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Documentation Imperative When Using Restraints

***W.A. by S.A. and J.A. v. Patterson Joint Unified School District*, 57 IDELR 38 (E.D. Cal. 2011).**

A grade school student with a disability was restrained by the teachers at a school in California on several occasions. According to the parents of that student, the restraints used were inappropriate and violated the student's 4th Amendment right to be free from unreasonable seizures. Therefore, the parents filed a Section 1983 claim against the employees of the school. The Court granted summary judgment in favor of the employees, citing that each incident of restraint was reasonable under the circumstances.

The student restrained in this case was a student with autism. The District stated that the only time the student was physically restrained was when it was necessary in order to prevent harm to others within the classroom. The record showed that the teachers only restrained the student after he started hitting, kicking, and swatting staff members and classmates. The type of restraint used most often was the "prone" restraint, which involved pinning the student to the floor. The teachers were trained in using that restraint and because of the strength of the student, the Court agreed that it was the appropriate restraint to be used. Further, the teachers helped their case by documenting the type of restraint used, the duration of the restraint, and the events that led to the use of the restraint in each situation.

The Court stated that because the restraints were being used not only to protect the staff members, but also to protect other students in the classroom, the teachers did not violate the student's constitutional rights.

How This Affects Your District:

Not every student with a disability will need to be restrained. However, if a student has a disability that could cause the student to become violent and risk harm to other employees and students, then it is appropriate for employees to be ready to restrain that student.

When restraints are appropriate, it is important for the district to have policies for when and how to use restraints. These policies not only protect students from inappropriate restraints, they protect staff who properly administer restraints and they aid in the imposition of discipline against staff members who do not properly administer restraints. It is strongly recommended that every school building where students attend who have a history of needing to be restrained have a team of trained staff members available to assist when a restraint may be required. This training should be ongoing – it is not appropriate for a staff member to be trained once and to never receive refresher training. This training should also include de-escalation techniques aimed at avoiding the need for a restraint to begin with. In this case a "prone" restraint was used, which is a highly restrictive restraint. Former Governor Strickland issued an executive order strictly forbidding the use of prone restraints because of the number of fatalities that have resulted from such restraints. Most national training programs prohibit the use of prone restraints. Even with proper policies and training, it is critical that staff understand that a restraint is only to be used as a last resort, and only in cases where a student is endangering himself or others.

The Court stated that this case was decided in large part on the district's

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Documentation Imperative When Using Restraints, Cont.

documentation of each incident. Documentation is important because it gives the parents and the Court, when necessary, an idea of what was happening to cause the restraint and how restrictive that restraint was. By documenting all restraint activities a district can minimize its liability for allegations of wrongful restraint.

So, when a district allows the use of restraints the two most important procedures that should be followed is to: (1) train the employees on how to appropriately use the restraint; and (2) train employees to document each occurrence. This documentation should include the duration of the restraint, type of restraint, and the events that led up to the use of the restraint.

If a particular student has been restrained it is important that the parents be contacted to inform them of the use of a restraint. It is also recommended that the child's IEP or 504 team consider the development of a functional behavioral assessment ("FBA") and behavior intervention plan ("BIP"). While these documents are not legally required until a child's placement has been changed for disciplinary reasons, they should be proactively developed for children who are being restrained to ensure that the school has done all it can to avoid the need for restraints. It may also be appropriate, depending on the specific facts of the case, for the team to propose a change of placement to a more restrictive environment where restraints might not be required as often. If the parent refuses such a change of placement the proposal should be documented in a prior written notice.

Election Date Changes According to HB 318

House Bill 318 set up an election calendar for 2012 with two separate primary dates. Therefore, there will be three elections in 2012, as follows:

March 6 (primary)
Ohio General Assembly
U.S. Senate

June 12 (primary)
U.S. House of Representatives
U.S. President

November 6
General Election

While the special election in August is eliminated, the Bill provides that political subdivisions may place a question or issue on the June ballot for consideration. In short, the opportunities to place a bond issue or levy on the ballot are in March, June, and November.

If you intend to run a March 2012 issue, your Board will need to take action at some point in November.

Prevention Plan Key to Avoiding Liability For Bullying

***Doe v. Big Walnut Local School District Board of Education*, 57 IDELR 74 (S.D. Ohio 2011).**

An Ohio student with a cognitive disability was repeatedly harassed by students at his school. The U.S. District Court for the Southern District of Ohio held that the parents of that student could not hold the district or its employees responsible for that harassment when the district took appropriate and reasonable steps to prevent the harassment.

