into a classmate's wheelchair and confining him to a dark bathroom may have been out of proportion to his conduct. Although the extent of the student‟s injuries could not be accurately discerned because of the student‟s impaired communication abilities, the court noted that the student toppled the wheelchair in an attempt to free himself, and thus concluded that the risk of serious bodily harm was reasonably foreseeable. The court denied the teacher's motion to dismiss, determining that the parent established both the use of "obviously excessive" force and a subjective intent to use excessive force.

Damian J. v. School District Of Philadelphia 49 IDELR 161 (E.D. Penn. 2008)

Although a Pennsylvania district did not violate the IDEA by restraining a 12-year-old boy during behavioral outbursts, it did deny the student FAPE when it failed to implement his IEP. Although district staffers had to restrain the student three times due to behavioral outbursts it was the district's failure to implement substantial portions of the student's IEP that amounted to a denial of FAPE. The court concluded that by failing to assign a qualified teacher to the student's emotional support the district did deny the student FAPE. The court pointed out that the teacher did not have a degree in education, was not certified or licensed to teach in any state, and had no prior experience teaching a special education class. Nonetheless, the court observed, the district assigned her to teach students who had significant emotional and behavioral problems. The court noted that the district provided little training to the teacher. Not only was the teacher unqualified to instruct children with emotional disturbances but she had no training on IEP implementation. The court added that the teacher did not provide daily progress reports, as she believed it would be unfair to single the student out. Moreover, the teacher continued implementing an old IEP after the district developed a new IEP to address the student's ongoing behavioral problems.

W.E.T. by Tabb v. Mitchell 49 IDELR 130 (M.D.N.C. 2008)

Although North Carolina law permits educators to use reasonable force to restrain or correct students and maintain order, a therapist could not persuade a District Court to dismiss a Section 1983 action brought by a 10-year-old student. The court concluded that the student, who claimed that he suffered mental and emotional injuries as a result of the therapist taping his mouth shut, sufficiently pleaded a violation of his constitutional rights. The court based its decision on the nature of the student's allegations. According to the student, the therapist "sharply rebuked" the student for talking to a classmate, ripped a piece of masking tape off a roll, and forcefully placed the tape over the student's mouth. The student, who had asthma and cerebral palsy, maintained that he experienced breathing problems as a result of the tape. When the student tried to speak to the therapist through the tape, the therapist purportedly ripped the tape from his mouth. Noting that students have a long-established right to be free from unreasonable restraint and mistreatment, the court determined that a reasonable educator would have known that forcefully taping the mouth of a child with asthma amounted to a constitutional violation. As such, the therapist could not use the qualified immunity doctrine to shield herself from liability. Still, the student would need to prove his allegations in order to obtain relief.

C.B. v. Sonora School District, 691 F. Supp.2d 1123 (E.D. CA 2009)

A federal district court „denied without prejudice" the Defendant"s motion to dismiss on the ground of qualified immunity and order the Plaintiff to file an amended complaint setting forth the specific facts regarding handcuffing upon which he relies in contending that he was subjected to excessive force in violation of his constitutional rights. There, C.B. was threatened by a teacher did if he did not do as she instructed, she would call the police. The police, responding to a report of an "out of control juvenile", found eleven year old C.B. not acting in a disruptive manner but sitting quietly on a bench with his head down. Despite this fact, the police took C.B. into custody, placed him handcuffed in a police car, and drove C.B. to Jamestown, California.

This caused extreme emotional distress to C.B. including a regression in progress previously made in treating his mood disorder and ADHD.

King v. Pioneer Reg. Educ. Service Agency, 53 IDELR 196 (Ga. Ct. App. 2009), *reconsideration denied* (Dec. 10, 2009), *cert. denied*, 110 LRP 23970 (Ga. 2010), *cert. denied*, 110 LRP 63973 (U.S. 2010)

The United States Supreme Court denied the parents‟ petition for certiorari, thereby upholding a Georgia Court of Appeals‟ decision that the service agency did not have an affirmative duty to prevent the student from harming himself. In that case, the Court ruled that a school district was not liable for the death of a special education student who committed suicide after being placed in a "time-out"/"seclusion" room by school officials. When J.K. arrived at school on the day of death, he was given a length of rope to hold up his pants because he had forgotten his belt. Later J.K. was locked in the seclusion room after he exhibited threatening behavior toward other students. While in the room, he used the rope to hang himself. The parents sued PRESA under Section 1983. The suit alleged that PRESA failed to adequately train employees and failed to maintain adequate policies and procedures regarding: (1) the use and supervision of the seclusion room; (2) prevention of suicide by students; and (3) the supervision and handling of students with behavioral disorders such as those exhibited by Jonathan. According to their claim, these failures amounted to deliberate indifference to and deprivation of his constitutional rights under the Fourteenth Amendment‟s Due Process Clause.

