RESTRAINT OF STUDENTS IN SCHOOLS IN THE USA

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Increasingly, schools in the United States face problems with disruptive students. Restraining problem students has not been easy. State legislatures have intervened with requirements that all school districts must have written policies that define restraints and the length of time they can be imposed. School policies also can require that school personnel be trained in administering restraints and those personnel will need to include teachers who have regular contact with students. In the United States the presence of special education students can present a special population with unique challenges. Special education students can have one of a number of disabling conditions that cause them to be aggressive towards other students, in which case school officials need training not only in how to restrain students in general, but also how to restrain a unique population of students whose behavior is related to a medical condition.

I INTRODUCTION

In May 2009, the US General Accountability Office (GAO) reported to the US House of Representatives Committee on Education and Labor that no federal laws existed restricting the use of seclusion and restraints in public and private schools and, at the state level, the laws were widely divergent.[1] The GAO found hundreds of state cases of alleged abuse and death related to the use of seclusion and restraints on school children that led to criminal convictions and found that those cases shared the following themes: children with disabilities who were restrained and secluded, often in cases where they were not physically aggressive and their parents did not give consent; restraints that blocked air to the lungs; teachers and staff not trained on the use of seclusions and restraints; and teachers and staff violating state law who continued to be employed as educators.[2]

The GAO Report served to focus attention on the use of restraint regarding students who are disruptive or who refuse to obey teacher or administrator instructions. To date, the Third,[3] Fourth,[4] Fifth,[5] Sixth,[6] Seventh,[7] Eighth,[8] Ninth,[9] Tenth,[10] and Eleventh Circuits[11] have applied the Fourth Amendment's reasonableness standard[12] to seizures of students in non-punishment cases to prevent harm to themselves, other students, or school staff.[13] In many of the cases, the students restrained had been evaluated to have a disability.[14]

No federal statute concerning student restraint exists and students allegedly abused by teachers are left to pursue claims under substantive due process, federal statutes (such as § 504[15] or the ADA[16]), or state law negligent hiring, supervision, or retention claims. This article examines

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1836-9030 VOL 19, NO 2, 2014 & VOL 20, NO. 1, 2015, PP. 21–31
INTERNATIONAL JOURNAL OF LAW & EDUCATION

the challenges that students allegedly abused by school personnel face in suing school district personnel and their school board employers. Because of the large number of federal and state cases addressing student restraints under federal and state law, the emphasis of this article will focus on specific cases that furnish insight into the development of case law involving student restraints under a variety of legal theories.

II Restraint in the Classroom

A recent Eleventh Circuit decision, *T.W. v School Board of Seminole County Florida* ('*T.W.*'),[17] illustrates the legal barriers encountered when a student with disabilities seeks to sue a teacher. The facts in *T.W.* are extensive and concern a five-foot 150 pound (1.5m, 68kg) student (T.W.) diagnosed with pervasive developmental disorder and a six-foot, 300 pound (1.8m, 136kg) classroom teacher (Garrett). Although the facts involving Garrett and T.W. only extend from May 2004 to the end of the calendar year, Garrett had been a teacher in another school in the district prior to May 2004 where 'an escalating problem [of parental complaints] with Garrett'[18] and four administrative unsuccessful investigations of parent complaints had led to her being transferred in 2000 to the school where T.W. was to be enrolled as a student in May 2004. Unfortunately, the principal at the new school had not been advised of the concerns about student abuse that had led to the transfer and 'no one [had] advised [him] to monitor Garrett for potential abuse'.[19]