In this case, the district developed a safety plan that reduced the student's interaction with the problem students. This plan adjusted the problem students' schedules to reduce their contact with the harassed student, allowed the student to leave class early to lessen interaction, and assigned an aide to monitor the student outside the classroom. The parents argued that the district was indifferent to the student's issues with the harassers, but the Court pointed to the safety plan to demonstrate that the district was not at all indifferent.

Additionally, the Court stated that districts should be prepared to investigate all reports of harassment, inform parents of any investigation's outcome, and take action to prevent bullying or harassment. In this case, the district took all of the steps necessary to prevent harm to the student, and therefore, could not be held liable for any further harassment. In order to properly bring a claim, the Court noted that the parents would have to prove that the district was deliberately indifferent to the plight of their son. Since that was not the case, the claim failed.

How This Affects Your District:

The Court noted that there is no constitutional duty on the district's part to protect students from the actions of schoolmates. This is a particularly important concept since recently there have been many cases dealing with bullying and harassment on and off school property. The Court did say a district could have

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Prevention Plan Key to Avoiding Liability for Bullying, Cont.

liability when a duty is established by showing that the district employees knowingly placed a student in harm's way.

With that knowledge, districts should take reasonable actions to prevent harm to a student when the district or its employees are aware that harassment or bullying may be taking place. Steps should be taken to decrease the interactions between harassers and the students they are harassing, because if a Court finds that a district was indifferent to harassment the district can then become liable for any harm that comes to the student being harassed or bullied.

In Ohio, R.C. 3313.666 requires each district to have a policy prohibiting harassment. So, employees of the district should be aware of the policy and how to use it in order to properly prevent harassment and bullying.

Tax Treatment of Employer Provided Cell Phones

IRS Notice 2011-72

Since the enactment of the Small Business Jobs Act of 2010, the IRS has received many questions about the proper tax treatment of employer-provided cell phones. Section 2043 of this Act removed cell phones from the definition of listed property for taxable years beginning in 2010. Otherwise, the Act did not alter the fact that an employer-provided cell phone is a fringe benefit, and the value must be included in the employee's gross income, unless an exclusion applies.

Gross income, as defined in section 61(a)(1) of the IRS Code, is any compensation for services, including fees, commissions, fringe benefits, and similar items. The question with cell phones provided by an employer is whether the cell phone is a fringe benefit, and if so whether it is specifically excluded from gross income by and exception.

There are two main types of fringe benefits: (1) working condition fringe benefits; and (2) de minimis fringe benefits.

A working condition fringe benefit is any property or services provided to an employee by the employer, that if the employee paid for such property or service the payment would be allowable as a deduction according to the IRS. A deduction is allowed for any ordinary and necessary expenses paid or incurred during a taxable year in carrying on a business. However, no deduction is allowed for personal, living, or family expenses. For certain listed items heightened substantiation is needed in order for the person to claim the deduction. But the Small Business Jobs Act of 2010 removed cell phones from that list, so the heightened substantiation is not needed.

A de minimus fringe benefit is defined as any property or service which has a value so small that accounting for it is unreasonable or administratively impracticable. When calculating the value it must be taken into account the frequency with which similar fringes are provided by the employer, because at some point when all of the de minimus fringes are added up, they are no longer de minimus. The only time a cash fringe benefit can be de minimus is for occasional meal money, local transportation fare, or other expenditures of the like.

In applying this to cell phones it is important to note that employers who provide cell phones for their employees generally do so for non-compensatory business reasons. When that is the case, a cell phone is a working condition fringe benefit, because if the employee was paying to use the cell phone himself, the IRS Code would allow the employee to deduct the service as a business expense. In order for an employer to qualify as providing a cell phone for non-compensatory business reasons there must be substantial reasons relating to the employer's business for providing the employee with the cell phone (i.e. the cell phone is not provided for compensation to the employee). Examples include the need to contact employees during non-regular business hours, the employee's need to be available to speak with clients during non-regular business hours or when away from the office, or in cases where work-related emergencies will come up and the employer will need to reach the employee. On the other hand, when a cell phone is provided to promote good morale or to attract a prospective employee the cell phone is compensatory.

Therefore, the IRS will treat an employee's cell phone as a working condition fringe benefit when the employer provides the cell phone primarily for a non-compensatory business reason. If that is the case, the value of the fringe benefit is excludable from the employee's income and it can be used as a deduction for the employer. Additionally, if an employee uses the cell phone for any personal use the IRS will treat this use as a de minimus fringe benefit, so long as the primary use of the cell phone is for non-compensatory business purposes.

