

SPECIAL POINTS OF INTEREST:

- Interpret the definition of disability broadly under the ADAAA but continue to analyze the need for services
- Ignoring risk of aggressive student may subject district to liability
- DOE emphasizes goal of avoiding the use of restraints/seclusion whenever possible
- PA Regulations already address many of the issues raised by DOE in its 15 principles.

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OCR Provides Guidance on ADA and Section 504

The Office for Civil Rights (OCR) recently published a *Dear Colleague* letter and a Frequently Asked Questions that provides guidance on how the ADA Amendments Act (ADAAA) that was passed in 2008 and went into effect January 9, 2009, impacts Section 504 requirements for school districts.

It reminds school districts that the intent of the ADAAA was to ensure a broad scope of protections for individuals with disabilities and should be interpreted liberally. The ADAAA was passed to ensure that the question of

whether an individual's impairment qualifies as a disability under the ADA and Section 504 should not be an extensive analysis.

The letter reiterates much of OCR's prior positions. For example, it reminds District that most mitigating measures may not be considered when determining whether the disability substantially limits a major life activity for the child. It also reminds Districts that an impairment that is episodic or in remission is a disability if, when active, it is substantially limiting.

These changes may mean that some students who did not qualify prior to the ADAAA may now qualify as a student with a disability. However, once a school determines that a student has a disability, the use of mitigating measures can still be relevant in determining whether the child needs special education or related services.

The questions and answers provides the guidance to schools on the impact of the ADAAA and will be summarized in this article.

Read a Summary of OCR's Guidance on pages 6-7

DOE Issues 15 "Principles" on Restraint/Seclusion

The U.S. Department of Education Secretary Arne Duncan issued a document on May 15 that sets forth the DOE's ideas on the use of restraint and seclusion for special education students. The 45 page document, including the list of 15 principles is not formal guidance nor does it establish any new legal requirements or additional rights or require Schools to take a particular action. Rather it gives the DOE's suggestions, but leaves it up to individual States and school districts to decide to what extent it will apply the information, if at all. See the recommended principles in this Article to review whether your district is already following these standards

Go to page 3-6 for a Summary of DOE's Principles

CASE LAW UPDATE

Billingsley v. Franklin Area School District Section 1983 Liability

The U.S. District Court for the Western District of PA denied a Motion to Dismiss in a claim against a school district and a teacher for failure to prevent a female student from being sexually assaulted by another student whom the District knew had sexually aggressive tendencies, but did dismiss the individual claims against the Superintendent and a Principal.

History

On the date of the incident, Leah Billingsley was given a hall pass by her teacher, Peter Wygant to leave her special education classroom without supervision. Shortly thereafter, Wygant gave another hall pass to another student, J.R. After leaving the classroom, JR found Leah and “viciously assaulted and raped” her.

The family filed a federal lawsuit against the District and three individual defendants: The Superintendent, the Principal and Wygant. The family alleges that the school and the individual defendants knew that JR had sexually assaulted another female student at the High School and were aware that JR had “aggressive tendencies” and had repeatedly made sexual advances to other female students.

The family alleged that the Defendants violated Leah’s due process right to bodily integrity under the 14th Amendment to the U.S. Constitution. Particularly, they allege that the defendants created the danger that caused Leah harm thereby depriving her of her right to bodily integrity.

Defendants filed a motion to dismiss arguing that the individual defendants have qualified immunity and that the family failed to state a claim against any of the defendants.

Standard of Review

It should be noted that this is only at the beginning stages of litigation and that Motions to Dismiss are viewed in the light most favorable to the Plaintiff (the family). In deciding a Motion to Dismiss, all well pled allegations must be accepted as true and will only be dismissed if the Plaintiffs have pled enough facts to state a claim that is plausible on its face. Denying a Motion to Dismiss does not mean that the Plaintiff have or will prevail—only that the claim can move forward to the discovery phase.

Holding

The Court analyzed the family’s theory of “state created danger” to determine whether the Defendants “acted in a way that makes a person substantially more vulnerable to injury from another source than he or she would have been in the absence of the state intervention.” The plaintiff must prove that the state employee affirmatively acted to the plaintiff’s detriment and establish a direct causation between the affirmative act and the injury.

The Court held that the Superintendent and Principal took no “affirmative act” and therefore, dismissed them from the case. However, it found that Wygant’s actions of giving JR the hall pass when he knew of JR’s sexually aggressive behavior and past assaults and knew Leah was in the hall unprotected could be seen by a jury as conduct that “shocks the conscience.” Therefore, Wygant was not dismissed.

