

REASONABLY ADDRESSING STUDENT SAFETY CONCERNS IN SPECIAL EDUCATION

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INTRODUCTION:

This paper examines how schools and school governance bodies can provide better protection against abuse and neglect of their special needs students. Special education providers are challenged because the degree of care required to protect students from abuse and neglect is higher than usual in the case of special education. This is particularly true when considering that neglect can be established by merely negligence. Recent case studies have exposed instances of maltreatment in special education. Some of the case studies that received considerable public exposure involved rather extreme cases of abuse or neglect – but they tended to show a common problem with related to student safety that even the most well-intentioned personnel and institutions might be susceptible to: insufficient communication in the development and implementation of individualized education plans (IEPs).

This paper is divided into three sections. The first section describes the higher-than-usual quantum of care applicable in special education (assuming that liability can attach to unreasonable or negligent conduct). The second section identifies recent case studies of student safety problems in special education, which have led to increased awareness of the shortcomings of special education in keeping students safe. The third section discusses how schools and school governance bodies can address the problem in the context of the existing legal requirements for special education. It

identifies communication as the key ingredient for assuring that the development and implementation of IEPs are reasonably tailored to keep students safe.

(A) Legal Expectations: The Higher Quantum of Care Required in a Special Education Environment

In general, schools play a vital role in our society's efforts to minimize instances of child abuse and neglect. The role of a school in securing the safety of children is so important because of the regularity and intimacy of a child's contact with his or her school. Students are likely to have regular intimate contact with their teachers and other school personnel, which puts schools in a position in which society expects them to reasonably identify and disclose signs of abuse or neglect,¹ and also to refrain from abuse and neglect themselves. A legal standard for liability based on reasonableness may apply to teachers and also to the higher levels of school governance. Thus, school personnel, school principals, and school districts may all be held to society's expectations that they implement methods, procedures, and policies reasonably tailored to keep their students safe.

The expectations placed on schools are even higher in the case of special needs students, who are traditionally at an increased risk for abuse and neglect. Why do greater expectations and greater risks exist in special education? These more demanding conditions flow from the exceptional investment of time, effort, and finances that tend to be necessary to provide adequate care for special needs students.

¹ See Jody Aaron, *Civil Liability for Teachers' Negligent Failure to Report Suspected Child Abuse*, 28 Wayne L. Rev. 183, 211 (1981) (a special relationship exists between teachers and students justifying the potential for liability for failure to reasonably report abuse). *But see id.* at n.44 and accompanying text (traditionally, several courts have been hesitant to acknowledge the potential for civil liability of school personnel for failure to report, and have imposed liability only in cases of active misfeasance).

A psychological explanation is that even the most devoted caregivers are likely to feel “overwhelmed” at some point while caring for a child with a disability, and that this can give rise to instances of abuse or neglect.² Situations where overwhelming circumstances can lead to abusive behavior by an otherwise devoted caregiver are fairly easy to imagine. For example, a parent or teacher might feel compelled to use physical force where an autistic child exhibits uncontrollable behavior that creates a disturbance, makes a mess, or inconveniences the caregiver at the wrong time. Neglect resulting from an overwhelmed caregiver is even easier to imagine given the complex set of responsibilities that caregivers might face. An overwhelmed caregiver could be a step too slow in reacting to a seizure or another physical problem requiring an immediate response. Or perhaps an overwhelmed caregiver could incorrectly follow directions in responding to such a situation, thereby aggravating the child’s condition. Assuming that caregivers of disabled children are likely to be overwhelmed by their responsibilities at some time, it may not take much for instances of abuse or neglect to surface.

A concise legal explanation for the heightened expectations and risks that apply to caregivers of disabled children is that disabled children simply demand a greater quantum of care than do most children. Schools consequently face a major challenge in providing this higher quantum of care.

What is the legal *standard* of care for special education with respect to abuse and neglect? While this paper assumes that the threshold for civil liability is based on reasonableness (e.g. a negligence standard), school districts should be familiar with their own state laws to know what

² See Am. Acad. of Pediatrics Comm. on Child Abuse and Neglect and Comm. on Children with Disabilities, *Assessment of Maltreatment of Children with Disabilities*, 108 PEDIATRICS 508, 509 (2001).

standard applies. Currently, there is no federal law on point, although Congress may pass a law in the near future relating to liability for certain restraints and seclusions by school personnel.³ This proposed federal law would cover a narrow category of cases which might involve special needs students, but it would come nowhere near encompassing all of the possible instances involving student safety in special education.⁴ Since state law is the main source of liability, schools and school governance bodies should know the applicable state disclosure statutes⁵ and be familiar with other potential state law causes of action at a minimum.⁶

