Is There Recourse if Your Special Education Child Is Injured at School From a Wrongful Restraint or Seclusion?[1]

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When a child is injured at school, a parent's first reaction may be to seek redress for their child's injury through the legal system. Succeeding in having a court even adjudicate the merits of the matter will be a challenge. Indeed, should litigation be filed in Federal court, the first action defense counsel will likely take is to challenge the litigation by filing a motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12 (b)(1) for lack of subject matter jurisdiction. In most cases, the defendant's dispositive motion will prove successful on various grounds. This primer is intended to identify some of those grounds, provide insight as to the court's consideration of these grounds, and ultimately stimulate dialogue to formulate creative, good-faith litigation strategy to overcome such challenges.

Part I of this primer addresses the exhaustion doctrine of the Individual with Disabilities Education Act ("IDEA"),[3] which is often a substantial hurdle for plaintiffs litigating in Federal court to overcome. It argues that, to avoid Rule 12 summary dismissal, practitioners should draft

[1] Please note that the information contained in this primer is not a substitute for the lawyer's own research, analysis and judgment. This primer is not intended, and does not provide, substantive legal advice or opinions.

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[3] *See generally* 20 U.S.C. § 1400 *et. seq.*

complaints (1) to avoid raising claims already raised in the request for a due process hearing, (2) to avoid the common practice of pleading traditional IDEA claims which are likely to fail, and (3) to build a record of futility at the administrative proceeding level.

Part II examines the substantial bar practitioners face when adding state-law tort and negligence claims to a complaint against a school district or school employee. Where a child is wrongly restrained or otherwise injured, a civil practitioner's first instinct may be to seek redress under state-law tort and negligence claims. But whereas tort actions against a private party may meet with a high likelihood of success, a tort claim against a school district – if not considerate of a state's governmental immunity statutes (which include both procedural and substantive requirements) – will meet summary dismissal.

I. SURVIVING THE INDIVIDUAL WITH DISABILITIES EDUCATION ACT'S EXHAUSTION DOCTRINE

The "exhaustion doctrine" of the IDEA requires a plaintiff to exhaust his administrative remedies before filing a lawsuit.[4] Exhaustion "was intended to channel disputes related to the education of disabled children into an administrative process that could apply administrators' expertise in the area and promptly resolve grievances."[5] The doctrine allows state and local agencies the opportunity to exercise their discretion and educational expertise, "affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency."[6] Practically speaking, this translates into a prerequisite which

[4] Courts interpreting the IDEA have stated that "the legislative history of the Act . . . reflects the understanding that exhaustion is not a rigid requirement." *Ruth Anne M. v. Alvin Indep. Sch. Dist*., 532 F. Supp. 460, 463 (S.D. Tex. 1982). There are also instances where "'wooden application of the exhaustion doctrine . . . would accord neither with the salutary interests the doctrine is intended to serve . . . nor with the basic purpose underlying the [IDEA].'" *Id.* (citations omitted).

[5] *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 487 (2d Cir. 2002).

[6] *Id.* (citations omitted).

requires a party to have its claims heard and resolved by the school's due process hearing officer and appellate authority before filing a lawsuit.

There is an exception to this doctrine and it occurs where efforts to exhaust the administrative remedies would be futile because administrative procedures do not provide adequate remedies.[7] Accordingly, the relevant inquiry is "whether the administrative process can address the plaintiffs' concerns not whether the process can grant the specific remedy" requested by plaintiffs.[8] Courts have carefully carved out this exception, recognizing that there are times when it is not appropriate to require a plaintiff to exhaust their administrative remedies prior to filing a lawsuit – but they rarely grant its application. The key then, is to craft the claims of a complaint in a manner that fall within this narrow exception.

A. The claims sought in the complaint must be distinct from those raised in the Request for a Special Education Due Process Hearing.

The claims sought in a complaint seeking redress from a wrongful restraint or seclusion must be distinct from those raised in the Request for Special Education Due Process Hearing. In fact, the lawsuit should not involve claims for traditional IDEA violations regarding educational placement or services.[9] Those violations should be contained in the Request for a Special Education Due Process Hearing and will likely consist of claims surrounding the defendant's failure to follow the child's Individual Education Plan, and may even seek private homebound services. These violations are within the scope of the IDEA and fall within the expertise of the due process hearing officer and appellate body – a conclusion which coincides with the overall

[7] *See Honig v. Doe*, 484 U.S. 305, 326-27 (1988); *Gardner v. Sch. Bd. of Caddo Parish*, 958 F.2d 108, 111-12 (5th Cir. 1992).

[8] *J.I. & N.I. v. Beauregard Parish Sch. Bd*., No. 2:08-cv-535, 2008 WL 2340214, at *4 (W.D. La. June 6, 2008).