The Eleventh Circuit observed that Garrett had completed two courses on physical restraint techniques and was certified in crisis prevention intervention. The court of appeals also had identified five separate occasions where 'Garrett used physical force against T.W'.[20] On the first occasion, in spring 2004, when T.W. became upset and refused to go to the cool down room after having been verbally provoked by Garrett, the teacher 'put T.W. on the floor with his face to the ground, straddled him so that her pelvic area was on top of his buttocks, and pulled his arms behind his back'.[21] After five minutes, T W. was released without having suffered any physical injuries. During the second occasion in fall 2004, T.W. refused to perform a task as directed by Garrett and when he began swinging his arms at her, Garrett forced T.W. to the floor and pulled his right leg up against the back of his left leg, holding T.W. in that position for two to three minutes. On the third occasion in fall 2004, T.W refused to stop scratching an insect bite on his arm that had become red and raw-looking and Garrett, for about three minutes, forced T.W. against the table, held his arms behind his back, and placed her weight against his back to hold him in that position. When he resumed scratching the insect bite, Garrett escorted T.W. to the cool down room where she went into the room with him, closing the door behind her, and T.W.'s screams were heard along with furniture being moved in the room. When T.W. exited the room, his hair and clothing were disheveled and he was yelling that Garrett had hurt him. T.W.'s mother sent a note to the school the next day asking why Garrett had twisted her son's arm, but a witness outside the room was not able to testify to what had happened in the room when the door was closed. During the fourth incident in fall 2004, Garrett held T.W.'s hands behind his back as she walked him to the cool down room. The fifth incident involved Garrett placing T.W. in the cool down room, turning out the lights in the room and sitting in front of the door so T.W. could not exit. When T.W. left the room, Garrett stuck out her foot to trip T.W. A psychologist's evaluation of T.W. revealed that his being traumatised by Garrett resulted in his exhibiting symptoms of Post Traumatic Stress Syndrome. Because T.W. did not feel safe at school he eventually dropped out, but not before a final incident where 'Garrett had used her full body weight to restrain a student (not T.W.) on top of his desk and had held the student's head down so that his neck was against the edge of his desk, which caused his eyes to swell and his lips to turn blue'.[22] Garrett

was suspended from her teaching responsibilities with pay and was charged with child abuse, but resigned shortly thereafter.[23] A jury found her guilty of one count of child abuse but the court withheld adjudication.

T.W.'s mother filed suit against the school under three counts and was unsuccessful on all three. The first, a § 1983 Fourteenth Amendment substantive due process claim against the school district, alleged that the school district had demonstrated deliberate indifference to Garrett's intentional or reckless conduct. The second claim, a § 504 disability discrimination claim under the *Rehabilitation Act of 1973*, alleged that the school district had discriminated against T.W. solely because of his disability. The third claim for negligent hiring, supervision, or retention was based on a state law.

Regarding the first claim, the Due Process Clause of the Fourteenth Amendment protects individuals against arbitrary exercises of government power, but only where the government activity 'shocks the conscience'.[24] In *Ingraham v Wright*,[25] the Supreme Court, in a case involving the extensive use by school officials of corporal punishment, had declared that a student's right to be free of excessive force is a subset of the liberty interest in bodily integrity that is protected by the Due Process Clause.[26] The *Ingraham* majority opined that when 'school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, ... Fourteenth Amendment liberty interests are implicated'.[27]

However, 'the conscience-shocking standard'[28] is a high one and the Supreme Court has repeatedly stated that plaintiffs cannot use the Fourteenth Amendment 'to convert state tort claims into federal causes of action'.[29] Applying a threefold 'objective and a subjective' test that looks at '(1) the need for the application of corporal punishment, (2) the relationship between the need and amount of punishment administered, and (3) the extent of the injury inflicted'[30] the Eleventh Circuit in *T.W.* found for the school district. The school district's defence in *T.W.* was that Garrett's conduct constituted corporal punishment and, as such, Garrett restrained T.W., not out of malice and sadism, but for the purpose of discipline. The Eleventh Circuit accepted the school district's position, finding that '[t]he evidence overwhelmingly establishe[d] that Garrett's use of force during the first four incidents was related to T.W.'s disruptive or self-injurious conduct and was for the purpose of discipline'.[31] The Eleventh Circuit held that Garrett's conduct qualified as corporal punishment under state law and, in the absence of evidence that the treatment of T.W. was 'conscious shocking' the plaintiff had no substantive due process claim. Even though Garrett's treatment could have caused serious injury, such as asphyxiation, and Garrett could have restrained T.W. in a less harmful manner, 'the amount of force at issue here was [not] totally unrelated' to the need for the use of force.[32] While the appeals court was careful to declare that it '[did] not condone the use of force against a vulnerable student on several occasions over a period of months, ... no reasonable jury could conclude that Garrett's use of force was obviously excessive in the constitutional sense'.[33] Regarding the fifth incident, Garrett's tripping of T.W., the Eleventh Circuit held that, even though 'Garrett's use of force was unrelated to T.W.'s disruptive behavior and lacked a disciplinary purpose'[34] the incident fell within the 'range of teacher conduct that is neither corporal punishment nor so conscience-shocking as to trigger a substantive due process violation'.[35]