Further, the Court did not dismiss the claims against the school district finding that Plaintiff’s alleged enough facts that a jury could conclude that the District’s failure to take affirmative action to protect the female students from falling victim to JR’s sexually aggressive tendencies represented a policy of deliberate indifference.



15 Principles on Restraint/Seclusion

(continued from p. 1)

As part of the DOE's 45 page report, it included a list of 15 "principles" on the issue of the use of restraints and seclusion. Remember that Pennsylvania state regulations already provide specific requirements on the use of restraint and sets forth a list of eight aversive techniques of handling behavior that are specifically forbidden. 22 Pa Code §14.133. The following are the DOE's 15 "principles" set forth in bold with comments to follow:

1. **Every effort should be made to prevent the need for the use of restraint and for the use of seclusion.** PA State Regulations already put restrictions on the use of restraints in schools. In Pennsylvania, schools are required to use positive, rather than negative measures to form the basis of a behavior support plan. Further, schools must ensure that all eligible children are free from the "unreasonable" use of restraints although the term "unreasonable" is not clearly defined. 22 Pa Code §14.133(a). Although the term "seclusion" is not used specifically in the PA Regulations, schools may not use "locked rooms, locked boxes or other structures or spaces from which the student cannot readily exit as part of a behavior plan. 22 Pa Code §14.133(e)(3).
2. **Schools should never use mechanical restraints to restrict a child's freedom of movement, and schools should never use a drug or medication to control behavior or restrict freedom of movement (except as authorized by a licensed physician or other qualified health professional).** Obviously it should go without saying that your school should never give a drug or medication for any reason without the authorization of a physician. The PA Regulations address the use of mechanical restraints, providing that mechanical restraints, which are used to control involuntary movement or lack of muscular control of students when due to organic causes or conditions, may be employed only when specified by an IEP and as determined by a medical professional qualified to make the determination and is agreed to by the parents. Mechanical restraints may only be used to prevent a student from injuring himself or others OR to promote normal body positioning and physical functioning. 22 Pa Code §14.133(d). Devices used for physical therapy, seatbelts in wheelchairs or on toilets used for balance and safety, safety harnesses on buses and functional positioning devices are not considered "mechanical restraints" under the PA Regulations. 22 Pa Code §14.133(b)(iii).
3. **Physical restraint or seclusion should not be used except in situations where the child's behavior poses imminent danger of serious physical harm to self or others and other interventions are ineffective and should be discontinued as soon as imminent danger of serious physical harm to self or others has dissipated.** PA Regulations already specify that restraints to control acute or episodic aggressive or self-injurious behaviors may be used only when a student is acting in a manner as to be a clear and present danger to himself, to other students, or to employees and only after less restrictive measures and techniques have proven to be or are less effective. 22 Pa Code §14.133(c).
4. **Policies restricting the use of restraint and seclusion should apply to all children, not just children with disabilities.** PA Regulations only address the issue of restraint as it applies to children with disabilities. There are no state regulations regarding the use of restraint for regular education students. Again, there are no PA Regulations specifically addressing the issue of seclusion.