[9] *Id.* (noting that plaintiffs' concerns over "long bus rides, insufficient services, and inability to participate in extracurricular activities" all fell "under IDEA's purview and are appropriately handled through the administrative process").

purpose of the exhaustion doctrine, which is to allow for the exercise of discretion and educational expertise of state and local agencies.[10] In comparison, litigation involving wrongful restraint or seclusion will undoubtedly center around a defendant's egregious misconduct and include claims of personal injury and negligence. These claims do not pertain in any way to a child's education or implementation of a teaching plan so as to fall within the expertise of the due process hearing officer and appellate body.

Indeed, such claims are not within the scope of the IDEA, whose "primary purpose is to ensure [a free and adequate public education], not to serve as a tort-like mechanism for compensating personal injury."[11] Neither the due process hearing officer nor the administrative appellate agency can redress, for example, claims of physical and mental damages, negligence, and assault. These claims do not fall within their areas of expertise and any attempt to bring the claims raised in a wrongful restraint and seclusion suit before either would therefore be futile.[12] Moreover, the claims of a wrongful restraint and seclusion suit will allege egregious misconduct that violates rights independent of the IDEA. The IDEA was not intended to be, and should not be construed as, a shield from liability for those school districts and their employees who abuse their students and also abuse seclusion and restraint techniques when dealing with children with disabilities. Personal injury and related damages are simply not the areas of expertise of state educators or hearing officers.

1. Sufficient evidence must be proffered in support of a futility claim.

[10] *See Polera*, 288 F.3d at 487.

[11] *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 125 (1st Cir. 2003) (citation omitted).

[12] *See Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1272-73, 1276 (9th Cir. 1999) (where exhaustion was not required since plaintiff was not seeking relief that was also available under the IDEA and involved egregious conduct by defendants such as being force-fed, strangled and emotional abuse).

It is legally *insufficient* for a plaintiff to simply state exhaustion is futile; instead, a plaintiff must advance specific arguments and facts to support the contention or risk rejection of the futility exception.[13] Therefore, it is imperative that plaintiffs provide specific and detailed support in their complaint for why they should be excused from the exhaustion requirement.

A plaintiff must also proffer substantive evidence in support of his futility argument.[14] For example, litigation pertaining to injuries from a wrongful restraint or seclusion will likely advance claims of mental and physical injuries. Therefore, it is critical to provide medical records, as well as any incident reports or interview notes that evidence the type of conduct alleged. This evidence will serve to buttress the basis of the futility exception and supports the proposition that a defendant's conduct can not be remedied in an administrative proceeding.

B. It is necessary to establish that it would be futile to exhaust the available administrative remedies at the due process hearing and at the appeal level.

The specific facts alleged in support of the futility argument must apply to both the due process hearing and appellate review process. In *J.I. & N.I. v. Beauregard Parish Sch. Bd.*, plaintiffs claimed that their children's IDEA rights were violated when the school board decided to close their high school and consolidate it with two others.[15] In response to their request to keep the school open, the school board president informed plaintiffs that they could appeal their children's school re-assignment, but the school board would not consider reopening the school.[16] After plaintiffs filed suit, defendant moved to dismiss based on the lack of subject-matter jurisdiction because plaintiffs failed to exhaust their administrative remedies and no exception

[13] *See e.g., Flores v. Sch. Bd. of DeSoto Parish*, No. 03-30967, 2004 WL 2604225, at *5 (5th Cir. Nov. 16, 2004).

[14] *See Witte*, 197 F.3d at 1275.

[15] *J.I.*, 2008 WL 2340214, at *4.

[16] *Id.*

justified their failure to do so.[17] In response, plaintiffs argued they were relieved from the exhaustion requirement by virtue of the futility exception because the available administrative remedies were inadequate since the school board stated it would not consider keeping the school open.[18] The district court rejected this argument, and stated that the relevant inquiry as to whether available administrative remedies are inadequate or futile is "whether the administrative process can address the plaintiffs' concerns not whether the process can grant the specific remedy" requested by plaintiffs.[19] Moreover, the court noted that even if the hearing officer was unable to fashion a remedy, plaintiffs had not alleged that the state educational body was also unable to do so.[20]

In *Papania-Jones*, plaintiffs filed two formal complaints with the state defendant after their son ceased receiving occupational therapy provided to him under the IDEA.[21] In response to the complaints, defendant maintained that it had not violated the IDEA.[22] Instead of requesting a due process hearing, plaintiffs then filed a law suit in federal court.[23] Thereafter, defendants moved to dismiss, and the court granted their motion, finding that plaintiffs had failed to exhaust the IDEA's administrative remedies.[24] On appeal, plaintiffs argued that it would have been futile to exhaust the remaining IDEA administrative remedies.[25] The Fifth Circuit rejected

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[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Papania-Jones v. Dupree*, No. 07-30959, 2008 WL 1790428, at *1 (5th Cir. Apr. 17, 2008) (the futility exception applies where a plaintiff alleges a systematic IDEA violation and where the due process officer is powerless to correct the violation).

