

Legal Update



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The year in law

- **Litigation present:** What we learned from the courts in 2014-15
- **Litigation past:** Recent lessons worth revisiting
- **Litigation future:** New requirements regarding isolation and restraint

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Litigation present

- **M.M. v. Lafayette Sch. Dist. (9th Cir. 2014)**
 - District denied FAPE by failing to consider, document, and share RTI information with parents.
 - Data gathered for an evaluation must be “documented and carefully considered.”
 - RTI data must be included even if RTI is not the basis for qualification – and must be shared with parents to obtain their informed consent.
 - School psychologist takeaway: show your work

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Litigation present

- **D.A. v. Meridian Joint Sch. Dist. (9th Cir. 2015)**
 - Student on the autism spectrum was not eligible for special education
 - Staff testimony about progress at school still counts
 - School psychologist takeaway: never underestimate the importance of data about general education performance

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Litigation present

- **E.M. v. Pajaro Valley Unified Sch. Dist. (9th Cir. 2014)**
 - Student with auditory processing disorder could qualify as SLD or OHI
 - But under any category, disability must have an educational impact
 - School psychologist takeaway: consider all possible eligibility categories

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Litigation present

- **Caldwell Independent Sch. Dist. v. Joe P. (5th Cir. 2014)**
 - Acknowledging a disability by name is not enough to make an evaluation appropriate.
 - School psychologist takeaway: data gathered for an evaluation must examine the effects of a disability on a student’s education

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Litigation present

- G.M. v. Saddleback Valley Unified Sch. Dist. (9th Cir. 2014)
 - Affirmed trial court's use of child find standard from Hawaii v. Carl Rae (D. Hawaii 2001)
 - Child find duty is triggered when district has reason to suspect a disability and reason to suspect special education services may be needed to address that disability
 - School psychologist takeaway: when in doubt, refer for evaluation

Litigation present

- Sam K. v. Hawaii Dep't of Educ. (9th Cir. 2015)
 - School district that failed to offer an IEP at the expiration of a settlement agreement was on the hook for another year of private placement.
 - School psychologist takeaways: beware previous litigants; out of sight is not out of mind; don't leave an IEP/evaluation unfinished

Litigation present

- Rodriguez v. Indep. Sch. Dist. of Boise City (D. Idaho 2014):
 - District denied FAPE by failing to evaluate whether/why student could not attend school
 - School psychologist takeaway: when attendance declines, address the reasons directly through evaluation

Litigation past

- Doug C. v. Hawaii Dep't of Educ. (9th Cir. 2013)
 - Decision to hold IEP meeting by annual deadline without parent was not reasonable.
 - When two procedural requirements conflict, err on the side of parental participation.
 - School psychologist takeaway: it's better to postpone a reevaluation feedback meeting than to hold it in 35 days without the parents

Litigation past

- Seattle Sch. Dist., 2011-SE-0096
 - When parent requests an IEE, district must pay for IEE or deliver due process hearing request to parent within 15 days.
 - School psychologist takeaway: act on IEE requests promptly and strategically

Aversive interventions, Isolation, Restraint and SHB 1240

Litigation future

Overview

- Historical view: “Aversive Interventions”
 - How and why “aversive” interventions are used
 - How their use has evolved
 - Media coverage – increasing concerns
 - 2013 amendments
- The new law: SHB 1240 – Ch. 206, Laws of 2015
 - Theory behind it
 - Procedures and limitations imposed

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History of Aversives

- Regulations in place for 25 years
- Defined: “the **systematic** use of **stimuli** or **treatment** the student is known to find **unpleasant** for the purpose of **producing desired behavior**”
- *Generally*: restraint and seclusion – but others as well:
 - Pain
 - Noxious tastes
 - Unpleasant sounds

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History of Aversives

- Function evolved:
 - Restraint: Prevent harm to self, others or property
 - Seclusion: To provide opportunity to calm
- Disconnect:
 - These uses don’t necessarily rely on “unpleasant stimuli”
 - These uses are not necessarily employed on basis that doing so will result in better behavior next time
- Arguably, we needed better terminology

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History of Aversives

- Evolution reflects thinking among education professionals:
 - Growing consensus that aversives are of limited effectiveness
 - Less buy-in to idea that negative intervention (scaring, alarming, annoying, hurting kids) changes behavior in a positive way
 - Greater focus on positive interventions as more effective in altering student behavior
- Yet, seclusion and restraint still of some value?