The Court found that the school officials were not liable as they did not exhibit "deliberate indifference" to the student. Key quote:

> Here, there is no evidence that the two Alpine employees who were responsible for putting Jonathan in the time-out room (Jackson and Trotter) on the day that he committed suicide acted with deliberate indifference. Both Trotter, who was working only his second day as a substitute paraprofessional at Alpine, and Jackson testified that they were not made aware by other staff that Jonathan had ever threatened to harm himself and did not know of any reason why he would do so. In fact, the Kings acknowledge that neither Jackson nor Trotter had been made aware of the alleged suicidal threats that Jonathan had made while confined to the time-out room a few weeks prior to his death. Thus, in sending Jonathan to the time-out room, neither Jackson nor Trotter deliberately disregarded a strong likelihood that Jonathan would harm himself (citation omitted). Accordingly, even if we were to conclude that Jonathan‟s confinement created an affirmative duty for Pioneer RESA to protect him from harming himself, the Kings have not demonstrated that the two school officials actually responsible for that confinement deprived Jonathan of his substantive due process rights.

D.D. v. Chilton County Board of Educ., 54 IDELR 157 (M.D. Ala. 2010)

A federal district court found that an Alabama teacher did not violate the 14th Amendment rights of a four year old child with a Pervasive Developmental Disorder, ADHD, and a mood disorder when the teacher strapped the student into a Rifton chair and left the child in the hallway outside

of the classroom for a brief time. The student had kicked and hit the teacher and the teacher‟s aide. Key quote:

> Applying 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. Therefore, the court concludes that the facts, viewed in a light most favorable to the non-movant, did not shock the conscience in a constitutional sense.

J.D.P. v. Cherokee County, Ga., School Dist., 55 IDELR 44 (N.D. Ga. 2010)

The parent of a twelve year old student with autism and cognitive disabilities could not establish that school personnel discriminated against the student on the basis of disability when the staff restrained the student during an after school care program. Key quote:

> The fact that these individuals did not utilize all of the specific techniques identified in J.D.P.'s BIP, 504 plans or the Pisor plan or reacted differently from how McCullough testified he would have reacted is of no moment, as there is nothing in the evidence indicating that their method of restraint harmed J.D.P. in any way or was inconsistent with their professional training. Further, the undisputed evidence, including McCullough's own testimony, demonstrates that when J.D.P. was hitting, kicking, or presenting a risk of running away it was necessary to restrain him. Additionally, Dr. Trapani testified that even if the proper restraint technique of the "backwards two-man carry" had been implemented by CCSD employees, there was no guarantee that J.D.P. would have reacted any differently that day. She testified that she had observed J.D.P. "lash out" even when the appropriate technique was followed to the letter and that the potential of J.D.P. lashing out was omnipresent. This testimony is further bolstered by the fact that Dr. Fisher of the Marcus Institute had suggested, and Martin Pope approved of, the use of a "blue room" to seclude J.D.P. in those instances in which he was unmanageable or was putting himself or other children in danger. Presumably, the Marcus Institute and Martin Pope would not have approved of the use of such a protocol if J.D.P. was at all times compliant with other, less intrusive behavior interventions used when he was becoming aggressive.
>
> The record shows that even though these individuals had received no specific training on J.D.P., they utilized many of the techniques identified in his 504 plan. Further, the undisputed evidence shows that even if CCSD had trained all of the participants in the November 18, 2003 incident on all of the specifics regarding

> J.D.P. and the suggested behavior interventions, there was no guarantee that such training would have prevented J.D.P. from reacting aggressively with this staff. The staff made reasoned professional judgments, reacted in a way to minimize the harm to J.D.P., themselves, and others, and did so in accordance with training that they had received.
>
> Finally -- and significantly -- Defendants have demonstrated that Plaintiffs have not adduced any evidence indicating that J.D.P. was actually harmed as a result of the November 18, 2003 incident. McCullough testified that he did not notice any regression in J.D.P.'s behavior after the incident. Additionally, behavior data from the Marcus Institute does not show any regression in J.D.P.'s behavior in the following months. Plaintiffs have not provided any evidence to contradict McCullough's testimony or the Marcus Institute's data. Consequently, Plaintiffs have failed to demonstrate that J.D.P. suffered any harm as a result of the November 18, 2003 incident.
>
> The Court thus finds that Plaintiffs have failed to produce any evidence demonstrating that the CCSD staff inappropriately responded to J.D.P.'s behavior on November 18, 2003, that their response was due to a lack of training, or that J.D.P. was harmed in any way. Accordingly, Defendants are entitled to summary judgment with respect to these issues.

W.A. v. Patterson Joint Unified School Dist., 55 IDELR 227 (E.D. Cal. 2010)

A federal district court held that a case could proceed against two school employees who restrained a student with autism at school. The student reportedly was following a teacher and attempting to kick and hit the teacher when the employees implemented a prone restraint of the student. The parents argued that the prone restraint violated the child‟s rights under the Fourth Amendment. In response, the employees argued that they were entitled to immunity from the claims and sought to have the case against them dismissed; however, the court found that the employees failed to establish that the use of restraint was reasonable under the circumstances. The court noted that the "lack of details" surrounding the restraint made the decision difficult and allowed the case to proceed.