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* at *2.

this argument because it was solely based on plaintiffs' dissatisfaction with the state's response to their formal complaints.[26]

The Fifth Circuit considered a Second Circuit case that found the exhaustion requirement "may be bypassed in situations with systematic violations that a hearing officer would have no power to correct."[27] The *Papania-Jones* court distinguished its case from that in the Second Circuit and determined that plaintiffs "had not proffered sufficient evidence to support their futility argument and bypass the important administrative review process."[28] Ultimately, the court found that plaintiffs failed to show a hearing officer would have been powerless to correct the alleged IDEA violation, and that they did not challenge a settled state policy that could not be addressed through the IDEA's administrative remedies.[29] Therefore, the court held that the claims did not fall within the futility exception and had been properly dismissed because of their failure to exhaust administrative remedies.[30]

C. Improper Implementation of the Behavior Intervention Plan.

It may also be futile for a plaintiff to seek exhaustion of administrative remedies when claiming improper implementation of a Behavior Intervention Plan.[31] The parents in *David G.* filed a lawsuit for damages on behalf of their son arising from injuries he sustained while a student, and sought monetary damages[32] and declaratory injunctive relief. At trial, plaintiffs argued that defendants failed to provide a safe and suitable environment as required in the ARD

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[26] *Id.*

[27] *Id.* (citation omitted).

[28] *Id.* at *3.

[29] *Id.*

[30] *Id.*

[31] *See David G. v. Austin Indep. Sch. Dist.*, No. 93-8861, 1994 WL 652589, at *2, fn 1 (5th Cir. Nov. 10, 1994).

[32] Seeking monetary damages – damages which are unavailable through the administrative process - is insufficient to avoid exhaustion and withstand a motion to dismiss. See, e.g., *Polera*, 288 F.3d at 487.

committee reports.[33] They also argued that defendants failed to reasonably accommodate their child on paper, or based on what was contained on the paper.[34] The district court denied plaintiffs claims, and the Fifth Circuit affirmed. **Although the issue was not raised on appeal to the Fifth Circuit**, the district court found that with respect to the improper implementation of the ARD report, it would have been futile for plaintiffs to exhaust their administrative remedies because "'the relief they seek is not contemplated by the statute and raises legal questions that require judicial determination.'"[35] Accordingly, the district court had jurisdiction to consider the claims that involved improper implementation of the ARD report.[36]

Thus, while it may not possible to withstand a motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, it is imperative that the claims contained in the complaint be distinct from those raised in the request for a due process hearing, do not involve traditional claims under the IDEA, and that futility be established at both levels of the administrative proceeding.

II. TORT AND NEGLIGENCE CLAIMS UNDER STATE LAW MUST BE CAREFULLY PLED TO AVOID FINDINGS OF GOVERNMENTAL IMMUNITY

Claims sounding in state tort and negligence law face a difficult path when the defendant is a school district or employee. Nationally, only one in ten lawsuits against school districts prevail "conclusively or at least partially" under state law claims.[37] This highly exceptional rate

[33] *David G.*, 1994 WL 652589, at *1-2.

[34] *Id.*

[35] *Id.*

[36] *Id.* at *2 n.1.

[37] *See* Diane Holben & Perry A. Zirkel, *Empirical Trends in Teacher Tort Liability for Student Fights*, 40 J. L. & EDUC. 151, 153 (2011) (referencing published negligence suits between subject years 1990 and 2005 and finding that 11%). Statistics from tort suits for the same period are not available. *See id.*

of dismissal is mostly attributable to the affirmative defense of governmental immunity.[38] If the defendant is a school district, public school board, or other governmental entity, it may be (and often is) immune from liability for injuries that allegedly resulted from policy or planning-level decisions or, more broadly, from the exercise of any "governmental function," *i.e.*, the day-to-day operation of the school and the daily care of students.

In its purest form, governmental immunity "completely absolves a governmental body from liability and prevents an injured party from recovering damages."[39] Governmental immunity can serve as a total, complete, and (unfortunately) unassailable bar to any claim against an educator defendant.[40] Even with a modern legislative trend of abrogation to state immunity laws, the defense of governmental immunity in public school district litigation "continue[s] to flourish," according to some legal commentators.[41] And, while variation exists between and among states on the available exceptions to the governmental immunity bar, *no* American state has "completely eliminated" immunity for school districts and their employees.[42] Even where a suit is permitted under a state's tort claims act, procedural and technical requirements (including Notice of Claim requirements) may serve as a litigation bar. Therefore, practitioners need to have a complete understanding of the governmental immunity laws in the

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[38] Perry A. Zirkel & John H. Clark, *School Negligence Case Law Trends*, 32 S. ILL.U. L.J. 345, 361 (2008) (finding "governmental immunity was particularly prominent in terms of both the frequency and district-favorable outcomes of all the various bases for [court] decisions"). Of course, other affirmative defenses exist and may serve as an effective bar to recovery of claims, *e.g.*, (1) privileged conduct – school officials are not held liable for harm when the use of reasonable force in self-defense or to stop a school fight is necessary, (2) victim fault – assumption of risk and contributory negligence may serve as a bar to recovery depending on the state's laws. *See* EdGrowth, *Avoiding Tort Liability in Schools*, http://www.edgrowth.com/p7.html (last visited May 5, 2011).