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Theory of Behavior Intervention

- Functional Behavioral Assessment: We have the ability to diagnose the function/purpose of student behavior and in doing so, deny the behavior its function
- Special Education and Positive Behavioral Intervention: We have the ability to improve student behavior through intentional, tailored, monitored and revised interventions
- Punishment is de-emphasized – see 2014 student discipline revisions

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INVESTIGATORS 2

Brutal and allowed: The shocking ways schools can legally restrain kids

By Chelsea Kates | Published: Sep 3, 2014 at 10:49 AM PDT

LONGVIEW, Wash. - Lacey still bristles when she recalls the time teachers pinned her daughter to the ground following an outburst in elementary school. Lacey's daughter, who was 7 at the time, is on the Autism spectrum.

"I was shocked," said Lacey, who asked KATU not to reveal her last name or her daughter's name. "They had policies and procedures in place before this incident happened and they weren't followed."

Lacey said the incident began when her daughter hissed, growled and threatened other students in her second grade class in the Longview School District two years ago. Lacey said staff members moved her daughter to a resource room, designed to calm her down, but she continued to act out.

"What they told me is that she started throwing some soft objects, started kicking the wall," Lacey said. "So they decided to put her in a restraint: face-down prone hold."

In a prone hold, school staff hold a child face-down on the floor, which can restrict breathing. The restraint is so dangerous it's banned in at least 20 states, including Oregon.

"I was angry," Lacey said. "Are you kidding me?"

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School isolation rooms create worry and legal action
 By Jon Humbert | Published: Dec 1, 2014 at 6:52 PM PDT

Yet the family says caretakers there forced Nigel into a small, closet-like room more than 100 times this school year alone.

"We're appalled by the treatment that he's receiving," Nigel's father Adam Burns said.

The isolation room spells came after outbursts or signs of hitting or pinching. It's more than a timeout.

"It's a carpeted room with nothing on the walls," Krikorian said.

Just last week, reports from the school show Nigel was put into the room for 36 minutes in one session. "Until he shows absolute calm and quiet, they don't let him out," Burns said.

That treatment is all part of a sprawling legal complaint sent to the state Office of Administration Hearing. The Burns family wants the district to rein in this form of discipline.

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FOX NEWS THIS MORNING SPORTS TRAFFIC PICK MY PET WASHINGTON'S MOST WANTED
Bellevue parents outraged over isolation rooms, other restraints in schools
 POSTED 9:45 PM, JUNE 3, 2014, BY JOHN HOPPERSTAD, UPDATED AT 10:41PM, JUNE 3, 2014

BELLEVUE
 — In recent months, the use of isolation rooms in schools has outraged a lot of parents.

The rooms are used for special needs students who act out.

The Washington Legislature is requiring school districts to come up with policies on how to use restraints and isolation techniques. So the Bellevue School Board came up with a plan, but parents there say they need to go back to the drawing board.

"It's going to kill somebody," said parent Cathy McVay to the school board. "It's going to hurt somebody. The long-term effects on these kids, it's traumatizing."

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2013 Amendments – ESHB 1688

- The legislature's first pass at addressing aversive interventions
 - Defined *isolation* and *restraint*
 - Defined *aversive intervention* as isolation or restraint – *implied* prohibition on all other forms
 - IEP requirements including development of aversive intervention plans
 - Documentation and reporting requirements

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SHB 1240 – Ch. 206, Laws of 2015

- Strong bipartisan support:
 - House : 71-27
 - Nays all GOP
 - Senate: 48-0
 - All 25 Republicans vote in favor
- Governor signed May 8, 2015
- Effective July 24, 2015
- Primarily amends RCW 28A.600.485

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Strong Policy Statement

"The legislature finds that there is *no educational or therapeutic benefit* to children from physically restraining or isolating them as part of their public school programs when not necessary for immediate safety. The use of seclusion or restraints in nonemergency situations poses significant physical and psychological danger to students and school staff."

