

The Report Card

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What is “Serious Bodily Injury”

In 2004, the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) was amended to allow school districts to implement a 45-day alternative placement to the extent that a special education student inflicts “serious bodily injury” on another individual. The term “serious bodily injury” is defined as being inflicted with an injury or illness that involves: (1) a substantial risk of death; (2) extreme physical pain; (3) protracted and obvious disfigurement; or (4) protracted loss or impairment of the function of a bodily member, organ or mental faculty.

Guidance was not provided to school districts as to the meaning of “extreme physical pain.” Pain can be highly subjective such that what may cause extreme pain to one person may not cause pain to another. Therefore, because Section 1415(k)(1)(G)(iii) of the IDEA and its implementing regulations adopted the federal Criminal Code for the definition of “serious bodily injury,” it became necessary to look to decisions issued by federal court judges to understand the meaning of “extreme physical pain.”

A review of the criminal cases and the few reported cases decided by IDEA hearing officers make it increasingly evident that, in order to defend a decision to issue a 45-day alternative placement, a school district must be able to demonstrate that the injury to the victim was significant. There must be evidence that the victim required some type of involved or ongoing medical treatment and that the subject injury is of the type that requires pain management. In other words, cuts, abrasions or bruises resulting from the typical fist-fight are unlikely to be sufficient in and of themselves to meet the criteria for establishing “serious bodily injury.”

Case Law – Interpreting the Definition of “Serious Bodily Injury”

There have been only a handful of cases reported by hearing officers in which the meaning of “serious bodily injury” has been analyzed.

In *In re: Student with a Disability*, 108 LRP 45824 (W. Va. SEA June 4, 2008), the hearing officer found that a student did not inflict “serious bodily injury” by kicking a teacher’s shins and stomping on her toes. The student’s violent behavior caused the teacher’s shins and toes to redden, but did not cause bruising. The teacher declined immediate medical treatment and, instead, chose to go home. After arriving at home, the teacher’s husband called paramedics because the teacher had a heart condition and was experiencing shortness of breath. But, the teacher required no hospitalization or any further medical care. Thus, the hearing officer determined that, while the teacher experienced pain as a result of the student’s actions, she did not suffer “extreme” pain.

Pocono Mountain School District, 109 LRP 26432 (Penn. SEA, Dec. 12, 2008), involved behavior by a student that was unquestionably injurious, frightening and intimidating. Yet, the hearing officer found that a broken nose does not fit within the IDEA’s narrow definition of the infliction of serious bodily injury. The hearing officer rationalized that removing a special education student for 45-days was “an extraordinary governmental power that deprives disabled children of the pendency protections usually associated with most other disputed changes in placement.” Thus, such power could be used only in the most egregious circumstances, and a broken nose was not sufficient to justify its use.

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A similar determination was reached by a hearing officer in *Tehachapi Unified School District*, 106 LRP 22450 (Cal. SEA Feb. 7, 2006). In that case, a mild concussion to one pupil and a broken nose to another was deemed not to involve serious bodily injury within the meaning of the IDEA. The hearing officer noted that there was no evidence of extreme physical pain, substantial risk of death, or protracted injuries of the kind described in the federal definition.

Inasmuch as the IDEA relies upon the definition and interpretation of "serious bodily injury" from the federal criminal code, it is relevant to rely upon the manner in which this term has been interpreted by the federal courts. Thus, in the criminal context, the courts look at whether the victim was hospitalized and required pain medication or other medical intervention over the course of two or more days. For instance, in *U.S. v. Two Eagle*, 318 F.3d 785 (8th Cir. 2003), the court instructed that "serious bodily injury means something more than slight bodily injury, but not necessarily life threatening injury." The court found that two of the victims in that case suffered serious bodily injury when they were shot in the legs. Both victims suffered extreme pain and significant blood loss, were hospitalized, ultimately had difficulty running and/or could no longer run, and suffered scarring at the points of their entry and exit wounds. Although the third victim suffered only a grazing shot to his head, this nearly split his ear in two, resulted in some hearing loss, and caused a permanent scar on his ear.

U.S. v. Villela-Alberto, 2008 WL 2795926, (4th Cir. 2008), involved a fight between inmates, during which a first inmate kicked a second inmate while wearing prison-issued hard-toed boots. After finding that the use of the boots constituted the use of a dangerous weapon, the court found that the first inmate had inflicted "serious bodily injury" on the other. A registered nurse who examined the second inmate after the assault testified that the victim suffered what she considered to be facial trauma that would have caused severe pain. A doctor ordered follow-up treatment, which consisted of hourly icing of the victim's wounds for three days, Tylenol, and two days of bed rest. The nurse's testimony, in conjunction with a video showing the victim's injuries, was adequate and sufficient to support a conclusion that the victim suffered extreme physical pain.