[39] John B. Mancke, *Liability of School Districts for the Negligent Acts of Their Employees*, J.L. & EDUC. 109, 109 (1972).

[40] *Cf. C.B v. Sonora School Dist.*, 621 F. Supp. 2d 1123, 1150 (E.D. Cal. 2009) ("Immunity is the rule. Exceptions are, by definition, exceptions to the rule. The rule applies unless and until Plaintiff can plead facts demonstrating that an exception applies to the facts of the case.").

[41] *See* Peter J. Maher et al., *Governmental and Official Immunity for School Districts and Their Employees: Alive and Well?*, 19 KAN. J.L. & PUB. POL'Y 234, 234 (2010).

[42] *Id.* at 242.

state in which they practice. Complaints, where possible, should limit claims only to legislative exceptions to immunity laws' wide nets.

A. Claims against school districts must comply with technical and procedural requirements of a State's tort claims act.

Before any litigation against a school district (or a school district's employees) is commenced, litigators are cautioned to comply with special statutory notice requirements of state and local governments. These notice requirements, which are housed within each State's statutory schemes governing tort claims, have been referred to as "sleepy statutory monster[s]" capable of dooming any Complaint before the Answer is even served.[43] Notice requirements can be "perilous for unsuspecting parties dealing with school districts."[44]

For example, New York State's Education Code requires that in *every* action against a school district, board of education, board of cooperative educational services or school, a notice of claim must be filed *within three months* after the accrual of a claim and be presented to the governing body of a school district or school *prior* to the commencement of any litigation.[45] The purpose of the provision is to "allow municipal defendants to conduct an investigation and examine the plaintiff with respect to the claim, and to determine whether the claims should be

[43] *See, e.g.*, Kevin Schlosser, *The Statutory Minefield of Education Law § 3813*, N.Y.L.J., Sept. 28, 1994, *available at* http://www.msek.com/publications/archive_pub.php?pub_id=86. It has been observed that requirements for notice of negligence claims against school districts and employees obviously have a *de facto* effect of limiting a school district's liability. *See, e.g.*, Felice v. Eastport/South Manor Cent. Sch. Dist., 85 N.Y.S.2d 218 (N.Y. App. Div. 2008). Practitioners in one case "who [ ] failed to take note of the provision have had their cases dismissed, some in which more than half a million dollars were in dispute." Steven Isaacs & Mathew Paulose Jr., *The Notice of Claim Provision in Breach of Contract Actions Against the City of New York*, 6 N.Y. CITY L. REV. 1, 1 (2003).

[44] *See id.*

[45] N.Y. EDUC. LAW § 3813(1) (2001).

adjusted or satisfied before the parties are subjected to the expense of litigation."[46] Failure to comply with the letter of the statutory requirement results in dismissal of the claims.[47]

Whether a Notice of Claim is required, the allotted time in which to file a Notice of Claim, and the form for notice may vary from state to state, and local government to local government. In some states, the government entity is allowed a period to review the claim before it can be filed. To avoid the harshness of immediate dismissals, some states have relaxed notice requirements by allowing late Notice of Claims to be served – by leave of court – in limited circumstances, such as where "the school district acquired actual knowledge of the essential facts constituting the claim" during the Notice of Claim period.[48]

Other procedural and technical issues that a potential plaintiff will need to consider before filing suit are how the state's Tort Claims Act treats joint and several liability and the applicability of the usual (or a more restrictive) statute of limitations.[49]

B. There exist exceptions to the general rule that school districts and school employees cannot be subject to suit or liability.

Realizing the hardships on injured parties that governmental immunity can cause, an increasing number of jurisdictions have abrogated or partially abolished the doctrine of governmental immunity.

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[46] *Davidson v. Bronx Mun. Hosp.*, 64 N.Y.2d 59 (1984) (addressing N.Y. GEN. MUN. LAW § 50-h); *see also Parochial Bus Sys., Inc. v. Bd. of Educ. of City of N.Y.*, 60 N.Y.2d 539, 547 (1983) (addressing N.Y. EDUC. LAW § 3813).

[47] N.Y. EDUC. LAW § 3813(1) (2001).

[48] *See* N.Y. EDUC. LAW § 3813(2-a) (permitting applications for leave to file late notice of claim in tort actions only).

[49] *See, e.g.*, HAW. REV. STAT. § 663-11 (2009); NEB. REV. STAT. § 13-919 (2009).

