1:1 AIDES – APPROPRIATE ADDITIONAL ADULT ASSISTANCE FOR STUDENTS WITH DISABILITIES

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I. INTRODUCTION

The decision as to whether a school system should place a 1:1 aide with a student with a disability can be a very difficult one to make. In some cases and for some students, it may be essential in order to provide the student with FAPE under the IDEA. For others, placing a 1:1 aide with the student could be detrimental and result in a denial of FAPE to the student. There are many questions surrounding this issue, and this presentation will address those questions and, to some degree, provide some answers and practical guidance for considering the provision of a 1:1 aide to a student with a disability.

II. ARE 1:1 AIDES MENTIONED IN THE IDEA?

Neither the IDEA nor its regulations *specifically* address the provision of the services of a 1:1 aide or assistant to a student with a disability. However, there are provisions in the law/regulations that are relevant to the overall discussion of providing aides to students with disabilities. These provisions are highlighted below.

A. Definition of Special Education

The IDEA requires the provision of "special education" and defines it as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions and in other settings…." 20 U.S.C. § 1402(29) and 34 C.F.R. § 300.39.

B. Definition of Related Services

The IDEA defines "related services" to include:

> transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individual education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, (except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1402(26). The regulations add early identification and assessment of disabilities in children, as well as school health services, school nurse services, social work services in schools, and parent counseling and training to the list of related services. 34 C.F.R. § 300.34.

C. The IDEA's LRE Provisions

1. The statute

The IDEA's Least Restrictive Environment (LRE) provision is particularly relevant to the issue of providing 1:1 aides to students with disabilities. Curiously, the Act's LRE provision is one of the only provisions that has not changed since its original enactment in 1975. Specifically, the IDEA provides that each State must establish procedures to assure that—

> to the maximum extent appropriate, children with disabilities...are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5).

2. Additions made by the IDEA regulations

The IDEA regulations generally restate the statutory LRE provision at 34 C.F.R. § 114 but also add somewhat to it.

a. Continuum of alternative placements requirement

The regulations require school districts to ensure that a "continuum of alternative placements" is available to meet the needs of children with disabilities for special education and related services. The continuum must include—

> the alternative placements listed in the definition of special education under [the regulations] (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions) and make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

34 C.F.R. § 300.115.

b. Placement decision requirements

When determining the educational placement of a child with a disability, the regulations also require school districts to ensure that placement decisions are made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 C.F.R. § 300.116(a)(1). In addition, a child's placement is to be determined at least annually; be based upon the child's IEP; and be as close as possible to the child's home. 34 C.F.R. § 116(b).

The regulations further provide that unless the IEP of a child with a disability requires some other arrangement, the child is to be educated in the school that he or she would attend if nondisabled and that consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs when selecting the LRE. 34 C.F.R. § 300.116(c) and (d). Finally, placement teams must also ensure that a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. 34 C.F.R. § 300.116.

c. LRE and nonacademic/extracurricular activities

An additional and important provision of the regulations contemplates consideration of the LRE in providing or arranging for the provision of nonacademic and extracurricular services and activities, such as meals, recess periods, counseling services, athletics, transportation, health services, recreational activities, school-sponsored special interest groups or clubs (see, 34 C.F.R. § 300.107). Specifically, 34 C.F.R. § 300.117 provides that school agencies must ensure that each child with a disability participates with nondisabled children in extracurricular services and activities to the maximum extent appropriate to the needs of that child and that the child has the "supplementary aids and services" determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings. Issues concerning the provision of 1:1 assistance also arise within this context.

d. Definition of "supplementary aids and services"

The regulations also contain a definition of the terms "supplementary aids and services" as:

> [A]ids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance [with the LRE regulations].

34 C.F.R. § 300.42.

D. IEP Requirements

Among other things, the IDEA regulations require that IEPs contain:

> A statement of the special education and related services and supplementary aids and services, based upon peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child—
>
> (i) To advance appropriately toward attaining the annual goals;
> (ii) To be involved in and make progress in the general education curriculum…and to participate in extracurricular and other nonacademic activities; and
> (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities….