15 Principles on Restraint/Seclusion

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5. **Any behavioral intervention must be consistent with the child's right to be treated with dignity and to be free from abuse.** Among the eight prohibited aversive techniques for handling behavior set forth in the PA Regulations are: treatment of a demeaning nature; corporal punishment, noxious substances, deprivation of basic human rights, such as withholding meals, water or fresh air and electric shock. 22 Pa Code §14.133(e).
6. **Restraint or seclusion should never be used as a punishment or discipline (e.g. placing in seclusion for out-of-seat behavior) as a means of coercion or retaliation or as a convenience.** Pursuant to the PA Regulations, restraints may not be included in the IEP for the convenience of staff, as a substitute for an educational program or employed as a punishment. 22 Pa Code §14.133(4). Neither IDEA, 504 or the State Regulations address "time out" or other forms of seclusion. Courts have held that the use of "time out" is not a violation of a child's rights or improper. Time out may be seen as a form of discipline, although more typically it is used to remove a student when behaviors are interfering with a class or have become so disruptive that the student needs an opportunity to calm down. Be sure if you are using "time out" to include it in the PBSP so there is no confusion about when and why time out is being used. Remember that the PA Regulations specifically prohibit the use of locked rooms, locked boxes or other structures or spaces from which the student cannot readily exit. 22 Pa Code §14.133(e)(3).
7. **Restraint or seclusion should never be used in a manner that restricts a child's breathing or harms the child.** The PA Regulations do not address the issue of breathing or injury to the child. The state Regulations do prohibit the use of prone restraints which are restraints where the child is held face down on the floor. 22 Pa Code §14.133(c)(4).
8. **The use of restraint or seclusion, particularly when there is repeated use for an individual child, multiple uses with the same classroom or multiple uses by the same individual, should trigger a review and, if appropriate, revision of strategies currently in place to address dangerous behavior; if positive behavioral strategies are not in place, staff should consider developing them.** Schools are required to hold an IEP meeting after using a restraint on a child. The PA Regulations specify that at that IEP meeting, the Team shall consider whether the student needs a functional behavioral assessment, reevaluation, a new or revised positive behavior support plan or a change of placement to address the inappropriate behavior. 22 Pa Code §14.133(c)(1).
9. **Behavioral strategies to address dangerous behavior that results in the use of restraint or seclusion should address the underlying cause or purpose of the dangerous behavior.** In Pennsylvania, although the use of restraint is permitted, the focus of the regulations remains on providing positive behavior support. The use of restraints may only be included in a student's IEP when: (i) the restraint is utilized with specific component elements of positive behavior support; (ii) the restraint is used in conjunction with the teaching of socially acceptable alternative skills; (iii) staff are authorized and trained to use the procedure; and (iv) there is a plan in place for eliminating the use of restraint through the application of positive behavior supports. 22 Pa Code §14.133(c)(2).

15 Principles on Restraint/Seclusion

10. **Teachers and other personnel should be trained regularly on the appropriate use of effective alternatives to physical restraint and seclusion, such as positive behavioral interventions and supports and, only for cases involving imminent danger of serious physical harm, on the safe use of physical restraint and seclusion.** The PA Regulations do not address the issue of training school personnel on alternatives to restraint and seclusion, although it is certainly a good suggestion given the emphasis on using positive behavior supports. Schools are responsible for ensuring that staff who are implementing restraints are trained on the use of specific procedures, methods and techniques. 22 Pa Code §14.133(f).
11. **Every instance in which restraint or seclusion is used should be carefully and continuously and visually monitored to ensure the appropriateness of its use and safety of the child, other children, teachers, and other personnel.** There is no such requirement in the PA Regulations for such stringent monitoring. Again, IEP Teams are required to meet after the use of a restraint. The Regulations only state that schools may convene a review to oversee the use of restrictive or intrusive procedures or restraints. 22 Pa Code §14.133(g).
12. **Parents should be informed of the policies on restrains and seclusion at their child's school or other educational setting, as well as applicable Federal, State or local laws.** Schools are required under the PA Regulations to have a written policy and procedure on the use of positive behavior support and restraint. 22 Pa Code §14.133(f). There are, however no requirements regarding notifying parents of policies or laws regarding restraint or seclusion.
13. **Parents should be notified as soon as possible following each instance in which restraint or seclusion is used with their child.** Schools are required to notify parents after each use of restraint. There is no requirement to notify parents after a child is placed in seclusion. Additionally, an IEP Team meeting must be held within 10 school days after a restraint is used, unless the parents agree in writing to waive the meeting. 22 Pa Code §14.133(c)(1).
14. **Policies regarding the use of restraints and seclusion should be reviewed regularly and updated often.** Again, although there is a requirement for Districts to have policies on positive behavior intervention and restraints, there is no requirement regarding how often policies should be reviewed. PDE does review the behavior policy as part of its special education audit.
15. **Policies regarding the use of restraint and seclusion should provide that each incident involving the use of restraint or seclusion should be documented in writing and provide for the collection of specific data that would enable teachers, staff, and other personnel to understand and implement the preceding principles.** While certainly this is a good suggestions, there is no legal requirement either in the IDEA or in PA law that requires such action.

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15 Principles on Restraint/Seclusion

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Although the 15 principles are not enforceable law, what we do see clearly is DOE’s continued goal to avoid the use of restraints and seclusion whenever possible. Many of the principles on restraint are common sense and our state Regulations already provide Pennsylvania schools with legal requirements for implementing restraints.

Like the 15 principles, the PA Regulations place a great emphasis on using positive behavioral supports to address a child’s behavior and only using restraints when the child is a clear and present danger to himself or others and when less restrictive techniques have been tried and are proven to be less effective. PA Regulations also prohibit the use of mechanical restraints without a prescription from a medical doctor and completely prohibit the use of prone restraints. Schools in Pennsylvania must have policies on the use of restraints. Further, schools are required to notify parents any time a restraint is used on a child and to

convene the IEP Team to consider whether a child needs an FBA, a new reevaluation, a new or revised PBSP or a change of placement.