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Strong Policy Statement

"The legislature declares that it is the policy of the state of Washington to *prohibit the planned use of aversive interventions*, to promote positive interventions ... and to *prohibit schools from physically restraining or isolating* any student except when the student's behavior poses an *imminent likelihood of serious harm* to that student or another person."

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Definitions

Aversive Intervention:

- No definition
- The concept is now clearly gone – no further endorsement of the programmatic use of unpleasant stimuli or treatment in addressing student behavior
- OSPI's proposed rules explicitly prohibit aversive interventions

Isolation

Isolation:

- Was: **Excluding a student from his/her regular instructional area and** restricting the student alone within a room or any other form of enclosure, from which the student may not leave
- Now: Restricting a student alone within a room or any other form of enclosure, from which the student may not leave

Isolation

- Does not include a student's voluntary use of quiet area for self-calming
- Does not include temporary removal of student from regular instructional area to an unlocked area "for purposes of carrying out an appropriate positive behavior intervention plan"
 - OSPI proposed: PBI means "strategies and instruction that can be implemented in a systematic manner in order to provide alternatives to challenging behaviors, reinforce desired behaviors, and reduce or eliminate the frequency and severity of the challenging behaviors"

Restraint

Restraint:

- Was: Physical intervention or force used to control a student, including use of a restraint device
- Now: Physical intervention or force used to control a student, including use of a restraint device to restrict a student's freedom of movement

Restraint Device

Restraint Device:

- A device used to assist in controlling a student, including handcuffs, plastic ties, ankle restraints, leather cuffs, hospital-type restraints, pepper spray, tasers, batons
- New: **Does not include a seat harness** used to safely transport students
 - OSPI proposed: Lists examples such as safety belts for wheelchairs, changing tables, booster seats and other ambulatory or therapeutic devices

Restraint

- New: Restraint does not include appropriate use of a prescribed medical, orthopedic, or therapeutic device when used as intended, such as to achieve proper body position, balance, or alignment, or to permit a student to safely participate in activities

Applicability

- 2013 law's requirements applied only to special education and 504 students
- SHB 1240: **All students**, regardless of special education or 504 status, while participating in school-sponsored instruction or activities

Limitations: All Students

- Restraint or isolation of **any student** is permitted only when reasonably necessary to control **spontaneous behavior** that poses an **imminent likelihood of serious harm**
- Each district must adopt a policy providing for the least amount of restraint or isolation appropriate to protect the safety of students and staff

Spontaneous Behavior

- *Spontaneous behavior* not defined
 - Dictionary: "performed or occurring as a result of a sudden inner impulse or inclination and without premeditation or external stimulus"
- Possible intent: Distinguish from predictable behavior requiring specific programming – but is behavior "spontaneous" when staff can predict it?
- Can we use restraint when behavior is planned?

Imminent Likelihood of Serious Harm

- *Imminent likelihood of serious harm* defined in RCW 70.96B.010
 - RCW 70.96B provides standards for emergency involuntary mental health treatment
 - Good fit for public schools?
- *Imminent*: The state or condition of being likely to occur at any moment, or near at hand, rather than distant or remote

Imminent Likelihood of Serious Harm

Likelihood of serious harm:

- A substantial risk that student will inflict **physical harm upon self**, as **evidenced by** threats or attempts to commit suicide or inflict physical harm on self, OR
- A substantial risk that student will inflict **physical harm upon another**, as **evidenced by** behavior that has caused such harm or that places another person in reasonable fear of sustaining such harm, OR

Imminent Likelihood of Serious Harm

Likelihood of serious harm, cont.:

- A substantial risk that student will inflict **physical harm upon the property of others**, as **evidenced by** behavior that has caused substantial loss or damage to property OR
- The person has **threatened the physical safety of another** and **has a history of one or more violent acts** (homicide, suicide attempt, nonfatal injuries, substantial property damage)

Imminent Likelihood of Serious Harm

- What about:
 - Disruption of educational process?
 - Oppositional refusals?
 - Verbal harassment of peers or staff?
- Cannot use isolation or restraint
 - Even in IEPs?

