No. 07-35115

In the United States Court of Appeals For the Ninth Circuit

WINDY PAYNE AND DYLAN PAYNE,
PLAINTIFFS-APPELLANTS,

v.

PENINSULA SCHOOL DISTRICT, ARTONDALE ELEMENTARY SCHOOL, JODI COY, JAMES COOLICAN, AND JANE AND JOHN DOES 1-10

DEFENDANTS-APPELLEES.

On Appeal from the United States District Court
For the Western District of Washington at Tacoma
District Court Case CV05-5780 RBL

BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES, URGING AFFIRMANCE ON REHEARING EN BANC

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
October 13, 2010
Case Number 07-35115
Payne v. Peninsula School District, et al.

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Pursuant to FRAP 26.1 the National School Boards Association who is Amicus Curiae, makes the following disclosures:

1. Is party a publicly held corporation or other publicly held entity?
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2. Does party have any parent corporations?
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   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

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6. If case arises out of a bankruptcy proceeding, identify any trustee and the members of any creditors committee: N/A

/S/ Francisco M. Negrón, Jr. — October 13, 2010

Signature — Date

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INTEREST OF THE AMICUS CURIAE

The National School Boards Association (NSBA), founded in 1940, is a not-for-profit organization representing state associations of school boards and their over 14,500 member districts across the United States, which serves the nation's 50 million public school students.

NSBA is committed to supporting and advocating on behalf of school boards and local administrators to promote safe learning environments, maintain local control by schools and parents over the educational programs of students, and ensure the efficient and effective operation of school districts. NSBA strongly believes that schools must be afforded the opportunity to resolve disputes over a student's educational program informally and through administrative mechanisms to ensure speedy and efficient outcomes for students. School boards have a crucial interest in maintaining the ability to formulate and implement a student's educational program without the specter of costly litigation, knowing instead that the parties will take part in a predictable and expedient administrative dispute resolution process should disagreements arise.

This brief is filed with the consent of both parties.

STATEMENT OF THE CASE

The crux of this case is a school district's alleged failure to properly implement an educational strategy in a student's Individualized Education Program

(IEP), the use of a safe room, a behavior management strategy countenanced by state law and consented to by Plaintiffs-Appellants. Plaintiff D.P. is a student with moderate autism, resulting in delayed academic progress and behavior challenges, including inappropriate or aggressive behaviors. During the 2003-2004 school year, D.P. was placed in the Transition Program, a class designed for children with low cognitive skills and behavioral difficulties, at a school within the Peninsula School District (District).

D.P.'s operative IEP for the 2003-2004 school year identified behavior as an area of need. The IEP team met in September 2004 and found that D.P.'s behavior impedes his learning and the learning of others. The IEP team sought to address D.P.'s behavior issues through various interventions, including an Aversive Interaction Plan that provided for containment in a safe room. D.P.'s mother, Windy Payne, consented to the IEP. As early as October 2, 2004, Mrs. Payne had actual knowledge that the safe room was being used with the door closed.

In January 2004, Mrs. Payne requested that use of the safe room be discontinued. District staff defended the use of the safe room as an appropriate response to D.P.'s efforts to gain attention through his misbehavior. Plaintiffs-Appellants continued to have disagreements with District staff leading the parents to request repeatedly that D.P. be moved from his current classroom. When those requests were denied, the Paynes requested mediation. That mediation led to an

agreement that D.P. be transferred to another school within the District. "[T]he record suggests that the Paynes did not attempt to address D.P.'s emotional problems there and that they were unhappy with the District's provision of the services to which it had agreed. Despite the mediation agreement's failure to resolve all of Payne's issues with the District's provision of services, Payne never sought an impartial due process hearing." *Payne v. Peninsula Sch. Dist.*, 598 F.3d 1123, 1125 (9th Cir. 2010).

D.P. continued to attend school in the District during the 2004-2005 school year, until Mrs. Payne unilaterally removed D.P. from the District in favor of home-schooling. Plaintiffs-Appellants filed suit in December 2005. They claimed the use of the safe room led to "significant regression in the communicative and sensory functions," diminishment of his "academic prowess and abilities," and "continuing signs of emotional trauma." They sought general damages for "extreme mental suffering and emotional distress." *Id.* at 1125-26.

ARGUMENT

The Individuals with Disabilities Education Act (IDEA) ensures "that all children with disabilities have available to them a free appropriate public education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). The primary manner in which school districts fulfill this obligation is through an interactive IEP team process, resulting in the formation of an IEP that

guides the student's educational program and provision of special education services. *See* 20 U.S.C. § 1414(d)(1)(A). A student's parent is an indispensible decision-making member of the IEP team and generally must consent to the provision of special education services. 20 U.S.C. §§ 1414(a)(1)(D), (d)(1)(B).

