

THE YEAR IN REVIEW: A SPECIAL EDUCATION LEGAL UPDATE WHERE YOU GET TO BE THE JUDGE

Presented by:

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WHERE YOU GET TO BE THE JUDGE

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2020: Where To Even Begin?







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Covid-19 Issues in Public Schools

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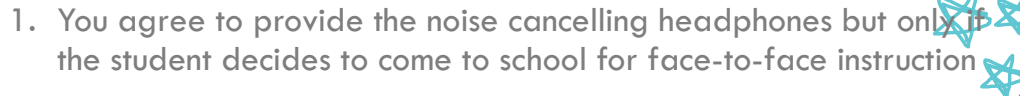



Covid Compensatory Services

During the spring of 2020, one of the student's teachers did not implement the IEP as written, stating that it was "too darn hard" to teach young children during a worldwide pandemic. This was during the period of remote learning. How should you respond when the parent calls you to express concern?




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1. You agree to provide the noise cancelling headphones but only if the student decides to come to school for face-to-face instruction
 2. You tell the parent where the best deal in town is to purchase headphones
 3. You make sure that the headphones are delivered to the house, but you make an unscheduled visit because you suspect the parent may be wearing the headphones at home instead of the student
 4. You furnish the headphones and ensure that teachers inquire during check-ins with the student whether the student is accessing them.
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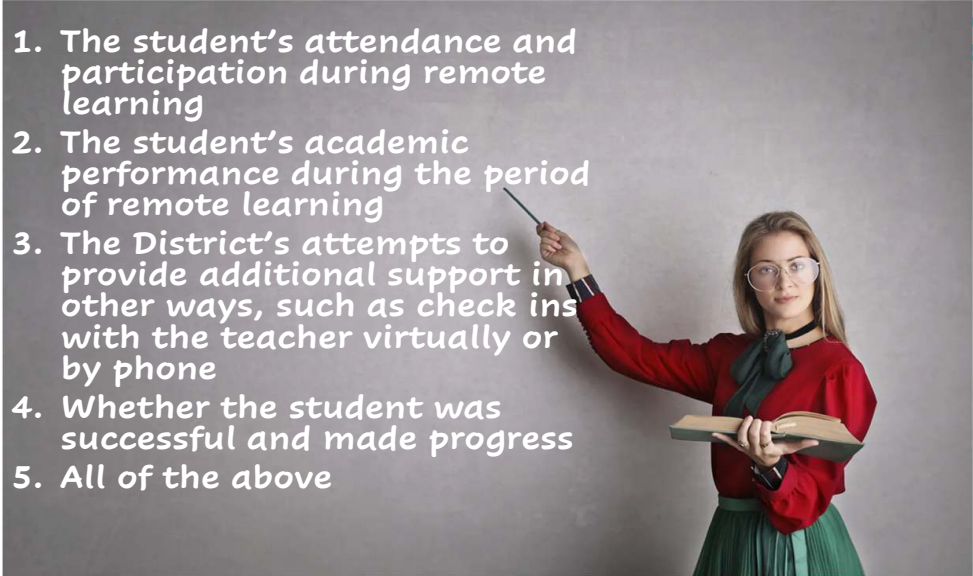
Another Implementation Issue:



Because of the parent's fear that the student might contract Covid-19 from a teacher coming into the home, the student did not receive any 1:1 instruction last spring for teaching new personal care skills (as required by the IEP). The student did receive instruction sent home in packets and through virtual class time. You are now sitting in the ARD committee meeting at which compensatory services will be considered. As part of that discussion, you should review:



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1. The student's attendance and participation during remote learning

2. The student's academic performance during the period of remote learning


3. The District's attempts to provide additional support in other ways, such as check ins with the teacher virtually or by phone

4. Whether the student was successful and made progress

5. All of the above

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Virtual Learning and Devices:


A child's mother reaches out to you to express concern that her 9-year-old with ADHD is struggling mightily with virtual instruction. Based on your conversation with the parent, you believe the parent just hasn't accessed any of the information posted in various places by the campus and the District online.