Plaintiff was also unsuccessful in his § 504 claim. Section 504 provides that '[n]o otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ...'.[36] The

key operative term is 'solely'. In order for T.W. to have succeeded on his § 504 claim, he would have to be able to prove, by a preponderance of the evidence, 'that the [School Board] intended to discriminate against him on the basis of his disability'.[37] In other words, without determining under § 504 whether the plaintiff would be held to a more lenient burden of proof standard of 'deliberate indifference' as opposed to the more stringent standard of 'discriminatory animus'[38] the Eleventh Circuit held that even under the more lenient deliberate indifference standard, plaintiff had failed to establish that the school district 'knew that harm to a federally protected right was substantially likely'[39] and had failed to act. In the facts of this case, school officials and the state professional licensure board had investigated complaints but had never been able to sustain a claim of a constitutional violation. The plaintiff's claim of respondeat superior[40] against the school board failed since 'no reasonable jury could conclude that Garrett intentionally discriminated against T.W. *solely* by reason of his disability'.[41]

Worth noting is that plaintiff failed to bring a claim under the other major disability nondiscrimination statute, the Americans with Disabilities Act, which prohibits discrimination against an individual 'by reason of such disability'.[42] Contrary to § 504 that requires alleged discrimination be 'solely' because of a disability, the ADA requires only that a disability be a motivating factor for discrimination.[43]

The Eleventh Circuit did not address the plaintiff's negligence claim, claims involving torts such as assault and battery under state tort law present different factual questions to be addressed. In resolving a state tort claim involving corporal punishment, a decision may well turn on whether ten swats with a paddle rather than five were excessive, so that line-drawing this refined may be required. Substantive due process, however, is concerned with violations of personal rights of privacy and bodily security of so different an order of magnitude that inquiry in a particular case simply need not start at the level of concern those distinctions imply.[44] Whether federal district courts have supplemental jurisdiction to resolve state claims, in addition to federal constitutional questions, either directly on a defendant's motion for summary judgment or on remand, requires a factual determination as to whether a 'supplemental [state tort] claim is so closely related to the jurisdiction-invoking [federal] claim that they are part of the same constitutional "case" or "controversy"'.[45] The result is that federal courts may have a range of approaches in addressing state claims: federal courts can choose address federal constitutional and statutory claims only, and remand state claims to a state court; federal courts could also choose to address state claims along with the federal ones where the federal and state claims are largely duplicative; and, finally, federal courts can elect to address the merits of both federal and state claims where the parties petition the federal court to address all claims on the merits.[46]

The dissenting circuit court judge in *T.W.* took issue with the majority's finding of law that Garrett's use of force was necessary and justifiable and even if her actions were 'inappropriate' they were not of sufficient duration or degree to rise to the level of a constitutional violation. The dissent observed that 'the disagreement in this record as to what happened, how it happened, and why it happened is a matter which must be left to a *jury* to resolve'.[47]

In a different kind of restraint case, *D.D. v Chilton County Board of Education* ('*D.D.*'),[48] an Alabama federal district court reached the same conclusion as the Eleventh Circuit regarding a four-year-old child placed by a special education teacher in a Rifton chair,[49] a specially designed chair with straps to restrain students whose conduct presents a risk to themselves or others. In this case, a student 'diagnosed [with] Pervasive Development Disorder, Attention Deficit/ Hyperactivity Disorder, Impulse Control Disorder, and Mood Disorder'[50] had been placed in the chair after he had repeatedly kicked students, the pre-school teacher and the classroom aides.

Apparently, the student enjoyed sitting in the chair and, because it was near the end of the school day, the teacher strapped him in the chair and placed the chair in the hallway outside the classroom door. The total amount of time in the chair was no more than ten minutes. Unfortunately, D.D.'s mother appeared on the scene at this time and found her child strapped in the chair, crying and alone. Although D.D. subsequently was assigned to another pre-school teacher, no disciplinary action was taken against the original pre-school teacher since an investigation revealed that her conduct had accorded with school district policy. The mother shortly thereafter moved out of the school district.

