

LEGAL ISSUES SURROUNDING 1:1 AIDES FOR STUDENTS

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GENERAL

1. Does the IDEA identify a 1:1 aide as a service?

Not specifically. IEP Teams are to develop IEPs for students that include “supplementary aids and services.” Supplementary aids and services are defined as “aids, 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...” 34 C.F.R. §300.42. Thus the idea of “supplementary aids and services” is to enable the student to be successful in a less restrictive setting. Notice that the regulation refers to “aids” rather than “aides.” However, an “aide” can be an “aid.”

2. When should school districts consider the use of a 1:1 aide?

Schools assign dedicated aides to support the education of students in numerous situations. As noted above, supplementary aids and services are required, “to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate...” Some of the most common reasons for this support include: (1) protection/safety of the student, (2) instructional support, (3) transition, and (4) reduction of anxiety for the student. The underlying requirement is for the school district to provide the student with a free appropriate public education.

3. Can school districts be held liable for harm to students resulting from the acts or omissions of the 1:1 aide?

It is unlikely. Liability issues may arise under state or federal law. With regard to federal law, it is very unlikely that a school district would be liable for the acts or omissions of an aide in the classroom. Federal law provides that public school districts, as governmental entities, can be held liable for the violation of any Constitutional or federally protected right. This protection comes under the federal law known as “Section 1983.” However, Section 1983 can result in school liability for the denial of those rights only if a school district had a board policy, practice, or custom enacted or known to the board that results in a violation/injury. Simple acts of negligence, or even willful acts of a teacher’s aide are unlikely to create liability for a school district. If higher level administrators knew of wrongdoing and failed to take corrective action, the school may be facing liability.

A 2007 case decided by the 5th Circuit Court of Appeals illustrates the distinction between “policy” and the acts of individuals. In the case, *Lewis v. Igwe et al.*, 49 IDELR 1 (5th Cir. 2007—unpublished decision), a Texas County Department of Education was sued by the parents of a 21 year old student who died during lunch on a campus for students with mental retardation and emotional disturbance.

Specifically, the student grabbed a meat patty off of the plate of another student, placed it whole in his mouth and began to choke. Despite rescue efforts provided by employees, including the Heimlich maneuver, the student died. The student’s parent charged that the accident and the student’s death resulted from inadequate staffing.

The 5th Circuit Court of Appeals found no evidence that the Department of Education’s Board had a policy, practice, or custom known to the Board that was causally related to the student’s injury and death. Accordingly, the school was not held liable.

4. Is it possible to impede a student’s progress by providing too much support?

Yes. At least one court has addressed the issue of “learned helplessness” in response to the provision of a 1:1 aide for a student with autism.

In that case, *A.C. and M.C. v. Bd. of Educ. of Chappaqua Central School District*, 51 IDELR 147 (2d Cir. 2009), the court of appeals considered the decision by a lower court that a school district had prevented the student from learning how to function independently due to the constant presence of an instructional aide. The parents charged that the 1:1 aide promoted the “learned helplessness” of the student.

On appeal, the court reversed the decision of the lower court, holding that the student’s proposed IEP addressed the student’s need to develop independence and called for the aide to decrease the level of support provided to the student. Accordingly, the court upheld the school district’s program.

5. Is it allowable for the school district to consider funding issues when determining whether to appoint a dedicated aide to a student with disabilities?

No. The fact that a school district has limited funding for aides will not justify the denial of a required one-to-one aide to a student with disabilities, if the aide is necessary for the provision of FAPE. *Washoe County (NV) School Dist.*, 51 IDELR 52 (OCR 2008).

Similarly, a parent cannot be requested or expected to pay for an aide to remain with the student. If the aide is a required supplementary aid or service, the school district must provide the service at no charge to the student.

In *Fisher v. Stafford Township Bd. of Educ.*, 50 IDELR 272 (3^d Cir. 2008—unpublished), a parent surreptitiously supplemented the income of the school aides assigned to work with her child with autism. The payments, which were sometimes as much as \$1200 per month, were allegedly paid by the parent to ensure continued provision of services for her child at school. According to the parent, the school's collective bargaining arrangement resulted in the aides' reluctance to continue to provide school services to the child.

The parent subsequently sued the school district, seeking reimbursement for the payments she had made to the school employees without the school district's knowledge. On appeal, the 3rd Circuit Court of Appeals held that the parent's contention that the aides would not have continued in their employment without her support was speculative, and that even when one aide did resign, the school still was able to provide ABA services to the student. Because the school district was unaware of the private payment arrangement, it had not denied the child a "free" appropriate public education and was not liable for the reimbursement of costs to the parent.