34 C.F.R. § 300.320(a)(4).

III. QUESTIONS TO PONDER WHEN ADDRESSING THE 1:1 AIDE ISSUE

A. How does an IEP Team Decide whether a 1:1 Aide should be Assigned?

Typically, 1:1 aides are considered for students who are a danger to themselves or others or for those who have medical/health conditions that require constant supervision to ensure the student's safety. In other instances, the provision of an aide may be considered to provide assistance with instruction or participation in the regular education environment (including participation in nonacademic/extracurricular activities) or as a support to a student who has significant difficulty transitioning from one environment to another. A 1:1 aide might be designated as a related service, a supplementary aid or service or, conceivably support for school personnel.

From a legal perspective, the question is whether the assignment of a 1:1 aide is necessary for the provision of FAPE to that particular student. As a result, this decision must be made on a case-by-case basis, focusing upon the individual needs of the student.

To ensure that there is not over-reliance upon 1:1 support generally, some school agencies have put in place a screening or preparatory process designed to assist IEP teams in systematically reviewing the full range of alternative support options and to define specific activities and environments in which a student does or does not need the assistance of a full-time 1:1 aide.

B. What Alternatives Should IEP Teams Consider When Determining Whether a 1:1 Aide is Necessary?

Potentially less restrictive options should always be considered (and generally exhausted) before an IEP Team determines that a 1:1 aide is necessary. These options include, but are not limited to:

- Conducting FBAs and developing BIPs (with or without the assistance of a Behavioral Analyst)
- The use of Assistive Technology or other specialized equipment
- A change in the school facility or location of services
- Specialized training for staff
- Specialized training for parents
- Specialized training for other students
- Assigning an aide to the classroom, rather than to the student
- Assigning peer buddies to assist the student
- Providing social skills training or other pertinent services to the student

C. Could the Assignment of a 1:1 Aide be Considered Detrimental to a Student?

Many experts will opine that, in some cases, the assignment of a 1:1 aide could be the most restrictive environment that is created for a student and amount to a denial of FAPE because it has resulted in "learned helplessness" on the part of the student.

> A.C. v. Board of Educ. of the Chappaqua Cent. Sch. Dist., 51 IDELR 147, 553 F.3d 165 (2d Cir. 2009). District court's decision that school district's program was inappropriate because the provision of a one-to-one aide promoted "learned helplessness" is overturned. Clearly, the State Review Officer's findings should have been affirmed, as the evidence identified ways in which the school district developed M.C.'s independence, for example, by decreasing the level of prompting where it was no longer needed. In addition, the IEP stressed independence in following daily routines and the application of reading and math skills. The student with autism also made progress toward independence in co-taught classes and a progress report indicated that

he had mastered the goal of independently following classroom routines. Among other things, the student no longer needed prompting and an escort to use the bathroom.

Roseville City Elem. Sch. Dist., 54 IDELR 37 (SEA Ca. 2009). It is appropriate to move the student to a special day class that would meet the student's need for positive behavioral interventions. Her maladaptive behavior, which included shouting in her regular class and physical aggression, would only be managed, not improved, if her mother continued to serve as her 1:1 aide. There is extensive evidence that that student requires a highly structured class that offers routine and individualized instruction. While the mother's presence in the sixth grade class helped reduce aggression and disruptive behaviors, the student "needs to gain independence, which is not likely to occur if she is constantly accompanied by a 1:1 aide to manage her behavior." Because the special class is designed to address maladaptive behaviors to allow students to change and become independent, it is a good fit for the student.

D. Once an Aide is Determined Necessary, Can the Services Ever be Discontinued?

If relevant and updated data demonstrate that a student no longer requires the service in order to receive FAPE, then an IEP Team can recommend the removal of the service. However, it is best practice to address the "fading" of the assistance of a 1:1 aide as part of the assignment of the aide in the first place. It is contemplated that the use of a 1:1 aide should never be presumed to be a permanent or long-term service and criteria should be set, via the creation of a "fading plan," by the Team to assist it in determining when the use of a 1:1 aide is no longer appropriate or necessary. Once the student begins to demonstrate competence as to the defined criteria and goals, the Team will have the support it needs for recommending that the services of a 1:1 aide be faded and, ultimately, discontinued. The discontinuation of an aide, however, must *always* be a decision of the student's IEP Team.