The IDEA is not toothless; the rights bestowed are associated with specific enforcement mechanisms. *See* 20 U.S.C. § 1415(b). The IDEA provides that a party may present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6). The party filing the complaint is entitled to an impartial due process hearing. 20 U.S.C. § 1415(f). Only after these impartial due process hearing procedures have been exhausted may a party aggrieved by the findings and decision reached in the hearing bring a civil action with respect to the complaint presented at the administrative hearing. 20 U.S.C. §§ 1415(i)(2)(A), (l).

Although the IDEA does not limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other relevant federal laws, a civil action may not be filed until administrative remedies are exhausted if the party is seeking relief also available under the IDEA. 20 U.S.C. § 1415(l). Exhaustion is required if the plaintiff's claims "relate to" a disabled child's education within the meaning

of IDEA or if the plaintiff seeks "relief for injuries that could be addressed *to any degree* by the IDEA's administrative procedures." *Kutasi v. Las Virgenes Unified Sch. Dist.*, 494 F.3d 1162, 1168 (9th Cir. 2007) (emphasis added). Additionally, "where the IDEA's ability to remedy a particular injury is unclear, exhaustion should be required . . . ." *Robb v. Bethel Sch. Dist.*, 308 F.3d 1047, 1051 (9th Cir. 2002). Parties wishing to avoid the administrative hearing requirement bear the burden of showing futility. *Id.* at 1050 n.2.

I. This Court Should Strictly Enforce the Exhaustion of Administrative Remedies Requirement Embedded in the IDEA

The purpose of the IDEA exhaustion requirement is to: (1) permit educational agencies to have "primary responsibility for the educational programs that Congress has charged them to administer," (2) ensure that federal courts "are given the benefit of expert fact-finding by a state agency devoted to this very purpose," and (3) promote "judicial efficiency by giving those agencies the first opportunity to correct shortcomings in their educations programs for disabled students." *Robb*, 308 F.3d at 1051.

Indeed, the IDEA reveals a strong legislative intent to require exhaustion; the school setting demands local expeditious dispute resolution, and it is dangerous to permit parents to skirt exhaustion easily by unilaterally removing a child from school. For these reasons, the IDEA's administrative exhaustion requirements should be strictly enforced.

A. The IDEA's Legislative History and Statutory Scheme Support Stringent Adherence to Exhaustion in Favor of Local Resolution of Disputes

The history and statutory scheme of the IDEA evince a strong intent to require parents to exhaust administrative remedies before going to court. Congress included formal procedures for dispute resolution in the IDEA, as well as each of its predecessors.[1] Where the legislature has gone to the trouble of devising an administrative scheme for dispute resolution, courts have been reluctant to allow parties to circumvent exhaustion requirements. The courts reason that where Congress establishes administrative remedies, exhaustion is required, even when the complaining party's preferred remedy is unavailable under the administrative process. *See Booth v. Churner*, 532 U.S. 731, 735 (2001) (finding that the requirement that no civil action may be brought by a prisoner until "such administrative remedies as available are exhausted," required prisoner to exhaust administrative process even though he sought only unavailable monetary damages because he had already been transferred to another prison).

[1] Congress introduced legislation ensuring students with special needs access to a free appropriate public education in 1975, with the Education for All Handicapped Children Act (PL 94-142). In 1990, that Act was replaced by the IDEA (PL 102-119). The IDEA was reauthorized in 1997 (PL 105-17) and again in 2004 (PL 108-446). Each iteration of the law contained procedural safeguards for parents and due process procedures.

In *Smith v. Robinson*, 468 U.S. 992, 1009 (1984), the Supreme Court found that the IDEA was the exclusive means by which a plaintiff could bring an equal protection claim in a special education matter. Congress responded to the *Smith* ruling, which appeared to foreclose section 1983 equal protection claims and claims brought under the Rehabilitation Act, by adding language to the IDEA clarifying that,

> [n]othing in this chapter shall be construed to restrict or limit the rights of, procedures and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, *except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under sections (f) and (g) [administrative dispute resolution procedures] shall be exhausted* to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C. § 1415(l) (emphasis added). Significantly, "Congress adopted the part of the rationale of *Smith* which had used the primacy of the IDEA administrative processes as a reason for precluding plaintiffs from resorting to other theories to get into court." Terry Jean Seligmann, *A Diller, A Dollar: Section 1983 Damage Claims in Special Education Lawsuits*, 36 GA. L. REV. 465, 492-93 (2002).

Over the years, Congress has amended the IDEA to emphasize informal mechanisms to resolve disputes. The 1997 amendments required that each state establish a process allowing parties to settle a dispute through mediation at state expense. 20 U.S.C. § 1415(e). In 2004, Congress imposed an additional informal

dispute resolution step, the "resolution session," prior to proceeding to a due process hearing. 20 U.S.C. § 1415(f)(1)(B). Perry Zirkel & Gina Scala, *Due Process Hearing Systems Under the IDEA: A State-by-State Survey*, 21 J. OF DISABILITY POL'Y STUD. 3, 3 (2010). Thus, Congress intended to make IDEA dispute resolution less formal, as opposed to other time-consuming and adversarial mechanisms like civil litigation.