6. Are school districts required to provide 1:1 aides to students enrolled in after school programs?

The answer depends on the level of involvement of the school in the program. In *Morris Bd. of Educ.*, 48 IDELR 295 (SEA NJ 2007), an administrative law judge held that the school district discriminated against a nine year old child with autism on the basis of disability by failing to provide a one-to-one aide to the student during the after school program. As a result, the school district was required to reimburse the parents \$9,000 for the cost of a private one-to-one aide.

The ALJ confirmed that the school district did not have to offer after-school services under the IDEA if the child's IEP provided for sufficient opportunities for socialization and interaction with typically developing peers during the instructional day. However, under Section 504, the district was prohibited from excluding a child with disabilities from any school operated program, or the benefits of that program, on the basis of disability. Here, even though the school district did not fund the program (and required parents to pay an enrollment fee that covered costs), the evidence supported that the district was connected to the program's operations. For example, the district's board of trustees took action to approve the employment of several individuals. Further, "the district provides information

about the program, acts as a financial outlet, and approves various policies at board meetings.” Accordingly, the program was subject to the requirements of Section 504, which in this case, resulted in the district’s need to furnish a one-to-one aide to the child in order to allow her continued participation in the program.

PRACTICAL CONSIDERATIONS IN THE ASSIGNMENT OF A 1:1 AIDE

7. What should the school review in determining whether a 1:1 aide is a required supplementary aid and support?

A school district should consider what support is required to enable the child to benefit from his or her education. Decisions regarding the use of a dedicated aide, as with any other service, should be made on an individual basis and addressed by the IEP team.

Factors to consider include individual student need, class size, staff to student ratio, and need for student support in order to demonstrate educational progress.

In *Flagler County School District*, 49 IDELR 296 (SEA Fla. 2007), an administrative law judge noted the following considerations in determining that a student did not require a 1:1 aide:

“...the overwhelming evidence is that Petitioner received adequate support services via the omnipresent one teacher and three aides who rotated among students in the classroom. Petitioner presented no evidence to show that [the student] was in any danger, did not receive meaningful educational benefit, or regressed as a result of the absence of a personal one-one-one attendant. The school district presented standardized testing results and two educators’ observations that [the student] is progressing well without an exclusively dedicated personal aide...Educators opined that [the student] should be expanding [the student’s] interaction with a number of people; that [the student] is affirmatively expanding interaction with more people as a result of not having an exclusive personal aide; and that an exclusive aide might stunt [the student’s] progress in this regard. It is conceivable that one exclusive aide would not represent LRE.”

In a similar case, *Killeen Indep. School Dist.*, 39 IDELR 21 (SEA TX 2003), a hearing officer supported the District’s position that a ten year old boy with a diagnosis of Asperger’s Syndrome, anxiety, and ADHD did not require a one-to-one aide. The hearing officer concluded that “the [IEP Team] declined to provide a classroom aide for [the student] because he is receiving a FAPE without one. He has an excellent teacher who is doing a good job with his instruction and with redirecting his behavior. Petitioner did not prove that an aide is necessary for academic, behavioral, supervisory, or other reasons at this time. [The student] is receiving an educational benefit in the least restrictive environment appropriate.”

However, in *Glendale Unified School Dist.*, 4 ECLPR 543 (SEA CA 2004), the independent hearing officer ruled against the district, stating that the district’s IEP failed to provide FAPE

to a preschooler with autism. The hearing officer determined that the child required a 1:1 aide in a preschool with typically developing peers with intensive behavior intervention services. Because the district's plan failed to include a full-time 1:1 aide during school hours, and because the student required the aide to redirect him, provide appropriate social modeling, help him attend to tasks, and facilitate appropriate social interactions, the hearing officer concluded that the district had failed to provide the student with FAPE.

8. Does the parent have a role in the assignment of a 1:1 aide for a student? May a parent dictate the assignment of a 1:1 aide for the student?

Generally, the appointment of staff members is a decision left to the school district. For example, in *Blanchard v. Morton School District et al.*, 52 IDELR 3 (D.C. Wa—2009), the court recognized that while the parent had a specific individual in mind to serve as the student's educational assistant, the parent failed to show that the aide chosen by the district was unqualified. Similarly, in *Gellerman v. Calaveras Unified School Dist.*, 37 IDELR 125 (9th Cir. 2002), the court held that the aide selected by the district was qualified to provide appropriate services to the student, even though the parent challenged that the aide had not previously worked with the student in the student's home.