Connally Indep. Sch. Dist., 34 IDELR 309 (SEA Tex. 2001). School district's determination that 14-year-old autistic student no longer requires 1:1 aide is upheld. Although the school had agreed to provide an aide to the student in all classes for the first six weeks of middle school, the IEP also called for the teacher to evaluate and determine in which classes the student would be able to function independently. Factors considered included the structure of the class, the student's skills in the class, the number of other students in the class and their behavior. The plan also called for the continued reevaluation of these factors, should 1:1 support be discontinued. Where the student displayed increased independence and noticeable improvement in behavior following his transition to middle school, constant 1:1 oversight was no longer required, but ongoing reconsideration of the student's need for an aide is warranted.

District of Columbia Pub. Schs., 8 ECLPR 85 (SEA D.C. 2011). Where the special education coordinator unilaterally decided that the autistic youngster should no longer have a dedicated aide, FAPE was denied. Because the decision was made without an IEP team meeting, this impeded the parent's right to meaningful participation in the decision-making process. Not only did the district exclude parental input, it failed to consider input from the child's teacher, who believed that the student required an aide, the child's service providers, or other members of the IEP team. Although the special education coordinator testified that the aide was removed because the student failed to meet the criteria for an aide, the IEP team never considered those criteria, and there was no discussion as to why the district believed the student did not meet them.

E. Have There Been any Rulings Where a 1:1 Aide was Found Necessary for FAPE?

Yes.

Glendale Unif. Sch. Dist., 4 ECLPR 543 (SEA Ca. 2004). Where the district's IEP failed to provide FAPE to an autistic preschooler, the child requires a 1:1 aide in a preschool program with typically developing peers and intensive behavior intervention services. Student requires an aide to redirect him, provide appropriate social modeling, help him to attend to tasks and facilitate appropriate social interactions.

Hacienda La Puente Unif. Sch. Dist., 48 IDELR 237 (SEA Ca. 2007). District denied FAPE when it offered 1:1 services for only one month. The child's failure to participate in classroom activities unless physically assisted by an aide clearly showed that he needed 1:1 services in order to obtain educational benefit. According to the psychologists who evaluated and observed the student in his private preschool, the student required substantial prompting and hand-over-hand guidance to engage in play activities or to respond to peers. Though the same psychologists indicated that the student would require 1:1 assistance for only the first month in his Head Start preschool program, the student's history of withdrawal contradicted the psychologists' testimony. "[The student's] unique needs indicate he will be unable to be successful in an inclusive general education class without the aide, based upon his continued need for and possible dependence on prompts, hand-over-hand assistance, and his general autistic-like behaviors." Thus, the district will provide a 1:1 aide for the Fall of 2007 and the district will convene the IEP team before the start of the Spring semester to determine whether the aide's services can be phased out.

F. Have There Been any Rulings Where a 1:1 Aide was Found Unnecessary for FAPE?

Sure.

Broward Co. Sch. Bd., 57 IDELR 58 (SEA Fla. 2011). Where a small class with a very low student-adult ratio could address the needs of the non-verbal autistic fifth-grader who had a tendency to elope and to eat non-food items, a 1:1 aide was not required for FAPE. The structure of the class, where two well-trained paraprofessionals were always within arm's reach, makes assigning a dedicated aide unnecessary. In addition, the child's BIP adequately addresses strategies for preventing feeding and safety issues and the teacher and paraprofessionals were adequately trained to implement the strategies in the BIP. Further, due to the low number of students per adult in the class, an adult was close to the student at all times and school records show that the student made academic progress in the class. Thus, assigning a 1:1 aide would have been needlessly restrictive.

Flagler Co. Sch. Dist., 49 IDELR 296 (SEA Fla. 2007). Student does not require a 1:1 aide where the overwhelming evidence is that the student received adequate support services via the teacher and the three aides who rotated among students in the classroom. There was no evidence that the student was in danger or that the student did not receive meaningful educational benefit in the absence of a 1:1 attendant. Rather, the school district presented standardized assessment results and two educators' observations that the student was progressing well without a personal aide. Further, educators opined that the student should be expanding interaction with a number of people, which is being done as a result of not having a personal aide. In addition, they opined that a personal aide might student the student's progress in this regard. Thus, "it is conceivable that one exclusive aide would not represent LRE."