(B) Recent Events: Shocking Case Studies, and Public Outcry for Improved Safety in Special Education

³ Congress recently took a major step towards intervening with schools' obligations to protect special education students. On March 3, 2010, the House passed the Preventing Harmful Restraint and Seclusion in Schools Act, H.R. 4247, 111th Cong. (1st Sess. 2010). The bill is awaiting vote in the Senate (S. 2860, 111th Cong. (1st Sess. 2010)) as of the time of this writing. The GAO report referenced in this article gave rise to the drafting of the bill. Although the Act is not restricted to special education, it appears to target some of the vulnerabilities that are known to surface in special education. Special education providers will accordingly need to understand the implications of the Act if and when it becomes law. A copy of the Congressional Research Service Summary for the Act is available at <http://www.govtrack.us/congress/bill.xpd?bill=s111-2860&tab=summary> (last visited May 19, 2010).

⁴ The Preventing Harmful Restraint and Seclusion in Schools Act defines only a small portion of schools' responsibilities to keep special needs children safe. It targets a narrow category of problematic conduct in schools (albeit the conduct is particularly reprehensible in the public eye). Since the scope of the Act is limited, and any foreseeable federal intervention in defining schools' obligations for protecting special needs children would seem to be less than comprehensive, schools will have to continue to be aware of their obligations and potential liabilities under state law.

⁵ See Aaron, *supra* note 1, at 184 and n.7 (all 50 states enacted statutes imposing an obligation on teachers, among other professional personnel, to report abuse to specified agencies).

⁶ This being said, a thoughtful school district should anticipate that a reasonableness standard may apply because state courts may permit a finding of liability based on common law negligence.

In 2009, the Government Accountability Office (GAO) issued a report on restraints and seclusions in schools.⁷ The report included multiple case studies in which special needs children were harmed by physical force or neglect by caregivers.

In one case study included in the GAO report, a 15 year-old special needs student with autism died on the first day of school after he had two seizures during a choir class.⁸ The choir instructor and the assistant principal at the school, who were responsible for the student at the time of the incident, had not been instructed on how to properly react to the situation.⁹ They restrained the student improperly (by holding him face down on the ground) and delayed seeking medical attention after the student's condition worsened.¹⁰ The student died as a result.¹¹ Following the student's death, the parents sued the school district and the case eventually settled for \$1.3 million.¹²

In another case study, the mother of a four year-old female autistic student learned that the student had been strapped to a chair as a result of being "uncooperative" during a "bathroom break."¹³ As the student's mother later claimed, the problem was that bathrooms were a negative

⁷ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-719, SECLUSIONS AND RESTRAINTS: SELECTED CASES OF DEATH AND ABUSE AND PUBLIC AND PRIVATE SCHOOLS AND TREATMENT CENTERS, *available at* <http://www.gao.gov/new.items/d09719t.pdf>.

⁸ *Id.* at 19-20.

⁹ *Id.* at 20.

¹⁰ *Id.*

¹¹ *Id.* at 21 ("The official cause of death was listed as "prolonged physical restraint in prone position associated with extreme mental and motor agitation.").

¹² *Id.*

¹³ *Id.* at 22.

behavioral trigger: the student frequently “acted up” when told to go to the bathroom.¹⁴ The mother withdrew her daughter from the school after just 10 days of enrollment (upon discovering that her daughter had been strapped to a chair), and later won a jury verdict of \$460,000 against the school board – primarily for the emotional harm caused to her daughter.¹⁵

Two other case studies in the GAO report involved allegations of flagrantly inappropriate conduct by special education personnel at public schools. In one case, a school district had received a series of complaints about a particular teacher’s conduct towards special needs students, and as a result, it subjected the teacher to a “corrective action plan,” under which it monitored the teacher closely and installed a surveillance camera in the classroom.¹⁶ Subsequently, the teacher was exposed to criminal liability following a series of incidents in which he tied down several students with Down’s syndrome to keep them from wandering, and struck them with a fly swatter to discipline them.¹⁷ Another case, in which the mother of a seven year old student with Asperger’s Syndrome alleged that her daughter had been kept in seclusion for hours at a time after refusing to do work, resulted in a jury verdict finding the school district, principal, and teacher liable for negligence and civil rights violations.¹⁸ Pending appeal, the case settled for \$260,000 and injunctive relief requiring policy changes by the school district.¹⁹

¹⁴ *Id.*

¹⁵ *Id.* at 22-23.