1. Insurance coverage

Proponents of governmental immunity argue that its "core purpose[] . . . is to protect the public purse by allowing the [state] to avoid the cost of trial for matters where the claim is barred."[50] Accepting *arguendo* this premise, if the public purse was not "on the hook" for costs associated with litigation, the need for school districts to be immunized from suit decreases. It is not surprising, then, that a growing number of states have turned to private insurance policies – authorizing school districts to purchase liability insurance to cover its employees' acts.[51] In states that allow school districts to purchase liability insurance, governmental immunity is generally waived if the school district actually obtains liability insurance.[52] Findings of liability are often statutorily capped at the school district's insurance policy limit.[53] Where a school district declines to obtain insurance in such a system, any finding of liability is negated.[54] Where the school district's action at issue in the litigation falls outside the district's insurance liability policy, immunity may bar the act.[55] Therefore, practitioners in states which permit districts to obtain insurance coverage, and waive immunity based on the holding of such coverage, practitioners should endeavor to understand the liability policy in place, the policy limit, and the kind of conduct the coverage insures.

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[50] *See, e.g.*, Gregg MacDonald, *Senate Bill Could Hinder Lawsuits Against Virginia Tech Officials*, FAIRFAX TIMES, Feb. 1, 2011, *available at* http://www.fairfaxtimes.com/cms/story.php?id=2945.

[51] *See, e.g.*, KY. REV. STAT. ANN. § 160.310; LA. REV. STAT. ANN. § 601; N.J. STAT. ANN. § 18A:39-6; N.Y. EDUC. LAW § 3023; W. VA. CODE § 18-5-13.

[52] *See, e.g., Sch. Bd. v. Surette*, 394 So. 2d 147 (Fla. Dist. Ct. App. 1981) (applying FLA. STAT. § 234. 03); *Hicks v. Walker County Sch. Dist.*, 323 S.E.2d 231 (Ga. Ct. App. 1984) (applying GA. CODE ANN. § 33-24-51); *Longpre v Joint Sch. Dist.*, 443 P.2d 1 (1968). Most states appear to make the purchase of insurance optional.

[53] *See, e.g., Huff v. Northampton County Bd. of Educ.*, 130 S.E. 2d 26 (1963).

[54] *See id.* Some states remove all discretion from the school district and specifically *require* school districts carry minimum levels of insurance. DEL. CODE ANN. Tit. 14, § 2904 (requiring school buses operated "by any public school district" carry bodily insurance coverage of "[t]otal coverage of [ ] $100,000" and medical payment coverage of $1,000).

[55] *See* ILL. CODE ANN. § 5/34-18.1.

2. Legislative exceptions to government immunity

Even if a state does not adopt the insurance coverage approach to immunity, there likely exist statutory exceptions to the immunity defense. For example, the Texas Education Code section 22.0511 provides broadly, as a general rule, that "[a] professional employee of a school district is not personally liable for any act that is incident to or within the scope of the duties of the employee's position of employment."[56] But that same provision has an important exception, *i.e.*, allowing suit "in circumstances in which a professional employee *uses excessive force* in the discipline of students *or negligence resulting in bodily injury to students*."[57]

While the text of a legislative enactment may seem clear, as in the case of section 22.0511, practitioners should dig deeper. As education law experts Nate Carman and Richard Fossey have noted, courts consistently err on the side of school districts/educators – interpreting governmental immunity provisions in favor of educator defendants "and resisting arguments that the law should interpreted in a way that would favor plaintiffs."[58] Indeed, section 22.0511's seemingly clear exceptions, ironically, are no exception to the Carman/Fossey rule. In *Barr v. Bernhard*,[59] the Texas Supreme Court interpreted section 22.0511's language barring suit "except in circumstances where professional employees use excessive force in the discipline of students or negligence resulting in bodily injury to students."[60] The plaintiff argued that this statutory exception to the Texas educator immunity law permitted lawsuits against educators for

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[56] TEX. EDUC. CODE § 22.0511(a).

[57] *Id.* (emphasis added).

[58] Nate Carman & Richard Fossey, *Statutory Immunity for Teachers and Administrators in Texas Public Schools: Texas Educators Enjoy Strong Protection Against Defamation Suits*, 247 Educ. L. Rep. 581, 583 (2009) (citing JIM WALSH ET AL. THE EDUCATOR'S GUIDE TO TEXAS SCHOOL LAW 385-86 (6th ed. 2005)).

[59] 562 S.W.2d 844 (Tex. 1978).

[60] *Id.* at 848 (citing TEX. EDUC. CODE § 21.912(b)).

negligence resulting in bodily injuries—a plausible interpretation of the statute.[61] The Texas Supreme Court, however, concluded that the Texas Legislature intended this clause to permit lawsuits against Texas professional educators only when their acts related to the disciplining of students, reasoning that this was the only way the entire section of the statute could be reasonably interpreted.[62] Thus, the court ruled, the law does not permit lawsuits against Texas educators that arise from negligence that cause bodily injury unless the injury results from disciplining students.[63] The Texas Supreme Court's ruling essentially negated a seemingly broad exception to the general immunity bar to a very limited window for plaintiffs.