Riverside Unif. Sch. Dist., 49 IDELR 83 (SEA Ca. 2007). Although 8-year-old autistic student experienced occasional difficulty with peer interaction, the school district is not required to continue the provision of a 1:1 instructional aide. "The few isolated incidents of possible teasing at school and Student's behaviors at hoe that may or may not related to autism, did not

demonstrate that Student required special education and related services…particularly when there was no evidence that the incidents or behaviors resulted in behavioral or educational problems for Student at school."

Jefferson Co. (AL) Sch. Dist., 50 IDELR 23 (OCR 2007). District did not discriminate against student by failing to provide a 1:1 aide where IEP did not call for such assistance. Instead, the student received assistance from a paraprofessional who worked with all students in the special education class and the student passed all of his classes and was promoted to eighth grade. It appears that the two occasions when the student missed the bus were related to miscommunication issues, not based on discrimination.

G. If an Aide is Assigned to the Student, is it OK for the Aide to Provide Special Education to the Student?

The U.S. Department of Education noted in the commentary to the 2006 regulations that the IDEA specifically allows paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulation, or written policy, "to assist in providing special education and related services to children with disabilities under the Act." However, the U.S. DOE further noted that—

> this provision should not be construed to permit or encourage the use of paraprofessionals as a replacement for teachers or related service providers who meet State qualification standards. To the contrary, using paraprofessionals and assistants as teachers or related service providers would be inconsistent with the State's duty to ensure that personnel necessary to carry out the purposes of Part B of the Act are appropriately and adequately prepared and trained. Paraprofessionals in public schools are not directly responsible for the provision of special education and related services to children with disabilities; rather, these aides provide special education and related services to children with disabilities only under the supervision of special education and related services personnel.

71 Fed. Reg. 156, p. 46611 (2006).

H. Can the 1:1 Aide for One Student Assist in Meeting the Needs of Another Student?

Not if the IEP assigns a dedicated aide to the student at all times.

Regional Sch. Unit #23, 54 IDELR 179 (SEA Complaint Me. 2010). When the district assigned the dedicated aide of a non-verbal student to assist another student as well, the district violated the IDEA. Because the student's IEP required the student to have the support of a 1:1 aide at all times, the district was obligated to implement that provision until it changed the IEP. Where the aide also supported the student's classmate during music, gym, lunch and recess before the time that the IEP was officially changed, the district violated IDEA.

I. What if the Teacher is Absent? Can the Aide Fill in and Supervise Instruction?

No.

Richard Springs Indep. Sch. Dist., 51 IDELR 144 (SEA Tex. 2008). The 1:1 aide testified that when the P.E. teacher was absent (about 17-18 times during the school year), a substitute teacher was available only twice and, for the remaining times, the aide was expected to supervise the class of more than 30 students. As a result, the disabled student did not receive instruction from a

certified teacher; nor did he receive the services of the paraprofessional as set forth in this IEP. Thus, the student was denied educational opportunity for a significant period of time and compensatory education services are warranted.

J. What if the 1:1 Aide is Absent?

According to OCR, schools need to have a "back-up plan" in place to ensure that the student continues to receive appropriate services as designated on the IEP.

Dorchester Co. #2 Sch. Dist., 37 IDELR 289 (OCR 2002). District discriminated against student where student did not receive the 1:1 full-time support listed in his IEP when his aide was absent. When all of the "back-up" aides had other responsibilities, district was nonetheless required to provide services.

K. If an Aide is Determined Appropriate, does the Parent get to Choose the Person who will Serve as the Aide?

Generally, the school district chooses the staff assigned to provide services, as long as the person chosen is qualified and can provide the services to benefit the student. Sometimes, however, changing the person who serves as a personal aide can affect the provision of FAPE.

Amador Co. Unif. Sch. Dist., 111 LRP 1693 (SEA Cal. 2011). Based upon evidence that a 4 year-old student with autistic-like behaviors made no progress after his special day class teacher and aides were replaced by unqualified substitutes, the district denied the student FAPE. The staffing changes made by the school district affected the quality of the student's program to such an extent that the student was unable to obtain meaningful educational benefit. The student had difficulty adjusting to change and had solid relationships with the three classroom aides before the district abruptly transferred them and the teacher went on leave. Where the student was progressing up until this time, student was denied FAPE when his progress came to a standstill because of the staffing changes and the exposure to unqualified and untrained substitutes.