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For example, the teacher's e-newsletter clearly explained that parents just have to log their child into Zablezoot, scroll down to the Zorkle app and have the kids work on the assignments sent through Kracklezam or check the links posted in Zumblekick . . . making sure to create new passwords for each app and not to use the same password more than once to ensure proper security.



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How do you proceed?

1. Call an ARD meeting to review the accommodation plan and determine whether additional supports are needed
 2. Tell the parent to call the District's IT support line
 3. Inform the parent that virtual learning obviously isn't successful & her child will just have to attend school on campus.
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Your school district has adopted a plan that requires facial coverings to be worn by all medically and developmentally able staff, students and visitors. A middle school student who has asthma DOES NOT WANT to wear a mask. The student reports that wearing a face covering makes it feel hard to breathe, and the student's parent maintains that the student should be able to make their own decision—that is part of the parenting style at home. How do you respond?

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1. Every student wears a mask. Period. You send an e-mail to the parent to express this decision.
2. You discuss the concern at a meeting of the ARD committee and consider whether the student requires an accommodation.
3. You send the parent the latest guidance from TEA, a bulletin from the CDC, a copy of the Governor's Order, and for good measure, a selfie of yourself in a mask.



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You are made aware that a student with disabilities on one of your school district's campuses is severely allergic to latex. All staff wear latex gloves when cleaning student spaces. Specifically, the student has been diagnosed with an IgE-mediated hypersensitivity (type I) allergy. This is the least frequent but most dangerous reaction to latex and typically occurs within 30 to 60 minutes of initial contact.

Symptoms can range from mild (e.g., pruritus, cutaneous rash, urticaria, edema of the eyes, rhinitis, conjunctivitis, slight hypotension, and tachycardia) to potentially life-threatening anaphylactic reactions.



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How do you respond?

1. Place the student in a classroom by him/herself
2. Tell the parent that during the pandemic (which appears to be without end), the student must attend virtual learning
3. Don't clean desks or materials (?)
4. Let the student sit outside while desks are cleaned
5. Call an ARD committee meeting

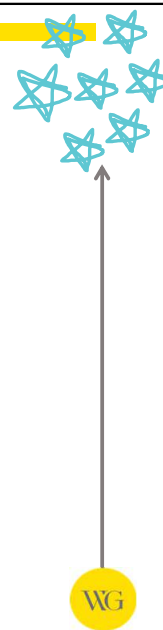


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The Year in Review:

Case Examples Where YOU Get To Be the Judge



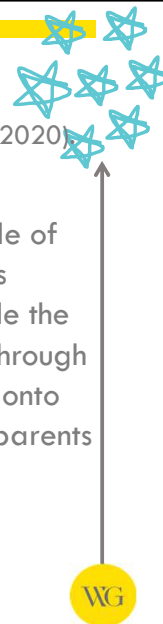
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Transportation

Hallsville ISD v. Garcia, 120 LRP 39928 (Tex. App.—Texarkana [6th Dist.] Dec. 2020)

The bus driver parked the lift-equipped bus in front of a pole outside of the school building. As a result, the lift is inoperable unless the bus is moved. Instead of moving the bus, the driver picks up a student, while the student is seated in a wheelchair, and attempts to load the student through the front passenger door of the bus. The student falls face forward onto the steps of the school bus and is significantly injured. The student's parents subsequently sue the school district for negligence.

You be the Judge. Who wins?



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Who wins?

1. The school district because the wheelchair was defective.
2. The parents because the bus driver was negligent in the operation or use of a motor vehicle.
3. The school district because the school district has immunity in cases alleging negligence.
4. I don't know—just give us the answer.



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2. The parents win.

School districts generally enjoy immunity from claims of negligence. However, there are exceptions. If the school district employee is negligent in the operation or use of a motor vehicle, the school district can lose its immunity under the TTCA.