In *U.S. v. Jordan*, 2009 WL 1741566 (11th Cir. 2009), the victim was punched in the face, which knocked him to the ground, split his lip and chipped his tooth. The victim rated the pain an eight on a scale of one to ten. A physician found that the punch injured three distinct layers of sensitive nerve endings in the victim's lip, meriting treatment with the strongest pain

medication available. One witness testified there was a "decent amount" of blood, and another stated there was "a lot" of blood and that he had never seen anyone be hit that hard. The physician noted that the victim would have a permanent scar on his lip and that the injured area would be permanently numb.

In *U.S. v. Alexander*, 447 F.3d 1290 (10th Cir. 2006), the court found that the accused had inflicted "serious bodily injury" where the victim was deemed in serious condition upon his arrival at a hospital; experienced severe pain both immediately after the attack and at the hospital; lost copious amounts of blood; suffered multiple severe lacerations, including one measuring two and one-half inches in length, all of which required medical staples to repair; experienced dizziness for several days following the attack; and was hospitalized for two days so that doctors could monitor whether the attack caused any swelling within his brain.

The above cases reveal that a determination of "serious bodily injury" necessarily will involve information from a medical provider, intervention and follow-up care. Thus, it is generally difficult to make an immediate determination about the appropriateness of placing the student in an alternative setting. Moreover, a school district will rarely be able to conclude that a special education student has inflicted "serious bodily injury" to another individual if the injury requires only a visit to the school nurse's office. That being said, even if an injured party appears to be physically or mentally fine after being seen by the student nurse, the extent of the injury and the resulting pain may not be known until several hours after infliction of the injury.

Consequently, if a special education student has inflicted an injury which requires more than minor medical treatment from the school nurse, or if the nurse determines that there is a likelihood that the injury's effects may not be fully realized until several hours after the subject incident, the district should consider issuing an out-of-school suspension of up to 10 days to the offending student, so long as such a suspension will not result in a change in placement. During the period of suspension, the district can assess the extent of the injury to the victim and make a further determination as to whether to proceed with a longer-term change in placement by way of a 45-day unilateral placement or a recommendation for expulsion. Any change in placement will require the district to complete a manifestation determination review within 10 days of making the decision to initiate or recommend the change of placement for disciplinary reasons.

Personnel Matters

***Sandra T.E. v. Sperlik*, 639 F. Supp. 2d 912 (N.D. Ill. 2009)**

In 2005, Robert Sperlik, Jr., an elementary music school teacher, was arrested and entered a guilty plea for sexually abusing elementary students. During a subsequent search of his personal belongings, the police found bondage pornography. Five years prior to his arrest, several students wrote a note to the principal indicating that Sperlik had used duct tape to restrain students while he touched the students' breasts and genitals. The then principal warned Sperlik against "inappropriate touching" and told him to keep his door open while teaching but did not report the accusations to the Illinois Department of Children and Family Services. The former principal and other school district personnel were later named in a civil lawsuit seeking redress under Section 1983 of the Civil Rights Act of 1871. The victims and their parents showed that the former principal had provided the victims' parents with a watered-down version of the students' allegations, lied to her fellow school officials about the extent of the teacher's actions, and failed to impose any discipline beyond warnings. That evidence was held to be enough to create a fact issue, and the court denied the district's request to dismiss the case. Therefore, the victims' and their parents' claim will go forward to trial.

Note: Section 10-22.39 of the Illinois School Code was amended recently to require school districts to train all district staff (at least once every two years) on educator ethics, teacher-student conduct, and school employee-student conduct. During such training, staff should be reminded of their obligations as a mandated reporter as well as of district expectations regarding the reporting and/or investigation of allegations of sexual harassment or abuse.

***Ekstrand v. School Dist. of Somerset*, 583 F.3d 972 (7th Cir. 2009)**

Renae Ekstrand, an elementary teacher, informed her school's principal that she had seasonal affective disorder (i.e., a form of depression) and would have difficulty functioning in a room with artificial light rather than natural light. She repeatedly requested an alternate room with natural light before and after the school year began. Even though there were two alternate rooms available, the principal refused to assign one to Ekstrand. Ekstrand sued the district under the Americans with Disabilities Act (ADA), alleging that the district discriminated against her on the basis of her disability when it refused to provide a medically necessary and reasonable accommodation. The court ordered the case to proceed to trial for the jury to decide whether the teacher's requested accommodation would impose an undue hardship on the district. Such undue hardship would excuse the district from having to grant the teacher's request to switch classrooms.

As this case demonstrates, school districts should not ignore or dismiss out of hand an employee's request for an accom-

modation of a disability. The ADA mandates that an employer engage in the interactive process with the employee when reviewing and considering an employee's request. Employers also are required under the Act to provide reasonable accommodations. Reasonable accommodations do not include removing essential job functions, creating new jobs, and providing personal need items such as eyeglasses and mobility aids. In addition, an employer is not required to grant the employee's demanded accommodation. Rather, a reasonable accommodation is any change in the work environment or in the way things usually are done that gives an individual with a disability an equal employment opportunity. Reasonable accommodations may include, among other things, a modification in the work environment or work schedule, a reassignment to a vacant position, altering the manner or timeframe in which an essential job function is done, and flexible leaves.