Blanchard v. Morton Sch. Dist., 54 IDELR 277, 385 F. App'x 640 (9th Cir. 2010) (unpublished). District is not required to select parent's chosen aide for student with autism. The parent failed to show that the educational assistant assigned by the district was unqualified to serve the student and, therefore, could not establish an IDEA violation. In addition, the parent could not prevail on her Section 504 or ADA claims because she failed to show that the district was deliberately indifferent to her son's educational needs when it assigned someone other than her chosen aide.

Central Dauphin Sch. Dist., 8 ECLPR 21 (SEA Pa. 2009). School district was free to replace student's 1:1 aide with another qualified employee where the IEP did not explicitly require the original aide and there was insufficient evidence that the child needed her to receive FAPE. While the relationship with the new aide would take time to develop, nothing establishes that the student's educational needs will not be met during that time.

Gellerman v. Calaveras Unif. Sch. Dist., 37 IDELR 125 (9th Cir. 2002). Aide selected by the district is qualified to provide appropriate services to the student, even though the aide has not worked previously in the home with the student.

L. What About the Parent Serving as the Student's Aide?

While this could happen if the parent and district agree to this employment relationship, it is generally not advisable.

Belkin v. Sioux City Community Sch. Dist., 46 IDELR 224 (N.D. Iowa 2006). School district did not retaliate against parent of student with autism when it removed her as the student's one-to-one aide. Rather, the decision to remove her was a personnel decision related to the breakdown in confidence between the parent and the regular classroom teacher that was irreversible.

Hawaii Dept. of Educ., 47 IDELR 175 (SEA Haw. 2006). Though the parent was qualified to serve as the kindergartner's 1:1 aide and had done so for two previous school years, the district is not required to rehire her for the upcoming school year. This is so because the aides that the ED has hired are ready, willing and able to provide the services required by the student. Personnel decisions are within the ED's sole discretion.

M. Can the Parent Demand that an Aide be Trained in Particular Techniques or Methodologies?

Only where the parent can prove that the particular training is required for the student to receive FAPE.

In re Student with a Disability, 50 IDELR 150 (SEA N.Y. 2008). While the student's aide might benefit from training in Strategies for Crisis Intervention and Prevention (SCIP), it is not necessary for the student to receive FAPE. The student's current aide is qualified to manage the student's behavior and the district trained its crisis management paraprofessionals to manage aggressive behavior through the use of redirection and positive reinforcement, similar to the training techniques taught in the SCIP program.

N. Aides Can be Very Expensive! Can't we Refuse it Based upon Cost?

No. Limited funding is not considered a defense for failing to meet the individual needs of a student with a disability.

Washoe Co. (NV) Sch. Dist., 51 IDELR 52 (OCR 2008). Limited funding for aides does not justify the denial of a required 1:1 aide to a student with a disability where the aide is necessary for the provision of FAPE.

Fisher v. Stafford Township Bd. of Educ., 50 IDELR 272, 289 F. App'x 520 (3d Cir. 2005) (unpublished). Where school district did not know that the parent was supplementing the salaries of certain school aides (sometimes as much as $1,200 per month), it did not deny the student FAPE and was not liable to reimburse these costs to the parent. This is particularly the case where the parent could not show that the aides would not have continued without her support and that the school could not have continued to provide ABA services to the student if the aide(s) had resigned.

O. Could the Assignment of an Aide in School Prevent Placement in a More Restrictive Setting, such as a Private or Residential School?

Some school systems have successfully defended that their proposed program, with the assistance of an aide, is the appropriate LRE for the student and that a private or residential placement desired by the parents is not.

G.S. v. Cranbury Township Bd. of Educ., 56 IDELR 233 (D. N.J. 2011). Where district proposed an IEP that addressed the rising high school freshman's physical, social and language deficits, the parents are not entitled to reimbursement for private school. The IEP included an aide who would assist the student in finding his way around the school building and help him to deal with peers during his initial transition to high school. Parents' argument that he would have trouble navigating the school and dealing with his peers because he was short for his age is rejected. The high school is a "good fit" in light of the student's social needs, because the student's tightly knit group of friends from middle school would be following him there. In addition, the proposed IEP offered a social skills group, language services and the assistance of an aide, all geared toward helping him with peer interactions. The aide would also assist with navigating the school during transition periods to address parental concerns. The use of an aide would not violate LRE, as it would allow the student to attend school with typical peers and there was no evidence that the aide would create a stigma. Moreover, the IEP team leader noted that the use of the aide could be phased out after the student became familiar with the new school and his schedule.