The outcome in *D.D.* was the same as *T.W.*. Finding no substantive due process violation for excessive corporal punishment, the district court observed that,

> [a]pplying an objective standard to the facts that D.D. was a young child who was receiving special education services, was restrained at both the waist and the feet, was shoeless, and was left alone in the hallway while restrained for a few minutes, and considering the totality of the circumstances including that D.D. had previously been disruptive, had engaged in kicking behaviors, that D.D. had accepted the option to sit in the Rifton chair, and that he did not sustain any physical injury as a result of the restraint, the court concludes that Alford's actions were not excessive as a matter of law and were a reasonable response to D.D.'s behavior.[51]

In response to the plaintiff parent's procedural due process claim that she had received no notice regarding the use of restraints, the district court declared that 'actions in restraining D.D. to a chair while [the teacher] moved him to the hallway, and while waiting for his mother whose arrival she anticipated within ten minutes, even when viewed in a light most favorable to the non-movant, are not a sufficient deprivation of liberty or bodily integrity so as to require advance notice and a hearing'.[52] Summary judgment was granted as to plaintiff's IDEA claim since, once she moved outside the school district, it had no obligation under the IDEA to provide an Individualised Education Program (IEP).[53] However, worth noting is that the school district had never provided, as requested by *D.D.*'s mother, a behavior plan as part of the original IEP. Although a behavior plan was provided following the Rifkin chair incident, one assumes that the mother could (and, probably should) have sought an administrative due process hearing when the plan was not provided at her request. Finally, the federal district court dismissed the plaintiff's state law claims for assault and battery without prejudice.

A result similar to *T.W.* and *D.D.* was reached in *Brown v Ramsey* ('*Brown*')[54] where parents of a child with Asperger's Syndrome[55] were not successful in their Fourteenth Amendment claim that the teacher's use of a 'basket hold'[56] allegedly had resulted in their son being diagnosed with Post Traumatic Stress Disorder. The student Brown's IEPs contained provisions in April 1995 whereby, 'in the event that Daniel becomes a danger to himself or to others, he will be physically restrained in a safe manner until he demonstrates the ability to control his own impulses' (April, 1995) and, to effectuate the November 1995 goal '[of] improv[ing] classroom behavior' declaring that 'physical restraint may be used when necessary for the safety of the child and others'.[57] In upholding summary judgment for the teachers and the school district, the federal district court in *Brown* opined 'that there [was] nothing before the Court to suggest that the alleged actions of [the two teachers] were anything other than a disciplinary measure within the sound discretion of the teacher'.[58] Although noting that the parents were still free 'under some stretch of the imagination [to] bring a cause-of-action under some state-law tort theory unknown to the [court]'[59] the district court concluded with this balanced observation:

> Schools and school teachers not only have a duty not to employ unconscionable restraints against individual students, but they also have a duty to educate other students within a class setting and to cure disruptive behavior that would deny the educational opportunities of other students Otherwise, schools cannot function at all [60]

III Implications and Conclusion

The three cases above, *T W*, *D D* and *Brown* demonstrate that students with disabilities, especially those students diagnosed with behavioral disorders, are the school population most vulnerable to unnecessary or excessive restraints The cases also reflect that claims for damages under either federal or state law are fraught with legal tripwires Under either federal or state law, the damages question will be addressed as to whether the student restraints 'were done for [the student's] safety and the safety of others or whether they were in fact punishment for behavior which is a manifestation of [the student's] disability' [61] Federal statutes (ADA, s 504) allow for damages claims, under section 1983, against individual employees as well as their school districts In addition, federal claims for violations of the Fourteenth Amendment allow for punitive damages [62] Federal courts disagree as to whether section 1983 claims can be pursued under the IDEA and whether the IDEA requires exhaustion of remedies before claims for damages under the ADA or section 504 can be brought [63]

Whether federal legislation addressing student restraints will appear soon in the US is difficult to say, but what is clear is that the current US constitutional remedies are unlikely to effect changes in the use of restraints At best, the changes are likely to be ad hoc and not systemic in the sense that schools with poor parent participation will have fewer incentives to change teacher behaviors

D D suggests that the forum for addressing the use of restraints is through the IEP and Behavioral Intervention Plans (BIPs)[64] which can serve to structure the kinds of restraints that are permissible, as well as identifying the point at which a parent must be contacted regarding the use of restraints Including provisions prescribing the use of physical restraint in IEPs or BIPs may give school personnel protection from suits for damages in the event that parents later sue those who have used physical restraints on their children Proper training in the use of physical restraints also provides school districts and personnel with a degree of protection from liability if students are injured during restraints It is less likely that students will be injured while restrained by trained personnel inasmuch as properly trained staff are more apt to administer restraints properly and use only the minimum amount of restraint necessary to control disruptive students