Ultimately, even where an exception applies and a state consents (in some limited way) to be *sued*, practitioners should consider whether the state's statutes permit actual findings of *liability*. A practitioner's failure to distinguish consent to suit from consent to liability may lead to Pyrrhic victory.[64]

C. Federal law may provide additional bars to recovery.

Even where a practitioner believes that an exception or other waiver of governmental immunity applies and the state has legislatively consented to suit, Federal law may interject yet another hurdle. In 2001, Congress passed the so-called "Teacher Liability Protection Act."[65] The Act "ostensibly granted qualified immunity to teachers for their good faith actions to

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[61] *Id.* at 849.

[62] *Id.*

[63] *Id.*

[64] "Immunity from suit bars a suit against the state unless the State expressly gives its consent to the suit. In other words, although the claim asserted may be one on which the state acknowledges liability, this rule precludes a remedy until the Legislature consents to suit . . . Immunity from liability protects the State from judgments even if the Legislature has expressly given consent to the suit. In other words, even if the Legislature authorizes suit against the State, the question remains whether the claim is one for which the State acknowledges liability. The State neither creates nor admits liability by granting permission to be sued." *Fed. Sign v. Tex. So. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997) (citations omitted).

[65] 20 U.S.C. §§ 6731-6738 (2008).

maintain order if those actions resulted in student injury."[66] If the state receives Federal education funding, it is bound to accept the act's governmental immunity limitations: the Act specifically states that it "shall only apply to States that receive funds under this chapter, and shall apply to such a State as a condition of receiving such funds."[67] The Act explicitly provides, "[t]his subpart preempts the laws of any State to the extent that such laws are inconsistent with this subpart, except that this subpart shall not preempt any State law that provides additional protection from liability relating to teachers."[68]

Commentators have observed that the Teacher Liability Protection Act "contains a lower level of protection than that available through immunity statutes in many states due to its numerous exceptions and limitations."[69] Although the specific parameters of the Teacher Liability Protection Act are outside the scope of this primer, practitioners should take care to ensure that their claims – even if allowed by state law – do not run afoul of federally imposed immunities.

D. Pursuing the employee: a State's tort claims act may allow, in certain limited circumstances, a claim against a teacher or other school district employee.

Immunity protects, in most circumstances, school district employees to the same extent it protects the school districts.[70] However, "there seems to be a general consensus that at the very

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[66] *See generally* Perry A. Zirkel, *The Coverdell Teacher Protection Act: Immunization or Illusion?*, 179 EDUC. L. REP. 547 (2003).

[67] 20 U.S.C. § 6734. The "chapter" the Act references is chapter 70 of title 20 of the United States Code, also known as the Elementary and Secondary Education Act.

[68] *Id.* at § 6735(a).

[69] Diane Holben & Perry A. Zirkel, *Empirical Trends in Teacher Tort Liability for Student Fights*, 40 J. L. & EDUC. 151, 154 (2011).

[70] *See Harris v. McCray*, 867 So. 2d 188, 189 (Miss. 2003) ("A governmental entity and its employee enjoy immunity if there is exercise of ordinary care in the performance of a duty under a statute, ordinance or regulation."); *Tarlea v. Crabtree*, 263 Mich. App. 80, 89 (Ct. App. 2004) ("Generally, governmental employees acting within the scope of their authority are immune from tort liability except in cases in which their actions constitute gross negligence.").

least, recklessness will defeat any immunity."[71] For example, Michigan law provides that "a governmental employee is not responsible in tort for personal injuries *unless the governmental employee is grossly negligent*, which the statute defines as 'conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."[72]

Teachers can also be held liable for physical punishment of students. A Texas statute provides that school employees are *not* personally liable for acts within the scope of their employ that involve judgment or discretion, *unless* they use excessive force *and* if their negligence results in bodily injury to a student.[73] What a reasonable person might consider "excessive force" does not necessarily correlate, in practice, with how courts have construed the term. For example, the Sixth Circuit Court of Appeals found that paddlings by coaches were for disciplinary purposes and not excessive in severity, frequency, motivation, or means when considering a Tennessee statute that allows corporal punishment "in a reasonable manner . . . to maintain discipline and order."[74]

In some jurisdictions, it is prohibited to simultaneously sue a school district *and* a school district's employees. So-called "Election of Remedies" provisions may bar such litigation. The Texas Tort Claims Act, for example, provides broadly that:

> (a) The filing of a suit under this chapter against a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter.

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[71] David Feingold, Note, *Who Takes the Heat: Criminal Liability for Heat-Related Deaths in High School Athletics*, 17 CARDOZO J. L. & GENDER 359, 370 (2011).

[72] *Id.* at 371 (citing *Tarlea v.* Crabtree, 263 Mich. App. 80, 82 (Ct. App. 2004)).

[73] TEX. EDUC. CODE ANN. § 22.051. The statute has been interpreted to require *both* excessive force and negligence resulting in injury. *See supra* notes 55-56.