In re Student with a Disability, 110 LRP 7507 (SEA Va. 2009). Parents of autistic student are not entitled to tuition reimbursement for private school, where district's IEP included the use of a dedicated aide and offered her FAPE in the LRE, continuing her placement in a regular class with the aide and related services. While eliminating the need for an aide is desirable, the 1:1 aide is necessary right now. Further, the evidence shows that the student is not totally dependent on the aide and that the district is taking steps to wean him from her assistance. In addition, the aide allowed the school to comply with the IDEA's mandate that students with disabilities be educated with nondisabled peers to the maximum extent appropriate. It is the use of the aide that enabled the district to place the student in a general education class instead of a more restrictive setting.

P. Are 1:1 Aides Required for a Student to Participate in an After School Program?

If the after school program is an activity that the school agency makes available to all students, the right to equal participation is implicated.

Morris Bd. of Educ., 48 IDELR 295 (SEA N.J. 2007). By failing to provide a 1:1 aide to the 9 year-old autistic student during its after school program, the district discriminated against him. Thus, parents are entitled to $9,000 for the cost of a private 1:1 aide. Even though the school district did not fund the after school program, the evidence supported that the district was connected to the program's operations where the district's board of trustees took action to approve employment of several of the program's employees and provides information about the program, acts as a financial outlet, and approves various policies at board meetings.

Q. Are 1:1 Aides Vulnerable to Lawsuits for Personal Behavior?

There have been numerous cases over the years alleging that an aide engaged in improper behavior and, therefore, injured the disabled student in some way.

H.H. v. Moffett, 52 IDELR 242 (4th Cir. 2009) (unpublished). Parent has sufficiently pled a violation of her daughter's constitutional rights where the kindergartner's confinement to a wheelchair appeared to be rooted in malice rather than educational need. Thus, a special

education teacher and her aide are not entitled to qualified immunity. Although the student's program required her to spend part of the day out of her wheelchair, a secret audio recording suggests that the child spent the entire day strapped in the chair without educational services. In addition, the parent claims that the employees mocked the child's appearance and discussed ways to sabotage an upcoming IEP meeting. The situation described by the parents is unconscionable. Because a reasonable teacher/aide would know that malicious restraint was unlawful, these employees cannot maintain that they were unaware of the alleged constitutional violation. As such, the employees are not immune from the parent's Section 1983 claim. (Important in this case is that the child, a kindergartner, had limited ability to communicate, due to her disabilities. In addition, some of the allegations were based upon information obtained from a recording device that the parent attached to the child's wheelchair).

R. Can the School Agency be held Liable for the Conduct of an Aide?

Typically, such cases are brought alleging violations of constitutional or other federally protected rights and money damages remedies are sought using "Section 1983," which is a civil rights enacted to provide a remedy for violations of laws that do not afford a remedy. However, Section 1983 only imposes liability upon a school agency if there is evidence of an agency or board policy, practice or custom that is enacted or known to the agency that results in injury to a student. Acts of negligence or even willful action on the part of an aide will not result in liability on the part of the agency unless there is evidence that high level administrators knew of the wrongdoing and failed to take any action to address it.

Lewis v. Igwe, 49 IDELR 1 (5th Cir. 2007) (unpublished). Where 21 year-old intellectually and emotionally disabled student grabbed a meat patty of the tray of another student, placed it whole in his mouth and choked to death while his aide was not watching, district is not liable because there is no evidence that the school board had a policy, practice or custom that caused the student's injury and death.

Doe v. Darien Bd. of Educ., 52 IDELR 44 (D. Conn. 2009). Where there was no evidence that the school district knowingly permitted two aides in a preschool inclusion class to abuse children with disabilities, the district is immune from liability for the aides' alleged misconduct. There is no evidence that school officials were aware of any imminent harm to the children and, at most, officials had knowledge only that the aides had difficulty working as a team. "[The preschool coordinator's] awareness of aides taking exception with the technique of other aides and general poor interaction among the aides does not rise to the level of awareness or knowledge of alleged abuse of children."