In *Brown*, the federal district court and court of appeals noted in their finding for the school district that the student who had been restrained had not been injured during the restraint [65] In another situation the Eighth Circuit concluded that the use of a blanket wrapping technique recommended by a licensed physical therapist to calm a student did not violate a student's clearly established right to be free from unreasonable bodily restraint [66] The Eighth Circuit observed that the proper balance between the legitimate interests of the State in retraining a person in a public hospital and the rights of an involuntarily committed person to reasonable conditions of safety and freedom from unreasonable restraints 'only requires that the courts make certain that professional judgment [of professional licensed personnel in the hospital] was in fact exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made' [67]

Courts have been cognisant of the fact that physical restraints may be required to protect students and staff from danger. In *Brown*, the court observed that the student's IEP specifically provided for restraints to be used when he became a danger to himself or others. In another case, a federal trial court in Texas dismissed an action brought against school personnel who had wrapped an out-of-control student in a blanket for safety reasons.[68] In holding that the parent had not alleged a violation of a clearly established Fourth Amendment right, the court explained that the student's substantive due process rights did not give her the right to be free from restraints used to control her outbursts in order to prevent harm to herself and those responsible for her education.

IV Recommendations for Practice

In the absence of comprehensive state guidelines regulating the use of physical restraint in the US, school authorities are advised to develop physical restraint policies of their own. Having such policies in place may help to protect personnel from liability. Following are recommendations regarding the content of those policies. These recommendations mirror the comprehensive provisions in the State of Maryland's Board of Education Regulations.[69]

- Schools should form crisis teams that will respond to situations where students are out of control and may require physical restraint. At a minimum the crisis team should consist of two individuals who will restrain the student and a witness who can observe and document the restraint. It is also recommended that additional personnel, such as a school nurse or other health professional who could monitor the student's health and a counselor who could try to calm the student, should be included on crisis teams.
- All members of a school's crisis team, as well as other personnel who may be required to participate in physical restraints, should be properly trained in the use of nonviolent interventions and physical restraint techniques. Training should be ongoing.[70]
- All instances of physical restraint should be witnessed and documented. Documentation should include a description of the student's behavior that prompted the restraint, efforts made to deescalate the situation, a description of the type of restraint used (i.e. holds), and a description of the student's behavior and reaction to the restraint. Any injuries suffered by either the student or staff should be documented.
- Physical restraint should be discontinued as soon as possible, but only when it is clear that the student is no longer a danger to himself/herself or others.
- If at any time during the restraint the student exhibits significant physical or emotional distress, medical assistance should be sought. The student's parents should be notified immediately that this has occurred.
- Parents and appropriate school administrators should be notified whenever a student has been physically restrained.
- Policies should identify a maximum time limit for restraints and should spell out procedures that are to be followed if that time limit is reached and the student is still not in control.
- Following each instance of physical restraint, crisis team members should review their actions to determine if all procedures were followed properly.
- Provide counseling to other students who may have witnessed and been traumatised by the restraint.

- Immediately refer any student who has not been identified as a student with a disability to the school's pupil services team or an IEP team to consider whether the student may need a behavioral intervention plan

These recommendations are made in the context of US court decisions and case law under available causes of action and remedies including constitutional rights and statutory rights We would suggest, however, that the recommendations for practice in student restraint have universal application As our companion article[71] examining Australian education experience with student restraint in law and policy demonstrates issues of student restraint especially for students with disabilities, are not unique to the US and will emerge in all jurisdictions where the education of students with disabilities is identified as a national priority The experiences from other jurisdictions could assist in identifying a universal set of guidelines that protect the best interests of all children and teachers, regardless of the country of practice