Currently, there are no specific state or federal laws that address the issue of seclusion. Courts have found the use of “time out” to be constitutionally legal. However, PA state regulations prohibit schools from using locked rooms, locked boxes or other structures or spaces from the student cannot readily exit. This DOE publication may however be an insight to future changes in the IDEA where we may see seclusion being specifically addressed.

Right now, it is important to remember that although this documents gives schools and states additional information to consider in establishing plans for behavior support—it is just that—information. It is not official guidance nor is it a binding and enforceable legal document. No official changes are required to be made in PA schools with regard to restraint or seclusion.

Impact of ADAAA On Schools

(continued from page 1)

The ADAAA has created questions among schools regarding whether a child does or does not have a disability and whether or not a child qualifies for services. **What has not changed?**

1. A diagnosis alone still does not automatically qualify any child for services under Section 504
2. A school must conduct an evaluation of any child who because of a disability or suspected disability needs or is believed to need special education or related services.
3. There remain four categories of students:
 - A. A child who does not have a disability and therefore does not qualify for services
 - B. A child who has a disability but is not in need of any special education, related services or modifications
 - C. A child who has a disability but only needs related services or modifications (Section 504)
 - D. A child who has a disability and needs special education services (IDEA)

IMPACT OF ADA ON SCHOOLS

What has changed: Definition of Disability

The definition of “disability” under the ADA has not changed: a physical or mental impairment that substantially limits a major life activity. However, the analysis of whether a person has a disability has changed:

Under the ADA, the definition of disability should be interpreted broadly and determining whether or not a child has a disability should not require extensive analysis. Typically the analysis hinges upon whether the person’s diagnosis “substantially limits” a major life activity. When determining a “substantial limitation”:

- A. The impairment need not prevent or severely or significantly restrict a major life activity;
- B. The term is to be interpreted without regard to the ameliorative effects of mitigating measures, other than ordinary eyeglasses or contact lenses. Mitigating measures include medication, prosthetic devices, assistive devices or learned behavioral or adaptive neurological modifications that an individual uses to eliminate or reduce the effects of the impairment. An example given by OCR is a student who gets allergy shots would be covered now under Section 504 because without those shots, the student’s allergy would substantially limit a major life activity.
- C. An impairment that is episodic or in remission is a disability if, when in an active phase, it would substantially limit a major life activity. OCR provides the following example: a student with bipolar disorder would be covered if, during manic or depressive episodes, the student is substantially limited in a major life activity.

While OCR stresses that there are no per se disabilities, there should be little analysis in determining

that a child with diabetes, epilepsy, bipolar disorder or autism has a disability under Section 504.

Learning Is Not The Only Major Life Activity To Consider

While this is not a change, it is important to highlight that schools must look beyond learning to determine eligibility. Examples provided by OCR include: A student with a visual impairment and cannot read regular size print is substantially limited in seeing; a student with an orthopedic impairment who cannot walk is substantially limited in walking; and a student with ulcerative colitis is substantially limited in the operation of major bodily function—the digestive system.

Obligation To Provide Services

Looking at the examples above, the question many districts have been asking is - does this mean these kids automatically qualify for a 504 Plan? The answer remains: NO! A child still must have a need for services to get a 504 Plan. But . . . The District does have an obligation to evaluate the child to determine whether they need special education, related services, or modifications. Further, schools can look at mitigating measures to evaluate the need of a student for services.

OCR cautions though that just because a student has passing grades does not mean that they do not qualify. Schools need to analyze how much effort or how many outside resources are required for the student to achieve those grades. Further, consider whether teachers are already providing undocumented accommodations or modifications to the student to help achieve those grades.

Further, remember that a child with a disability that does not need special education or related services is still protected by Section 504’s general protections that prohibit discrimination of a child based on their disability or perceived disability.



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If you have a special education issue you would like to see addressed in subsequent issues of this newsletter, please write to or e-mail Trish Andrews at the above address.

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Consult Your Solicitor!

The legal issues discussed herein are for the purpose of providing general knowledge and guidance in the area of special education. This newsletter should not be construed as legal advice and does not replace the need for legal counsel with respect to particular problems which arise in each district. As each child is unique, each legal problem is unique. Accordingly, when districts are faced with a particular legal problem, they should consult their solicitor or with special education counsel to work through the issues on a case by case basis.