¹⁶ *Id.* at 23.

¹⁷ *Id.* at 23-24.

¹⁸ *Id.* at 26-27.

¹⁹ *Id.* at 27.

The GAO report resulted in a proposed federal law targeting the use of restraints and seclusions in school²⁰ and also generated public outcry for improved safety in special education.²¹

(C) How to Improve Student Safety: Integrating the Obligation to Keep Students Safe into the Existing Special Education Framework

Developing an effective Individualized Education Plan (IEP) for each special needs student is central to maintaining a reasonable system under the existing special education framework. Critical to the effectiveness of an IEP is clear and open communication between all parties who are (or could potentially be) responsible for a special needs student. A related point deserves emphasis, particularly for schools and school governance bodies seeking to minimize the potential for liability for maltreatment of students: it is not enough to assume that going through the motions (e.g. speaking to a parent or to a special education aide, as required under the IEP rules or procedures) is the same as establishing clear and open communication. Further, communication continues to be of fundamental importance after an IEP is developed, and while it is being implemented throughout the school year.

This section first identifies the legal foundation for special education services that public schools must provide under the Individuals with Disabilities Education Act (IDEA), and then examines the critical role of clear and open communication in tying together schools' responsibilities under the IDEA with the goal of keeping students safe.

²⁰ See *supra* notes 3-4 and accompanying text for an overview of the bill and its impact on safety in special education.

²¹ See, e.g., Greg Toppo, *GAO: Schools Restrain, Confine Disabled Children*, U.S.A. TODAY, May 18, 2009, available at http://www.usatoday.com/news/education/2009-05-18-restraint-gao_N.htm; CNNPolitics.com, *GAO Report: Special-Needs Kids Abused in Schools*, <http://www.cnn.com/2009/POLITICS/05/18/siu.schools.abuse/?iref=mpstoryview> (last visited May 19, 2010).

(1) *Overview of the Special Education Framework: IDEA Requirements and the Role of IEPs*

The IDEA defines the scope of responsibilities for schools receiving federal funding to provide education for disabled students. All 50 states are currently IDEA participants.²² The IDEA mandates that schools provide a “free and appropriate public education” to students with disabilities from ages three through 21,²³ along with any “related services” that these students might need in order to attend school.²⁴ The definition of “related services” excludes medical services (services that must be provided by a physician) beyond diagnostics and evaluations.²⁵ However, services that can be performed by a layperson, even if critical to a student’s physical well-being, are most likely within the scope of “related services” mandated under the IDEA.²⁶ Therefore, schools and school governance bodies should anticipate that they will need to carry out these types of responsibilities for some of their special needs students.

²² MICHAEL J. KAUFMAN & SHERELYN R. KAUFMAN, *EDUCATION LAW, POLICY, AND PRACTICE* 714 (2d ed. 2009).

²³ 20 U.S.C. §§1401, 1414 (2010).

²⁴ §1401. The IDEA defines “related services” as “transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, *except that such medical services shall be for diagnostic and evaluation purposes only*) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.” §1401(26)(A) (emphasis added).

²⁵ *Id.* (See italicized language in the preceding footnote).

²⁶ These types of services have been classified as “supportive services,” which are a subset of “related services.” *See, e.g., Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891(1984) (clean intermittent catheterization or “CIC,” which can be administered by “a layperson with less than an hour’s training” and involves changing a tube attached to a special needs student’s body so that the student’s bladder can empty, constitutes a supportive service that the school district must provide under the IDEA); *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 79 (1999) (school district required to designate a responsible person to attend to physical needs of paralyzed special education student as a supportive service).

When an IEP is formed, a student's special needs are defined, applicable risks are assessed, protocols are established, and the various stakeholders in is the student's special education plan come to a mutual understanding of how to provide the student's education.²⁷ The IEP is a "written statement for a child with a disability that is developed, reviewed, and revised. . . ." ²⁸ Generally, the two most important parties to the development of an effective IEP besides the student are the primary adult who will be responsible for the student at the school and the student's parent or guardian. But the number of parties who must exchange information and understand their responsibilities under an IEP is necessarily much larger.²⁹

(2) Communication: The Key Ingredient to Ensuring Student Safety

Clear and open communication is critical to prospectively identifying and understanding the special needs of a student while creating an IEP. Communication continues to be of fundamental importance during the ongoing process of implementing the IEP. As a review of the case studies identified in the GAO report indicates, problems can occur as a result of numerous types of breakdowns in communication: inadequate oversight, insufficient instruction, or failure to identify school personnel who ought to be notified or trained can each threaten student safety, and subject schools to liability. Consequently, schools should ensure that under each student's IEP: (1) a communication network of all necessary individuals who share responsibility for the student's safety is developed, and (2) outside resources are available in the case of a breakdown in communication or a potential problem during the implementation of the IEP.