***Falchenberg v. New York State Dept. of Educ.*, 2009 WL 1585778 (S.D. NY 2009)**

After failing to pass a state teacher certification exam, a teacher sued the New York State Department of Education alleging that it discriminated against her on the basis of a disability in violation of the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973. The teacher — who had been diagnosed with dyslexia — claimed that she should have been allowed to take the written certification exam with a dictionary, granted extra time to take the test and frequent breaks during it, and the option to take the test as an oral exam. The court found that the teacher's requested accommodations were not reasonable inasmuch as an examinee's ability to spell, punctuate, capitalize and apply appropriate grammar was an inherent part of the certification exam. Exempting the teacher from demonstrating the same level of competency in those areas would not have put her on an even playing field with the non-disabled test-takers.

This case reinforces the long-standing principle that teachers with disabilities must be able to perform the essential functions of their jobs and that they are not entitled to unreasonable accommodations.

***Long v. Illinois Teachers Retirement System*, 2009 WL 3400955 (7th Cir. 2009)**

Julie Long was terminated from her position with the Illinois Teachers Retirement System (TRS) after 20 years of employment. She consequently sued TRS alleging that it had retaliated against her for taking protected time off work under the Family and Medical Leave Act (FMLA). TRS countered that Long was fired because she had failed to accurately and timely distribute TRS members' retiree benefits. Her errors had multiplied over time and resulted in repeated complaints from retirees. As evidence of TRS' animus toward workers who took FMLA time off work, Long pointed to her past favor-

able performance reviews and to several negative comments made by her supervisor about Long's FMLA absences from work. The supervisor had told Long that her absenteeism had contributed to the payment backlogs as well as the missed payments to members. He also noted that Long's absences had a negative impact on her co-workers' morale because they had to fill in for her and perform her assigned duties (as well as their own) during Long's absences. TRS explained that the executive director, not the supervisor, was the ultimate decision maker as to personnel matters. The executive director had conducted an independent investigation and received input from a number of sources, including the complaining retiree members. The information provided to the executive director, along with Long's performance reviews, revealed that Long's decline in performance began several months before she requested FMLA leave. The court, therefore, dismissed the lawsuit, finding that Long failed to present evidence of retaliatory intent.

As this case reveals, addressing matters involving the FMLA can frequently present challenges for employers. In this instance, the employer may have been able to minimize its exposure to a lawsuit by (1) temporarily assigning the employee to an alternative position which can better accommodate reoccurring absences; or (2) focusing solely on the employee's work performance and not on the impact her absences have on her performance.

Students & Instruction

Lopez v. Metropolitan Government of Nashville and Davidson County, 2009 WL 1971452 (M.D. Tenn. 2009)

A nine-year old disabled boy reportedly was forced to perform fellatio on an older student while riding on a school bus. His parents subsequently sued the city and county governments which operated the private academy to which the disabled student was assigned. Because of the offending student's past behavioral problems and inappropriate interactions with other students, the parents alleged a violation of Title IX of the Educational Amendments of 1972 in that the government officials had knowledge of the substantial threat of sexual harassment posed by the offending student. The court found that there were a number of issues that had to be decided by a jury and refused to dismiss the case. These matters included whether the government officials had knowledge of the substantial

threat of harm and whether they nevertheless acted with deliberate indifference by transporting a known aggressor with other vulnerable students and insufficient adult supervision.

This case serves as a reminder that school districts must take reasonable steps to adequately supervise students who are being transported to and from school, particularly where such individuals are disabled or extremely young. Liability under Title IX will attach only when the school is found to have acted unreasonably given the facts of the case.

C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist. (C.D. Cal. 2009)

When a school district refused to pay for the costs of a disabled student to attend a non-public school, the student's guardian filed a due process case against the school district alleging violations of the Individuals with Disabilities Education Improvement Act of 2004 (IDEA). A hearing officer found that the school district had failed to provide a free appropriate public education to the student and ordered that it reimburse the guardian a portion of the costs associated with the student's placement in a private facility. The hearing officer did not order full reimbursement because the facility was not a properly certified non-public school. A court later reviewed the hearing officer's decision and found that the hearing officer erred by considering whether the facility was a "properly certified" school. Instead, the proper inquiry was whether the education provided by the agency was reasonably calculated to enable the student to receive an educational benefit. The court answered this in the affirmative, pointing to the increase in the student's IQ scores, his improved behavior and his progress in reading comprehension. Accordingly, the court ordered the district to reimburse the guardian for the full cost of placement in the non-public school.

Hearing officers and courts may consider multiple factors in weighing the equities associated with a request for reimbursement by parents who prevail in a due process proceeding. These include, but are not limited to, whether the parent cooperated with the district in the design and delivery of individualized education plan (IEP) services; whether prior notice was provided, if required; whether the privately obtained services met the student's identified needs; and whether the costs of the private placement are reasonable. Not since the U.S. Supreme Court's decision in *Florence County School District Four v. Carter*, 510 U.S. 7 (1993), however, has a unilateral private placement had to meet state specific approval requirements.

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