9. Can the parent serve as the 1:1 aide?

Any such agreement is up to the parent and the school district. Generally, such is not advisable. Consider the outcome of the following case, *Belkin v. Sioux City Community School Dist. et al.*, 46 IDELR 224 (N.D.—IA 2006). In that matter, the mother of a first grade student with autism served as her son's classroom aide. When the parent and the teacher developed a conflict internally that could not be resolved, the school district offered to allow the mother to continue serving as the student's aide in another classroom. The parent refused that option and was dismissed from the school district. At the same time, the parent had been disputing the appropriate implementation of her son's IEP by school staff members. When the parent was removed from the classroom as the aide, the parent challenged the school district, claiming that she had been retaliated against for asserting her child's legal rights under federal law. However, the court found in favor of the school, which offered a legitimate, non-discriminatory reason for the parent's removal from the classroom. The federal judge wrote, "thus, faced with a breakdown in the working relationship between [the teacher] and [the mother], [the school district] made the decision to remove [the mother] from [the teacher's classroom]." Because the district had offered the parent the option of continuing as an aide for her child in another classroom, the court determined that the district's actions were not retaliatory.

10. What are some examples of how a 1:1 aide can provide appropriate support to students?

Behavior. In *Bethlehem Area School Dist.*, 52 IDELR 25 (SEA PA 2008), a school district was held liable when a student's self injurious and aggressive behavior did not improve and the district failed to amend or update the student's IEP in a timely manner, despite the parents' request for a 1:1 aide.

Transition. In *Cone v. Randolph County Schools Bd. of Educ.*, 53 IDELR 113 (M.D.—N.C. 2009), the court noted that had the student been afforded appropriate support services to ensure structure and consistency across all environments with minimal transitions, the student may not have needed an educational placement in a residential setting. Because the district’s IEP was deficient in that regard, the court held that the student could not receive FAPE in a public school setting.

11. What happens when the 1:1 aide engages in inappropriate conduct?

Address the situation immediately from the employment perspective, including the conduct of an investigation. Contact legal counsel, if needed, for guidance.

In *San Joaquin County Office of Education and Ripon Unified School Dist.*, 49 IDELR 120 (SEA CA 2007), a parent of a 22 year old student with severe disabilities alleged that the classroom aide frequently hugged the student, gave the student back rubs, and made inappropriate comments about the student’s appearance. The administrative law judge found the allegations to be without merit, noting that the student “would not have made such progress and received such positive ratings had the classroom situation been [as claimed]—a confusing, tense and frustrating place where inappropriate behaviors were commonplace and where [the aide] interfered with [the student’s] independent work time.”

12. What happens when the 1:1 aide is absent? Goes on medical leave?

The school district should have a back-up plan in place to ensure that services continue to be provided by appropriately trained personnel.

In *Richland Springs Indep. School Dist.*, 51 IDELR 144 (SEA TX 2008), a hearing officer ruled against a school district who failed to provide the individualized assistance required by the student’s IEP. In support, the hearing officer relied on the testimony of the one-to-one aide that when the P.E. teacher was absent (approximately 17-18 times during the school year), a substitute teacher was made available only twice. The remainder of the time, the aide was expected to supervise the class of 30 or more students, and as a result, the student at issue did not receive instruction from a certified teacher for a significant amount of time, nor the paraprofessional services required by his IEP. Even though the student did not suffer injury, the hearing officer nonetheless concluded that the student’s IEP was not followed, and the student was denied educational opportunity for a significant time.

Similarly, in *Dorchester County #2 School Dist.*, 37 IDELR 289 (OCR 2002), the Officer for Civil Rights held that when all of the “back-up” aides had other responsibilities, which prevented the student from receiving 1:1 full-time support as required by his program when his aide was absent, the district discriminated against the student on the basis of disability.

PRACTICAL CONSIDERATIONS IN THE REMOVAL OF A 1:1 AIDE

13. What considerations should be reviewed when determining to discontinue the use of a 1:1 aide?

Any decision to discontinue a supplementary aid and/or service to a child should be based upon data to demonstrate that the student no longer requires the service. Such decisions should never be arbitrary or based on funding and/or administrative convenience.

In *Connally Indep. School Dist.*, 34 IDELR 309 (SEA TX 2001), the special education due process hearing officer upheld the school district's determination that a 14 year old male student with autism no longer required the assistance of a one-to-one aide.

Prior to attending middle school, the student exhibited behavioral difficulties, including taking items (such as wires and computer components), focusing inordinate attention on dangerous items and materials such as properly marked biohazard containers, and using items in inappropriate ways. In one case, the student took some wires home and placed them in an electrical outlet and observed a spark. When the student first attended middle school, the student was able to obtain and secret numerous items in his clothing and bring them home. The student's IEP team met and agreed that (1) the student would wear closer fitting garments/clothing at school, and (2) school staff would increase vigilance in response to the concern. Additionally, the school district provided the student with a behavior intervention plan to address the behaviors of concern.