Keywords student, USA schools, safety, restraint, policy

Endnotes

1 General Accountability Office (GAO) *Seclusions and Restraints Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers*, Testimony Before the Committee on Education and Labor House of Representatives, May 19, 2009 (GAO-09-719T) <www gao gov/highlights> (last visited, Aug 8, 2012) For some state laws and regulations in this area vary widely For example, eighteen states had no laws or regulations relating to the use of seclusions or restraints in schools (Ariz , Fla , Ga , Idaho, Ind , Miss , Mo , Neb , N H N D Okla , S C , S D , Vt , Wis , Wyo) Other states had regulations but they did not apply to selected schools in certain situations For example, seven states place some restrictions of the use of restraints but do not regulate seclusions (Alaska, Col , Hawaii, Mich , Ohio, Utah, Va) Massachusetts is one state that has very strict regulations on the use of physical restraint in the public schools Those regulations mandate school authorities to notify parents and file written reports with the commonwealth's Department of Education on every physical restraint that lasts longer than 20 minutes or that causes an injury to a student or staff member that requires medical intervention These regulations also require training for all staff members in the school system s physical restraint policies and in-depth training in the use of physical restraint for designated staff members in each school building Physical restraints may be administered only by school personnel who have been given this in-depth training 603 C M R § 46 (2008)

2 Ibid

3 See eg, *Shuman v Penn Manor School District* 422 F 3d 141, 148 (3d Cir, 2005) (detention of male student who had sexually harassed female student, in a school conference room for several hours following questioning by assistant principal held to be reasonable for Fourth Amendment purposes)

4 See eg *Wofford v Evans*, 390 F 3d 318, 325–27 (4th Cir, 2004) (Fourth Circuit granting broad discretion to schools to address discipline problems including interviewing students without parents being notified)

5 See, eg, *Hassan v Lubbock Indep School District*, 55 F 3d 1075, 1079 (5th Cir, 1995) (upholding qualified immunity for school personnel who placed misbehaving student in a large intake room of juvenile facility during a school field trip, finding the "seizure' of the student for the balance of the field trip to be reasonable "qualified immunity" protects employees from liability for damages under the Fourth Amendment where the legal theory to recover damages had not been clearly established) See *Safford Unified School District v Redding*, 557 US 364 (2010) (female school administrative aide and school nurse not liable for strip search of female student under qualified immunity where the standard of care for strip searches not clearly established) See also *Greene* below n 9

6 See eg, *S E v Grant County Board of Education*, 544 F 3d 633 641 (6th Cir 2008) (upholding

principal's turning over to police a statement written at principal's direction as to the student's viewpoint of a sexual harassment claim where the principal's directive to the student was part of normal school procedure and not written at the direction of law enforcement).

7 See, eg, *Wallace v Batavia School District* 101, 68 F 3d 1010, 1013–14 (7th Cir, 1995) (grabbing a student's elbow to hasten her departure from a classroom not an unreasonable seizure).

8 *C.N. v Willmar Public Schools*, 591 F 3d 624 (8th Cir, 2010) (although plaintiff parent lacked IDEA claim where parent had moved to another school district without requesting a due process hearing, plaintiff 's section 1983 claim for alleged violations of the 4th amendment (seizing, restraining and confining plaintiff) could still have been brought against the former school district and its employees, but was dismissed here where the restraints had been agreed to by the parent and she had not requested an IEP meeting to revise the IEP).

9 *Preschooler II v Clark County School Board of Trustees*, 479 F 3d 1175, 1182 (9th Cir, 2007). See also, *Greene v Camreta* ('*Greene*'), 588 F 3d 1011 (9th Cir, 2009) (denying qualified immunity for social worker who furnished misrepresentations to support removing children from their home).

10 *Couture v Board of Education of Albuquerque Public Schools,* 535 F 3d 1243, 1255 (10th Cir, 2008).

11 *Gray v Bostic*, 458 F 3d 1295 (11th Cir, 2006).

12 The Fourth Amendment protects against unreasonable searches and seizures by law enforcement and school officials. The standard, however, differs. The standard for law enforcement searches is "probable cause" while the standard for searches by school officials is "reasonable suspicion." *See Riley v. California*, 134 S. Ct. 2473 (2014) (police search of cell phone held to probable cause standard) and State v. Scott, 630 S.E.2d 563 (Ga. Ct. App. 2006) (Georgia drew a bright line between searches solely by school personnel and those school searches conducted by school personnel and police).

13 For a summary of case law up to 2009, see Sean Croston, 'Incorporating Fourth Amendment Standards in a Model Policy for School Officials Use of Force to Restrain and Detain Students' (2009) *BYU Education & Law Journal* 39, 60.