Key quote: "[T]he bus driver's affirmative act of parking the bus in a manner such that the bus's wheelchair lift could not be used to safely load [the child] onto the school bus was a practical, purposeful action that is encompassed within the definitions of 'operation' and 'use.'"

Key Take-A-Way: Train your transportation staff members on safely transporting students with disabilities.



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Restraint

M.G. v. Copperas Cove ISD, 120 LRP 38704 (W.D.—Tex 2020)

An 8th grade student diagnosed with autism, oppositional defiant disorder, depression, anxiety, and bipolar disorder was taken to the office after another student alleged the first student had stolen his Rice Krispie Treat. While in the office, the student denied the claim and became aggressive. The student pushed an Assistant Principal into the wall and was restrained by a second campus administrator. The student was released but subsequently head butted, kicked, and bit the AP and was once again restrained. When the student's parents arrived at the office, the father asked that the administrators continue to restrain the student until he calmed down. The student incurred a shoulder injury, and the parents sued the school district for a violation of their son's Constitutional rights.



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You be the Judge. Who wins?

1. The school district because the restraint was proper and excessive force was not used.
2. The parents because the other kid shouldn't have been allowed to bring FMNV on campus in the first place.
3. The parents because restraint did not occur in response to an "emergency."
4. I'm not going to raise my hand, nor make eye contact with the speaker, in front of my colleagues.



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1. The School District wins.

Restraints can only be used in an emergency situation as defined by law. While the Constitution does preclude school staff from engaging in “excessive force,” the court found that such did not occur here.

Key quote: “the injury is attributable to [the student] struggling against the restraint.” Further, the restraint “cannot be deemed excessive as [the student’s] own father asked that the restraint be continued upon his arrival as he talked to his son.”

Key Take-A-Way: Anyone who might work with students with disabilities should be carefully trained in restraint and PBIS.



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Alleged Improper Conduct by a Teacher

P.M. v. Wylie ISD, 77 IDELR 161 (E.D.—Tex. 2020)

A five-year old child with autism and a speech impairment was injured and sustained a concussion when his special education teacher allegedly “pulled Student off of the play structure by his feet ... then drug student by his feet for approximately 10 yards. [The teacher] then picked the student off of the ground and roughly [and repeatedly] threw him back down on his back ... Several aides...were in the immediate area, but none of them took any action to stop [the teacher]. The District has acknowledged in communications with the parent, that none of the aides intervened.” The child was diagnosed medically as having a concussion, diminished activity, increased sleep patterns, remained quiet, experienced headaches, back pain and leg pain. The parents sued the school district for damages under §1983, and the school sought the dismissal of the case.



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You be the Judge. Who wins?

1. The school district because the student's BIP included the use of aversive techniques to maintain behavior.
2. The parents because the student was mistreated by school staff.
3. Neither side wins, because the judge needs more information in the pleadings to determine whether Section 1983 even applies.
4. What is Section 1983?

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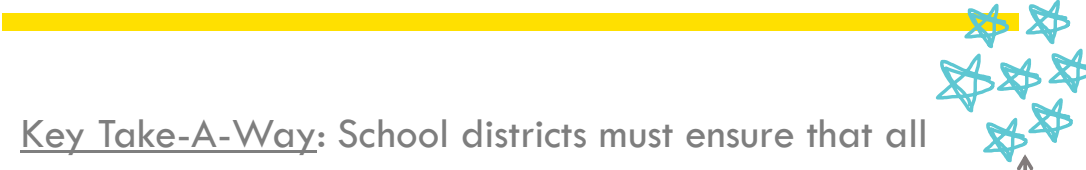
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3. The Judge orders the Parents to amend their complaint


Key quote: "Plaintiff's Complaint does not include any allegations of other employees exhibiting conduct similar to [the teacher's] alleged conduct at issue. Plaintiff's Complaint is further deficient, as it does not allege an official policy or custom that was the moving force behind the violation of P.M.'s constitutional rights. Finally, the Complaint does not include allegations pertaining to the Board of Trustees' knowledge; rather, it contains only broad assertions regarding the District's general knowledge. Plaintiff merely contends, in the Response, that the relevant information was at the Board of Trustees' disposal ... Plaintiff should be given an opportunity to cure the deficiencies in the Complaint."