V.W. ex rel. Wybrow v. DaVinci Academy of Science and the Arts, 2011 WL 4001150 (N.D. UT 2011)

The court concluded that V.W. had presented sufficient evidence from which a finder of fact could find a constitutional violation. There, V.W. was suspected of being a part of a drug transaction which resulted in the following: (1) the school‟s search of V.W.‟s locker prior to pulling her out of class; (2) the search of V.W.‟s shoes and socks; (3) the strip search and inspection of V.W.‟s bra; (4) the second search of V.W.‟s locker; and (5) the search of V.W.‟s backpack.

The key question was whether the seizure was reasonably related in scope. The original seizure, which began as an investigation into a possible drug deal, bore no fruit. Thus, by the time V.W.

was taken to the office, the school was no longer concerned that V.W. would try to get rid of any drugs or other contrabands but instead was attempting to prevent V.W. from talking to other students. This seizure, which lasted two hours, included V.W. not being allowed to use the restroom and resulting in her having to urinate in a garbage can in front of office personnel and a male student. A federal district court held that a finder of fact could conclude that a seizure was unreasonable under the circumstances, considering the reasoning behind the detention, the fact that the search of V.W. and her possessions turned up no contraband, and given V.W."s young age and gender.

Donlow v. Garfield Park Academy, 54 IDELR 170 (D.C. N.J. 2010).

A former student of a therapeutic school for students with disabilities sought injunctive relief prohibiting the school from using time out rooms while the student"s constitutional claims were being litigated. Finding that the student was no longer enrolled at the school, and thus it was highly unlikely that the student would suffer irreparable harm if the court did not issue the requested order, the injunction was denied.

M.G. by L.G. and J.G. v. Caldwell-West Caldwell Bd. of Educ., 57 IDELR 11 (D.C N.J. 2011)

A federal district court held that teacher's use of restraint on a 6-year-old with autism who was aggressive in class did not amount to excessive force within the meaning of the 14th Amendment. The court concluded the teacher's efforts to prevent the student with autism from hitting others and fleeing class were no more than necessary to achieve a legitimate pedagogical interest. When other interventions were unsuccessful, the teacher began to restrain the student using a "basket hold." She would also make the student sit down and touch his shoulders until he became calm. Key Quote:

> "DeMello (teacher) never used any physical restraints on MG, nor did she ever hit or spank MG. Rather, she held him in a bear hug and put her hands on his shoulders. Because MG repeatedly endangered himself and other students by running around the room and hitting and biting, the force DeMello used was no greater than necessary."

WHAT DOES COMMON SENSE TELL US?

A. Courts are reluctant to "constitutionalize" these matters, and will do so only when the fact situation is pretty bad.

B. There is a great deal of public interest in this issue and we are likely to see more and more restrictions on school authority imposed by state and/or federal lawmakers.

C. There is a substantive difference between the use of REASONABLE PHYSICAL FORCE in an EMERGENCY and the REGULAR or PLANNED use of techniques DESIGNED TO CAUSE PAIN, DISCOMFORT or EMBARRASSMENT in an effort to modify behavior.

D. Training of staff is critical. Communication with the parents is critical. Documentation of incidents where physical restraint was deemed necessary may be required by state law. If not, it is a good idea anyway.

E. Let‟s not forget one more factor: The Paul D. Coverdell Teacher Protection Act of 2001, 20 U.S.C. 6731 et. seq. This federal law is intended, "to provide teachers, principals, and other school professionals the tools they need to undertake reasonable actions to maintain order, discipline, and an appropriate educational environment."

   The Act states that a teacher that educates shall not be liable for harm caused by an act or omission of the educator on behalf of the school if 1) the educator was acting within the scope of employment; 2) the educator acted in conformity with federal, state and local laws in an effort to "control, discipline, expel, or suspend a student or maintain order or control in the classroom or school;" 3) the educator was appropriately licensed or authorized as required; 4) the harm caused was not due to willful or criminal misconduct, gross negligence, reckless indifference to the rights or safety of the individual harmed; and 5) the harm was not caused by the operation of a motor vehicle.

WHERE DO WE GO FROM HERE?

- Be aware of state laws and regulations. States are continuing to draft, implement and update laws and regulations in response to this issue. In February of 2010, the Department of Education published a 224 page report on the issue that can be found at http://www2.ed.gov/policy/seclusion/seclusion-state-summary.html.

- Implement state laws/regulations in operating guidelines in your school district. Make training mandatory. Only trained individuals should be allowed to implement restraint. Provide quality training for all staff members.

- Document all training efforts, including maintaining a copy of all training materials.

- Conduct a self audit. What patterns, if any, can be identified from a review of the District‟s restraint documentation? Do reports of restraint confirm the need for additional training?

- Collaboration with parents is important. Parents should be notified of the District‟s policies governing the use of restraint and seclusion. Parents should be notified immediately following the restraint of their student.

- Continued restraint of a student can be indicative of inappropriate programming or placement. The IEP Team should review carefully reports of restraint or seclusion.

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