14 In a related matter, courts have not found Fourth Amendment violations in situations where school personnel have used time-out rooms, particularly when such a strategy was outlined in the students' IEPs. See, eg, *Couture v Board of Education of Albuquerque Public Schools*, 535 F 3d 1243 (10th Cir, 2008) ("When M.C. refused to do his school work, it was not unreasonable for the teachers to send him to a five-minute timeout in the hope of obtaining his cooperation in the future": ibid 1253).

15 *Rehabilitation Act of 1973*, 29 USC § 794.

16 *Americans with Disability Act of 1990*, 42 USC § 12101 et seq.

17 610 F 3d 588 [258 *Education Law Reporter* 481] (11th Cir, 2010).

18 Ibid 594.

19 Ibid.

20 Ibid 595.

21 Ibid.

22 Ibid 597.

23 A search of the computer in Garrett's classroom revealed that she likely 'suffered from both sexual masochism and sexual sadism' and, according to a psychologist, her verbal and physical abuse of her students was 'consistent with someone whose private sadistic sexual practices spilled over into the classroom setting': ibid.

24 Ibid 598, citing *County of Sacramento v Lewis*, 523 US 833, 46 (1998).

25 430 US 651, 655 (1977). When plaintiff Ingraham had been slow to respond to his teacher's instructions, he was subjected to more than 20 licks with a paddle while being held over a table in the principal's office. The paddling was so severe that he suffered a hematoma requiring medical attention and keeping him out of school for several days. Plaintiff Andrews had been paddled several times for minor infractions. On two occasions he was struck on his arms, once depriving him of the full use of his arm for a week.

26 The dissenting judge in *T.W.* phrased the right slightly differently, namely that '[the] right to personal security and to bodily integrity is a historic and fundamental right that is implicit in our concept of ordered liberty'. *T.W.*, 610 F 3d 588 (11th Cir, 2010), 613 (Barkett J, dissenting).

27 Ibid 674

28 See *County of Sacramento v Lewis*, 128 S Ct 1708 (1993) (Supreme Court held that high-speed police chases with no intent to harm suspects physically do not give rise to liability under the Fourteenth Amendment and allegation that the pursuit was undertaken with "deliberate indifference" to passenger's survival was insufficient to state substantive due process claim

29 See *Neal v Fulton County Board of Education* 229 F 3d 1069, 1074 (11th Cir, 2000), citing *Collins v City of Harker Heights* 503 US 115, 125 (1992)

30 *TW* 610 F 3d 588 (11th Cir, 2010), 599

31 Ibid

32 Ibid 601

33 Ibid 602

34 Ibid 599

35 Ibid

36 42 USC § 794(a)

37 *TW*, 610 F 3d 588 (11th Cir, 2010), 603–04

38 Ibid 604

39 Ibid

40 See *Faragher v City of Boca Raton* 524 US 775 (1998) (Employer may be liable for actionable discrimination caused by an employed supervisor but the employer is entitled to assert an affirmative defence that looks at the reasonableness of the supervisor's conduct as well as that of the plaintiff victim An affirmative defence means that an employer cannot claim a defence unless evidence is asserted and is supported by a defensible claim)

41 *TW*, 610 F 3d 588 (11th Cir, 2010) 604

42 42 USC § 12132

43 See *Baird v Rose*, 192 F 3d 462, (4th Cir, 1999) (finding that a student's exclusion from the high school's show choir was motivated in part by disability discrimination, and noting that the school's alleged accommodation in allowing plaintiff to prove that she knew the routines did not constitute a reasonable accommodation under the ADA to the student's disability [depression]) *Contra Sandison v Mich High Sch Athletic Ass n*, 64 F 3d 1026, 1036 (6th Cir 1995) (interpreting the ADA as imposing a 'solely because of' standard in upholding a state athletic association's 19-year-old eligibility to compete requirement) However, plaintiff's alleged motivation for a disability-related decision under the ADA must be believable, see *McNely v Scala Star-Banner Corp*, 99 F 3d 1068 (11th Cir 1996)

44 See *Webb v McCullough*, 828 F 2d 1151, 1158 (6th Cir, 1987)

45 See Charles Wright, Arthur Miller, Edward Cooper, Richard Freer, Joan Steinman, Catherine Struve, and Vikram Amar, *13D Federal Practice and Procedure Jurisdiction* § 3567 (3rd ed, 2010)