[74] *See generally Nolan v. Memphis City Schs.*, 589 F.3d 257 (6th Cir. 2009) (citing TENN. CODE ANN. § 49-6-4103).

> (b) The filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents,[75]

Thus, practitioners should carefully select their named defendants and weigh their claims against the applicable standards for bringing suit against school district employees versus the school district itself.

E. A trend toward abrogation of governmental immunity may be waning; child/parent advocates should keep abreast of public policy developments and, potentially, consider adding their voices to the policy debate.

Teacher unions continue to be among the strongest proponents of increased immunity protections and have argued that immunity protections do not go far enough.[76] The primary argument by teacher unions is that "fear of litigation and liability" will "cripple educators from maintaining order and student safety in public schools."[77] This is an argument that some elected officials have appeared to embrace.[78] At the same time, state and municipal governments – saddled with increasingly significant shortfalls in funding – may be now further reluctant to expand immunity exceptions to allow for attendant risks of increased litigation costs.

Advocates of parents and children should consider adding their perspective to the debates in statehouses over how and whether the governmental immunity hurdle to lawsuits on state tort and negligence claims should be raised or lowered. If advocates view litigation as an effective

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[75] TEX. CIV. PRAC. & REM. CODE. ANN. § 101.106.

[76] *See, e.g.* Nat'l Educ. Ass'n – New Mexico, *The Truth About the Teacher Protection Act*, www.nea-nm.org/issues/ESEA/TPA.htm (arguing that the Coverdell Act and existing state immunity provisions are so "narrowly drawn and rife with exceptions, that—in practical terms—it affords school employees almost no real protection from lawsuits") (last visited May 5, 2011).

[77] *See* Diane Holben & Perry A. Zirkel, *Empirical Trends in Teacher Tort Liability for Student Fights*, 40 J. L. & EDUC. 151, 151 (2011).

[78] *See, e.g.*, Bob Gwaltney, *Governor Wants Legal Protections for Teachers*, USA TODAY, Aug. 12, 2008 (noting Indiana Governor Mitch Daniels pledged, if re-elected, to "give teachers legal immunity if they become the target of litigation for actions such as restraining a student"), *available at* http://www.usatoday.com/news/politics/election2008/2008-08-11-teacher-protection_N.htm.

method of discouraging wrongful restraint or seclusion in public schools, and state-law claims are viewed as the proper vehicle for relief, governmental immunity exceptions must be expanded so as to avoid what will likely be a continuing increase in the number of summary dismissals in the future.

Special Education Law
Advanced Case Studies

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This presentation is given as a service to the community . While the information is about legal issues, it is not legal advice.

Federal Court Decisions on Hot Topics in Special Education Law

- Grades as determinant of FAPE **3rd Cir.**
- Restraint and Corporal Punishment **11th Cir.**
- *Attorney's fees Collection Under IDEA*
  - By Parent **9th Cir.**
  - By Private School **6th Cir.**
  - By School District **9th Cir.**
- Child Find: Identifying a Child with Special Needs **9th Cir.**
- Least Restrictive Environment (LRE) **5th Cir.**
- Reimbursement of Private School Tuition **9th Cir and Supreme Court**

Do Grades Determine a Free Appropriate Public Education (FAPE)?

D.S. v. Bayonne Board of Education. 602 F. 3d 553
3rd Circuit (2010)

ISSUE: Whether high grades in a special education class means the child is receiving a meaningful education benefit.

HOLDING: Grades in special education classes are not conclusive evidence that the child has received a FAPE.

REASONING: High grades achieved in classes with only special education students set apart from the regular classes of a public school system are of less significance than grades obtained in regular classrooms.

Restraint and Corporal Punishment

TW v. School Board of Seminole County, Florida, et. al. 610 F.3d 588
11th Circuit (2010)

ISSUE: Whether a teacher of an Autism specific class violated a student's constitutional right under the 14th Amendment (via 42 USC § 1983) to be free from excessive corporal punishment or discriminated against the student in violation of Section 504 of the Rehabilitation Act solely when the teacher physically and verbally abused the student on several occasions?

HOLDING: Teacher's use of force (restraint) could be viewed as an attempt to "restore order, maintain discipline, and prevent the student from harming himself" was not "obviously excessive" and therefore did not violate student's constitutional rights under the 14th Amendment. Neither the Board nor the Teacher intentionally discriminated against the student on the basis of his disability.

REASONING: Conduct must be arbitrary and egregious to support a complaint of a violation of substantive due process. For violation of Section 504, a plaintiff must prove that the defendant knew that harm to a federally protected right was substantially likely and that the defendant failed to act on that likelihood.

NOTE: The dissenting opinion finds that under either a 4th or 14th Amendment analysis, the teacher's conduct was clearly unlawful.

Attorney Fees Awarded for Misclassification

Weissberg v. Lancaster School District, 591 F.3d 1255

9th Circuit (2010)

ISSUE 1: Whether a misclassification of disability, without a FAPE denial, will permit Parents to collect attorneys' fees under the IDEA as a prevailing party?