Use of Medications Does Not Disqualify Student for Section 504 Services

***Centennial School District v. Phil L. and Lori L. ex rel. Matthew L.*, 57 IDELR 72 (E.D. Pa. 2011).**

In this case, the student in question had ADHD. In January 2007 he began taking medication and there was a stark improvement in the student's behavior and success. There was a question as to whether the district could take into account the mitigating effects of his medication. The Court held that since this case arose before January 1, 2009 the district was allowed to take the mitigating effects of medication into account.

The effective date of the 2008 ADA Amendments was January 1, 2009. Therefore, any case that arose before that date did not fall under the new Amendments, because the Amendments are not retroactive.

How This Affects Your District:

This article serves to remind districts that the new ADAAA regulations are now in effect and many more students will qualify for Section 504 Services based on the fact that districts can no longer take into account mitigating factors, such as medication, when making judgments about a student's disability.

If this case was referencing any incident that occurred since January 2009, the Court would hold that the mitigating effects of the medication could not be used to show the student is not eligible for a 504 plan.

The only mitigating factors that can be taken into account from January 2009 forward are the mitigating effects of regular eyeglasses and contacts. So, when making decisions about a student's disability districts should look at whether the student would have a disability regardless of any medication or other mitigating factors that may be used.

Acceptance of Federal Funds Does Not Make Bus Company a Public Entity

***Santiago v. Commonwealth of Puerto Rico*, 10-1449 (1st Cir. 2011).**

The First Circuit Court of Appeals concluded that a private party, in this case a bus company, cannot be transformed into a state actor solely because it is paid with government funds.

This case arose out of an alleged sexual assault of a 6-year-old boy with a hearing impairment by a bus driver. The parents tried to pursue a Section 1983 claim against the bus company and its owners, but in order to do that the parents needed to prove the bus company was a state actor. The Court held that the bus company's acceptance of IDEA funds as payment for providing transportation services to students with disabilities did not make the bus company a state actor.

In order for a private entity to become a state actor subject to a Section 1983 claim one of three scenarios must be true: (1) the private entity performs a function exclusively reserved to the state; (2) the state coerces or significantly encourages the conduct at issue; or (3) the operations of the private entity and the state are so intertwined that they effectively act together.

Since parents have many options for getting their students to school, including driving, taking public transportation, and taking school busses, the act of transporting students to school is not exclusively reserved to the state. Further, in this case there was no evidence to suggest that the school or education department encouraged the alleged assault. Lastly, there was no evidence that the education department had any dealings with the day-to-day operations of the bus company. Therefore, there was no entanglement, and the bus company was not transformed into a public entity.

How This Affects Your District:

While this case is not binding, it does give insight into how a court may consider whether a private company can become a public actor. This becomes particularly important, because if the bus company could have been sued as a public actor, then it is likely that the district that contracted with the bus company might also get pulled into the lawsuit. Therefore, in order to decrease liability in these cases , districts must recognize what types of liabilities they may be taking on.

In some districts, as in the case above, bus transportation is contracted out. If the district plans to become entangled in the day-to-day running of the busses, then the district should also take some responsibility for monitoring the drivers and investigating any issues that may arise. By doing that, the district is showing that they are not indifferent to the problems that may occur on the busses and will not have as many liability problems if any lawsuits do arise.

However, if districts want to completely avoid liability in these situations then the district should not become intertwined in the activities of the contracted company and should not coerce or encourage any behavior that the district could later become liable for.

Education Law Speeches/Seminars

Ennis, Roberts & Fischer regularly conducts seminars concerning education law topics of interest to school administrators and staff.
Popular topics covered include:

Cyber law
School sports law
IDEA and Special Education Issues
Employee Misconduct

Erin Wessendorf-Wortman
Lakota on November 7, 2011
Legislative Update

Jeremy Neff
Princeton on November 8, 2011
Avoiding Problems in Special Education

Bill Deters
OSBA Capital Conference School Law Workshop on November 15, 2011
Strategies for Managing eNightmares

Gary Stedronsky
OSBA Capital Conference School Law Workshop on November 16, 2011
You're A New Superintendent — Now What?

Administrator's Academy Dates at Great Oaks Instructional Resource Center

December 8, 2011 — *FMLA*

March 22, 2012 — *New Teacher Evaluation Procedures*

June 14, 2012 — *Special Education Update*

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