46 See *TW*, 610 F 3d 588 (11th Cir, 2010 (Barkett J, dissenting)

47 Ibid

48 701 F Supp 2d 1236 (MD Ala, 2010)

49 Rifton chairs constitute a wide range of adaptive equipment designed for students with special needs See rifton com (last visited, Oct 3, 2014)

50 *D D* 701 F Supp 2d 1236 (MD Ala, 2010), 1238

51 Ibid 1242

52 Ibid 1244

53 An IEP is an Individualised Education Program, 'a written document laying out the plan for special education and related services for a student with disabilities' Mark Weber, Ralph Mawdsley and Sarah Redfield, *Special Education Law Cases and Materials* G-5 (Lexis Nexis, 4th ed, 2013) See 20 USC § 1401(14), 34 CFR § 300 320 328

54 121F Supp 2d 911 (ED Va, 2000), *aff d Brown v Ramsey*, 10 Fed Appx 131 (4th Cir, Va)

55 Asperger's Syndrome (AS) is a neurological disorder is also called Asperger disorder or autistic psychopathy that, belongs to a group of childhood disorders known as pervasive developmental disorders (PDDs) or autistic spectrum disorders

> Children with AS learn to talk at the usual age and often have above-average verbal skills. They have normal or above-normal intelligence and the ability to take care of themselves. The distinguishing features of AS are problems with social interaction, particularly reciprocating and empathizing with the feelings of others; difficulties with nonverbal communication (e.g., facial expressions); peculiar speech habits that include repeated words or phrases and a flat, emotionless vocal tone; an apparent lack of "common sense," a fascination with obscure or limited subjects (e.g., doorknobs, railroad schedules, astronomical data, etc.) often to the exclusion of other interests; clumsy and awkward physical movements; and odd or eccentric behaviors (hand wringing or finger flapping; swaying or other repetitious whole—body movements; watching spinning objects for long periods of time).
>
> Jacqueline L Longe (ed), 'Asperger's Syndrome', *Gale Encyclopedia of Medicine* 1, (4th ed, 2012).

56 A basket hold was described as 'clasping [the student] at his wrists, crossing his arms in front of his body, and pushing his head into his chest': *Brown*, 121F Supp 2d 911, 913.

57 Ibid.

58 Ibid 924.

59 Ibid

60 Ibid 925.

61 *Colon v Colonial Intermediate Unit 20*, 443 F Supp 2d 659, 670 (MD Pa, 2006).

62 Ibid 670–71.

63 See, eg, *Padilla v School District No. 1*, 233 F 3d 1268 (10th Cir, 2000) (Tenth Circuit does not permit section 1983 claims under the IDEA but does permit ADA or section 504 claims without exhaustion of remedies under the IDEA).

64 A BIP is 'a written document that outlines how the IEP team and others will try to intervene with the environment or the student to alter problematic behaviors presented by a student and identified in the functional behavioral plan'. Mark Weber, Ralph Mawdsley and Sarah Redfield, *Special Education Law: Cases and Materials G-2* (Lexis Nexis, 4th ed, 2013). See 20 USC §1415(k)(1)(D). See also 34 CFR § 300.530(f).

65 *Brown*, 121 F Supp 2d 911 (ED Va, 2000), 923.

66 *Heidemann v Rother*, 84 F 3d 1021 (8th Cir, 1996).

67 Ibid 1028–09.

68 *Doe v S & S Consolidated Independent School District*, 149 F Supp 2d 274 [155 *Education Law Reporter* [370]] (ED Tex, 2001).

69 See Code of Maryland Regulations (COMAR), § 13A.08.04.05 where the comprehensive set of regulations address 'Use of Restraint', 'Use of Seclusion', and 'Referral to a Pupil Services or IEP Team'.

70 See *Alleyne v New York State Education Department*, 516 F 3d 96 (2d Cir, 2008). New York Education Department regulation requires that aversive interventions, including skin shocks, contingent food programs, and physical constraints for students be administered by or under direct supervisions of licensed professionals or certified special education teachers).

71 See J. Joy Cumming & Ralph D. Mawdsley, 'Protecting Children in Australian Schools: Teacher Use of Force and Restraint and Legal Challenges' (2015) 19(2)/20(1) *International Journal of Law and Education*, 93.