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Key Take-A-Way: School districts must ensure that all staff members are appropriately trained regarding interventions/interactions with students with disabilities. If a parent can show the school has a policy or custom that violates the federally protected or Constitutional right(s) of students, the District is legally vulnerable when staff do not fulfill their responsibilities to the students.



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Handcuffs and Hard Decisions



Brayden S. v. Waxahachie ISD, 77 IDELR 130 (N.D. – Tex. 2020).

This case is largely about the treatment of an 8-year-old student eligible for special education services as a student with AU and SI who displayed significant behavior at school – resulting in injuries to others and the evacuation of his classroom.

In 2017, in response to four behavioral episodes, a teacher at the school district called the police. The City Police responded to the classroom and restrained the student, arguably improperly. No one initially told the cops that the student was a student with a disability. The student was placed in a prone restraint, an officer allegedly placed his weight on top of the 8-year-old by sitting on him, and the student was handcuffed. The principal held the student's head during the event.

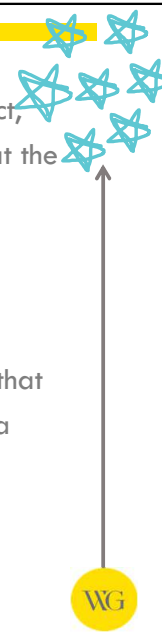


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The parents thereafter sued everyone involved, including the school district, the principal, the city, and two law enforcement officers. Today we look at the case against the principal.


The parents asserted that Principal should be held personally liable for violating the student's constitutional right by holding the students head in place while the police officers restrained the student. They also claimed that having the student in adult handcuffs for longer than necessary was also a constitutional rights violation.

You be the Judge. Should the Principal be held liable?



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1. Yes, because the Principal was involved by holding the student's head while he was being restrained and handcuffed. This constituted the use of excessive force, and the Principal should have known better.
2. Yes, because the Principal could have ordered the law enforcement officers to remove the handcuffs but failed to do so.
3. No, because the parents failed to establish that the principal used excessive force, and the Fourth Amendment's "reasonableness standard" must afford school officials with a relatively wide range of acceptable action in dealing with disruptive students.



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3. The Principal is dismissed from the lawsuit.

Key quote: “Plaintiff cites Kazda's failure to discontinue the use of handcuffs or failure to advocate that they be discontinued. Plaintiff has not demonstrated Kazda had authority to remove the handcuffs and her failure to advocate for their removal does not amount to excessive force. The Court concludes Plaintiff has failed to state an excessive force claim under §1983 claim against Principal Kazda in her individual capacity.”

Key Take-A-Way: School districts must ensure that all staff members are appropriately trained regarding interventions/interactions with students with disabilities. If a parent can show the school has a policy or custom that violates the federally protected or Constitutional rights of students, the District is legally vulnerable.



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Alleged Disability Discrimination: Is the Teacher Liable?

S.C. v. Round Rock ISD, 77 IDELR 101 (W.D. Tex. 2020)

A student diagnosed with anorexia nervosa claimed that her journalism teacher “exploited her mental illness” by pressuring her into being featured in a story in the school yearbook. She also alleged that the journalism teacher assigned other students to interview and photograph the student, without ever contacting her parents to obtain permission. The girl subsequently lost 43 pounds and was placed by her parents in an out-of-state institution to address her anorexia. The parents then filed suit against the district, an assistant principal and the journalism teacher, alleging that they had discriminated against the student on the basis of her disability under the ADA and Section 504, seeking money damages.



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You be the Judge: Should the teacher be held liable?

1. Yes, because the teacher revealed to other students that the girl at issue suffers from a mental impairment.
2. Yes, because the teacher discriminated against the student by not letting her write her own "feature article" about herself and instead asked another student to do so.
3. No, because individuals are not exposed to liability under the ADA and Section 504. School districts are potentially liable for disability discrimination under these statutes, but not individuals. So, the teacher is off the hook.