HOLDING: A misclassification of disability changes the legal relationship between the district and the student (specifically in a state which requires special education teachers be certified to instruct students with particular disabilities) and therefore meets the threshold of a "significant issue in litigation," allowing for attorney's fees.

REASONING: A student need not be deprived of FAPE to trigger prevailing party status for student's parents. Once Student's classification changed, student had the legal right to instruction by a teacher qualified to teach students with mental retardation and autism.

NOTE: Court also determined that student's grandmother, who is an attorney and represented student, could recover attorney' fees because she unlike parents "[is] not so uniquely invested in IDEA proceedings."

Attorney Fees: Who's Eligible to Collect Under the IDEA?

Children's Center for Developmental Enrichment v. Machle, 612 F.3d 518
6th Circuit (2010)

ISSUE: Whether a private school can collect its attorneys' fees from parents when parents' claims were brought under the IDEA?

HOLDING: The IDEA permits collection of attorney's fees from parents or their attorney where the parents' suit is determined to be "frivolous, unreasonable, baseless, or filed for an improper purpose" but does not allow for a private school which is not a public agency to recover legal fees from parents or their attorney.

REASONING: The IDEA allows parents and state or local educational agencies to seek collection of their attorney fees under specific circumstances. The private school argued throughout the process (and was successful) that it cannot be liable under the IDEA because it is a private school. Since the private school cannot be subject to an IDEA claim it also cannot use the IDEA to seek attorney's fees from the parents.

Attorney's Fees Collection: What Is Frivolous?

R.P. ex rel. C.P. v. Prescott Unified Sch. Dist. 631 F.3d 1117
9th Circuit (2011)

ISSUE: Whether a school district can recover it's attorney's fees from a parent or the parents' attorney when the parents' claims were unsuccessful?

HOLDING: As long as there is some form of remedy (either monetary or compensatory) available to the parents and the parents present evidence that, if believed by the fact-finder, would have entitled them to relief, the case is *not* frivolous and will not support an award of attorney's fees against the parents or their attorney.

REASONING: Forcing families and their attorneys to reimburse a school district's attorney's fees for bringing a suit where the families have plausible, though ultimately unsuccessful claims would discourage lawyers from taking potentially meritorious IDEA cases. Bringing a claim in anger alone does not result in a case being brought for an improper purpose. Collecting against parents requires that the claim be both frivolous and for an improper purpose and collecting against their attorneys requires only a showing of frivolousness.

“Child Find”: Identifying a Child with Special Needs

Compton Unified School District v. Addison. 598 F.3d 1181

9th Circuit (2010)

ISSUE: Whether a school district must *actively* deny services to a student before a Due Process claim can be raised?

HOLDING: A District does not have to actively deny services before a Due Process claim can be raised. Knowledge of a student's need and ignoring that need is sufficient to create a claim under the IDEA.

REASONING: Statutes must be read as a whole as to avoid interpretations which would produce absurd results. And based on the Supreme Court's statements in *Forest Grove,* an interpretation of the IDEA which leaves parents without an adequate remedy does not "comport with Congress' acknowledgement of the paramount importance of properly identifying each child eligible for services."

Least Restrictive Environment (LRE)

R.H v. Plano Independent School District, 54 IDELR 211
5th Circuit (2010)

ISSUE: Whether a parent can seek reimbursement for a private pre-school when the district only offers an "inclusion program" with both students with disabilities and those who were typically developing?

HOLDING: A Parent is not entitled to reimbursement for a general education private pre-school if the District made a FAPE available within the continuum of placements provided by the district (i.e. they do not have to create a general education pre-school class).

REASONING: While *Daniel R.R.* precludes a child's removal from the general education setting unless he cannot be educated satisfactorily with the use of supplemental aids and services, it does not require a private placement when the district offers only an inclusion program.

Reimbursement of Private School Tuition: Must a Student "Test Drive" a District Offered Placement?

Forest Grove School District v. T.A. 129 S. Ct. 2484
9th Circuit / U.S. Supreme Court (2009)

ISSUE: If a child is in a private school, then the District crafts an inappropriate IEP, must the child "test-drive" the placement first, or may parents disagree and seek reimbursement while keeping their child in the private placement?

HOLDING: A child does not have to "test-drive" a placement.

REASONING: The express purpose of the IDEA is to ensure that a free appropriate public education is "available to all children with disabilities." The interpretation posited by the school district would defeat the purposes of the IDEA. Lastly, ambiguous statutes are construed so as to avoid absurd results. The school district's interpretation would produce such results. It would prevent children who are provided with inadequate IEPs from receiving a free appropriate public education if their disabilities were detected before they reached school age. This suggestion turns on the erroneous assumption that parents would have to keep their child in a public school placement until it was clear that their "speculation" was borne out by a wasted year of actual failure.