Limitations: IEPs & 504 Plans

- An IEP or 504 plan **must not include the use of restraint or isolation as a planned intervention** unless:
 - Student's individual needs **require more specific advanced educational planning**
 - **Parent/guardian agrees**
- "Nothing in this section is intended to limit the provision of a free appropriate public education" under IDEA or Section 504

Emergency Response Protocols

- Welcome to your new acronym: ERP
 - Rules not yet final – but ERP is likely to stick
- Schools and parents may incorporate ERPs in a student's IEP
- But only for emergencies that pose an imminent likelihood of serious harm
- Parents must provide written agreement to ERP in advance

Emergency Response Protocols

- ERP must specify:
 - Emergency conditions under which isolation, restraint, and restraint devices will be used
 - Type of isolation, restraint, or device
 - Staff or contract positions permitted to use isolation or restraint
 - Required annual training for those staff
 - Any other special precautions that must be taken

Limitations: IEPs

- What if parents won't agree to restraint or isolation in IEP/504 plan?
 - We still have ability to use non-programmed isolation or restraint to respond to spontaneous behavior posing imminent risk of harm, and can refer to our isolation/restraint policy in the IEP
 - What about student who is regularly, predictably and significantly disruptive?
 - Consider more restrictive placement? Does this pose an LRE problem?

Employing Restraint or Isolation

- Whether in response to spontaneous event or pursuant to IEP:
- Must be closely monitored to prevent harm to the student
 - Must be discontinued as soon as likelihood of serious harm has dissipated

Employing isolation

- Enclosure must be ventilated, lighted, and temperature controlled for human occupancy
- Must permit continuous visual monitoring
- Supervising adult must remain in visual or auditory range at all times
- Supervision must be visual if student is incapable of releasing self from enclosure

Employing restraint and devices

- Must not interfere with student's breathing
- Student must be capable of self-release or must remain within view of supervising adult

What?

- Any staff member or other adult using isolation or restraint:
 - Must be "trained and certified in the use of" isolation/restraint
 - "Or otherwise available in the case of an emergency when trained personnel are not immediately available due to the unforeseeable nature of the emergency"

Follow-up Procedures

- After each use of isolation or restraint:
 - Review incident with student and parent/guardian to address precipitating behavior and appropriateness of response
 - Review incident with staff involved to discuss whether proper procedures were followed and what training or support staff need to help the student avoid similar incidents

Staff Reporting

- Any employee or SRO who uses isolation or restraint on a student during school:
 - Must inform principal or designee ASAP
 - Must submit written report within two business days

Staff Reporting

- Written report must include:
 - Date/time of incident
 - Name/title of individual who administered
 - Description of activity that led to intervention
 - Type and duration of isolation/restraint
 - Any injuries and medical care provided

Staff Reporting

- Written report must include (cont.):
 - New: Any recommendations for changing nature and amount of resources available to student and staff in order to avoid similar incidents
 - Consistent with theory of behavior intervention: With the “right” program, revised based on response to interventions, we can cure behavior

Administrator Reporting

- Principal or designee must:
 - Make reasonable effort to inform parents verbally within 24 hours of incident
 - Send written notification to parents as soon as practical and postmarked no later than 5 business days after incident
 - If we customarily provide that parent with school-related information in a language other than English, written notice must be in that language

Administrator Reporting

- Beginning January 16, 2016, district must provide summary to OSPI that includes:
 - Number of incidents of isolation and restraint
 - Number of students involved
 - Number of injuries
 - Types of restraint/isolation used
- OSPI may use this information for investigation of efforts to reduce the use of restraint and isolation

Thoughts on Special Ed Use

- Spontaneous behavior/imminent harm as a catch-all:
 - IEPs don't have to include use of isolation/restraint
 - Can rely on ability to use for any spontaneous behavior that poses imminent risk of harm
- Reasons to include ERP, even if you don't have to:
 - Demonstrates intentionality and appropriate planning by IEP team
 - Specifies conditions, types of intervention, duration and training required
 - Guidance and protection for staff
- Even if not in IEP:
 - Ensure appropriate staff training
 - Ensure appropriate facilities (e.g. isolation room specs)

Legal Update

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