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3. The Teacher is off the hook.

Individuals are not held liable under the ADA or Section 504. However, the Court noted that the school district could be held liable if the parents could prove that the teacher acted intentionally to discriminate against the student. As a result, the school district was not dismissed from the case.

Key Take-A-Way: A school district can be held liable for the acts of its employees. Teachers need to understand that the violation of a student's privacy rights could result in a finding of disability discrimination against the school district.

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Behavior & Documentation

Spring Branch ISD v. O.W., 76 IDELR 234 (5th Cir. 2020)

This case largely addresses child find and the evaluation of a student. For today's presentation, let's take a look at the decision through the discipline and behavior lens.

Issue One: Does the IEP or BIP have to "authorize" the use of physical restraint? Yes or No?

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No.

Key Quote: "Unlike the use of time-outs, the law contains no provision requiring that the use of physical restraints be expressly authorized by a student's IEP. Therefore, so long as the School District's use of physical restraints complied with state law, the use of restraints did not violate the IEP."

Issue Two: If the IEP/BIP calls for positive interventions, calm interactions, and the avoidance of power struggles, is it a violation of the IEP when the school calls in the cops?

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No.

Key Quote: “These strategies are not necessarily violated by a mere request for police presence, particularly to deal with a violent and escalating situation such as a student repeatedly striking a teacher and charging at her, as was the case here.”

Comment: that requirement that time-out (which is BROADLY DEFINED) be authorized by the IEP is in Texas state law—not IDEA or any other federal law.

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Attendance and Enrollment

When a student with disabilities is consistently absent from school, and the parent does not respond to the auto generated notification of absences, how should the school proceed?

1. Offer virtual learning for the student; after all, we’ve come a long way since last March with respect to digital learning.
2. Withdraw the student from school for failure to attend; that will avoid the ADA hit. Send home a RWA letter to the parent and let the JP Court handle it.
3. Call an ARD committee meeting.

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3. Call an ARD.

ISD No. 283 v. E.M.D.H., 76 IDELR 203, (8th Cir. 2020)

The court held that the district failed in its child find responsibility. This girl was “disenrolled” by the district in 8th grade, 9th grade, and twice in 10th grade, each time due to the student’s failure to attend school. At no point did the district refer the child for special education testing, despite its knowledge of several mental health diagnoses. The court drew a distinction between those students who willfully refuse to attend school vs. those with significant mental health issues.



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The Student was absent from the classroom not as a result of “bad choices” causing her “to fail in school,” for which the IDEA would provide no remedy, but rather as a consequence of her compromised mental health, a situation to which the IDEA applies.

The court described the student as having “a panoply of mental health issues that have kept her in her bedroom, socially isolated, and terrified to attend school.”

Comment: consistent failure to attend school is a red flag. Not all students who fail to show up are doing so because of a disability. But some are. The district would be wise to pause and look into it.



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Summing Up



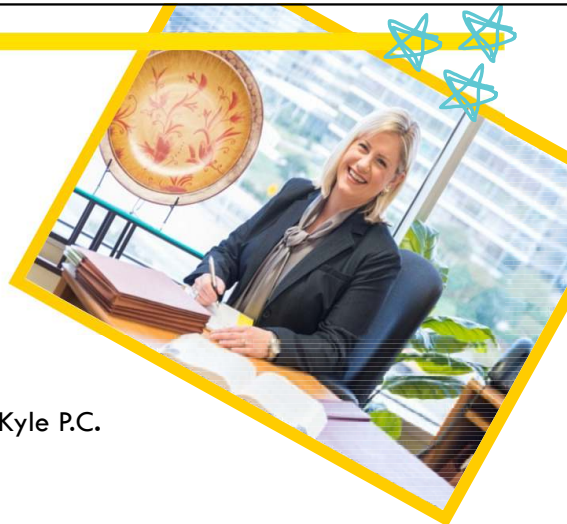
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