The school agreed to provide an aide-teacher with him in all classes for the first six weeks of middle school. Thereafter, the IEP called for the teacher to evaluate which classes in which 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 further called for the continued reevaluation of these factors, should one-to-one support be discontinued.

Following the student's transition to middle school, he displayed increased independence and noticeable improvements in behavior. As a result, the school district proposed to fade the one-to-one assistance. The parent requested a special education due process hearing.

The hearing officer opined that the student had shown an ability to behave appropriately in a general education setting, and the ongoing reconsideration of the student's need for an aide continued to be warranted. However, the behaviors of concern were noted to have decreased significantly, such that constant one-on-one oversight was required.

14. Will periodic behavior concerns support the continued need for a one-to-one aide?

The IEP Team must consider the individual needs of the student, including the duration, frequency and intensity of the behavior concerns.

In *Riverside Unified School Dist.*, 49 IDELR 83 (SEA CA 2007), an administrative law judge concluded that although an eight year old boy with autism experienced occasional difficulties with peer interaction, the school district was not obligated to continue providing him with a 1:1 instructional aide. The ALJ stated, “The few isolated incidents of possible teasing at school, and Student’s behaviors at home that may or may not relate 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.”

SOME RECENT CASES

H.H. v. Moffett, 52 IDELR 242 (4th Cir. 2009)

The court held that neither the teacher nor the aide were entitled to qualified immunity from personal liability. The suit alleged that the teacher and aide kept the child confined to a wheelchair through the entire school day, even though this was not necessary. The suit alleged that this was done maliciously, rather than for any educational purpose, and that it was accompanied by mocking and disparaging comments to the student. The constitutional right at stake was the right to be free from unreasonable restraint. Key Quote:

We stress that Appellees’ facts make this an unusual case, and our opinion is one that no reasonable teacher who errs in judgment ought to fear. Qualified immunity is intended to protect officials who make reasonable mistakes about the law. [Cite omitted]. But the immunity simply does not extend protection to an official motivated by the kind of bad faith alleged here.

Comment: Some of the allegations in this case were based on information obtained from a recording device the parent attached to the child’s wheelchair. The fact that the child, a kindergarten student, had limited ability to communicate, due to her disabilities, was also a factor.

J.G. v. Card, 53 IDELR 118 (S.D.N.Y. 2009)

This is a suit against teachers, teacher aides, the principal, the superintendent and the school district alleging “grave and persistent” abuse of students with autism. The suit was filed on behalf of the students, and also alleged causes of action for the parents themselves. The court dismissed all claims against the superintendent and the district. There was no evidence that district policy caused any injuries, and the superintendent was not sufficiently personally involved. However, the court refused to dismiss claims against the principal, and declined to grant qualified immunity to the principal. This opinion does not address claims against the teachers or aides.

Blanchard v. Morton School District, 52 IDELR 3 (W.D.Wash. 2009)

The court dismissed the suit in which the parent sought to have a particular person appointed as aide to the child. The court noted that the parent's preferred provider did not want the job. Moreover, there was no evidence of any inadequacy with the aide assigned.

T.W. v. School Board of Seminole County, Florida, 52 IDELR 155 (M.D.Fla. 2009)

The court granted summary judgment to a teacher and the school district after concluding that the student had not suffered a constitutional injury. The student alleged physical and verbal abuse by the teacher, much of which was confirmed by teacher aides who worked in the classroom. However, the court concluded that the three instances of physical restraint, along with the profanity and verbal abuse, did not "shock the conscience" of the court, and therefore, did not violate the constitution.

Comment: The facts alleged in this case are very disturbing, and the case includes footnotes indicating that the teacher was charged with criminal child abuse in state court, and that there are 14 companion cases arising out of the same fact situation. This decision only addresses possible liability under the U.S. Constitution. Other avenues of redress exist.

SOME KEY POINTS TO KEEP IN MIND

1. If the district provides a one-to-one aide during the school day it is much more likely that the district will also have to provide the aide for extracurricular activities.
2. Be sure to distinguish between a dedicated aide and the availability of assistance from teacher aides who serve students in general. Those are different levels of service.
3. The law promotes independence. An aide should be assigned only as absolutely necessary. Even when deemed necessary, there should be a plan to move away from the aide toward more independence.
4. Make sure the aide understands that he/she works for the school district, not the parent.
5. Provide necessary training.
6. If the aide reports wrongdoing, take it seriously. Investigate, take appropriate corrective action if called for.
7. Encourage aides to report wrongdoing.
8. Remember that if you get into a legal dispute with a parent, the testimony of the aide as to what really happened in the classroom will be given considerable weight. The same is true regarding testimony concerning student progress, even if the aide lacks educational credentials.