²⁷ See 34 C.F.R. §§300.345, 300.347(a); KAUFMAN & KAUFMAN, *supra* note 22, at 761.

²⁸ 34 C.F.R. §300.340.

²⁹ See 34 C.F.R. § 300.345; *see also* KAUFMAN & KAUFMAN, *supra* note 22, at 761 (identifying the key stakeholders who meet to develop a student's IEP).

First, providing all personnel who might foreseeably share responsibility for the student's safety with necessary material information about the student (and ensuring that all such personnel understand their responsibilities) can help to create an IEP that secures student safety. While forming the IEP, the school should ask as many questions as possible to the student's parents or guardians, and identify any potential risk areas that parents or guardians might not anticipate. Probing may be necessary to eliminate a safety concern before it arises. The GAO case study where the student died at choir class provides an example of the consequences resulting from inadequate communication. In that case, the choir instructor did not even know about the student's disability, much less how to react in the case of a seizure.³⁰ One practical lesson that schools and school governance bodies can learn from this case is that a broad range of school personnel may have responsibility for the safety of a special needs students, and that these personnel must not be overlooked when the IEP is developed.

To the extent that particularly high-need students are integrated with the rest of a school's student population, the stakeholders developing the IEP may need to carefully weigh the benefits of such integration with any potential safety risks that would result. For example, perhaps student safety is subject to greater risk if school personnel who are relatively unfamiliar with the student could be required to administer important care.

Second, given the ongoing importance of communication, ensuring that all stakeholders have access to outside consultation in the event of a communication breakdown or when a potential problem arises is of utmost importance. Schools should assume that communication will not be

³⁰ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-719, SECLUSIONS AND RESTRAINTS: SELECTED CASES OF DEATH AND ABUSE AND PUBLIC AND PRIVATE SCHOOLS AND TREATMENT CENTERS 21, *available at* <http://www.gao.gov/new.items/d09719t.pdf>.

perfect. If the GAO report's case studies are any indication of the problems in communication that tend to occur in special education, they suggest that the first few weeks of the implementation of an IEP constitute a high-risk period, during which school personnel are adjusting to their responsibilities. The student death that occurred on his first day at school and the alleged confinement of a student to a chair for refusing to use the bathroom both provide illustrations of severe communication breakdowns which occurred almost instantly when IEP implementation began.

To alleviate the inevitable problem of imperfect communication after an IEP has been developed, stakeholders should know who to contact in the case of a problem. Because problems can occur at any level (e.g. as a result of a school district's bad policy, poor oversight at a school, abusive practices by a teacher, abuse at the student's home, or a failure to communicate clearly and openly regarding student safety issues at any of these levels), stakeholders should know to seek outside advice if they suspect something is not right. Stakeholders should be equipped with a list of contacts that can provide advice and intervene if necessary. Health advisors, psychologists, governmental agencies, and law enforcement officers are all examples of these types of outside contacts. Schools and school governance bodies should know to err on the side of caution if they suspect abuse or neglect, because immunity from defamation or similar claims will apply to good faith disclosures of suspected maltreatment.³¹ Ensuring that the system of communication allows for back-up options in the case of communication breakdowns or other suspected problems will help to keep communication open and effective in spite of imperfections. The case study that involved abusive conduct by the special education instructor caught on the surveillance camera

³¹ KAUFMAN & KAUFMAN, *supra* note 22, at 827.

illustrates this point. Planning for communication breakdowns and allowing for alternate ways to timely communicate risks while an IEP is being implemented may be the key to preventing or mitigating future harm.

CONCLUSION:

Special education programs in U.S. public schools face difficult challenges with respect to ensuring student safety, due to the high quantum of care necessary to reasonably protect special needs students from harm. Further, recent evidence suggests that in many instances, schools and school governance bodies have not been up to the task. To make special education safer, schools and school governance bodies must use the existing special education framework (e.g. the IEP plan) to advance the objective of providing reasonable care for special needs students. Student safety can be maximized, and schools' liabilities limited, by ensuring that clear and open communication exists during both the development and implementation of IEPs.