On the whole, the legislative history evidences an intent to maintain the exhaustion requirement and to encourage informal dispute resolution.

B. There is a Special Need to Preserve the Exhaustion of Administrative Remedies Requirement in the School Context

The need for exhaustion is even more compelling in the context of resolving disputes over a student's educational program. The IDEA exhaustion requirement recognizes the traditionally strong state and local interest in education, allows for the exercise of discretion and educational expertise by state agencies, affords full exploration of technical issues, furthers development of the factual record and promotes judicial efficiency by giving state and local agencies the first opportunity to correct shortcomings. *Kutasi*, 494 F.3d at 1167. It is "intended to channel disputes related to the education of disabled children into an administrative process that could apply administrators' expertise in the area and promptly resolve grievances." *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 487 (2d Cir. 2002).

The nation's public schools serve approximately 6.6 million students with disabilities, representing 13.4% of total enrollment. U.S. Dep't of Educ., Nat'l Ctr. for Educ. Stat., *Digest of Education Statistics*, 2009 (NCES 2010-013), Chapter 2. Disputes between parents and schools about a child's special education program, while certainly unfortunate, are inevitable. John Reiman et al., Consortium for Appropriate Dispute Resolution in Special Education, *Initial Research Literature on Appropriate Dispute Resolution in Special Educ.* 1 (April 2007).

Commentators have rightfully noted with concern that the administrative due process hearing procedure under the IDEA has become increasingly adversarial and legalistic. Perry Zirkel et al., *Creeping Judicialization in Special Education Hearings? An Exploratory Study*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 27, 28-29 (Spring 2007). This "creeping judicialization" refers to a "gradualistic increase of the time-consuming proceduralism associated with the courts and often referred to more generally and less precisely as 'legalization' or 'over-legalization.'" *Id.* at 29 (footnotes omitted). As discussed above, this was never Congress' intent.

That being said, despite the "judicialization" of due process hearings, the benefits of the administrative hearing still far outweigh the perceived benefits of civil litigation, and better serve the interests of students. The IDEA ensures that due process complaints be heard and decided within 45 days, while civil litigation can take years to resolve. 34 C.F.R. § 300.515(a) (2006). Additionally, while 98%

of due process hearings were resolved in 1998 to 1999, almost half of litigation cases were unresolved during the year the survey was administered. Jay G. Chambers et al., Special Educ. Expenditure Project, Report 04, *What are we Spending on Procedural Safeguards in Special Education, 1999-2000?* 1, 20 (May 2003). This demonstrates that cases that proceed to litigation for whatever reason, take longer to resolve than due process hearings.

Civil litigation also imposes both financial and intangible costs to the parties. The Special Education Expenditure Project, a national study conducted by the American Institutes for Research for the U.S. Department of Education, Office of Special Education estimated that cost per mediation or due process hearing ranges from $8,160 to $12,200. In stark contrast, the average expenditure in 1999 to 2000 on an open litigation case was about $94,600, a significant cost especially when considering that public monies are involved. Chambers, *supra*, at 15. Adversarial court proceedings are not only financially costly, but pit families and schools against each other in adversarial proceedings, potentially irreparably damaging important ongoing relationships between the parties.

For all these reasons, the trend nationally has been to encourage less formal processes to resolve IDEA disputes.[2] The National Association of State Directors

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[2] *See* Reiman, *supra*, at 1 (noting that "[d]uring the past 10 years, as the costs of adversarial procedures have become more apparent and collaborative practices have emerged, interest has evolved regarding the efficacy both of dispute

of Special Education reported that from 1991 to 2000, although the average number of requests for a due process hearing had risen from 4,655 in 1991 to 11,068 in 2000, from 1996 to 2000, the number of hearings held decreased. Eileen Ahearn, Nat'l Ass'n of State Dir. of Special Educ., Project Forum, Quick Turn Around, *Due Process Hearings: 2001 Update*, 4-5 (April 2002). This is presumably due in part to growth in alternative dispute resolution methods. *Id*.

As noted, Congress evidenced an intent to continue moving away from the judicialization of the IDEA's administrative dispute resolution mechanisms when it emphasized the mediation option in 1997 and added the requirement of a resolution session in 2004. Relaxing the IDEA's administrative exhaustion requirement does violence to Congress' intent to ensure expeditious, less adversarial dispute resolution with minimal emotional and financial costs to the parties. It goes against the national trend favoring less formal ways to resolve disputes over a student's educational program. Finally, it fails to serve the student's best interests by delaying resolution.

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resolution processes prescribed by the IDEA (e.g., due process hearings, written state complaints, mediation) and other more informal and less adversarial dispute resolution processes. Interest has grown particularly in how dispute resolution processes contribute to parent-school relationships that effectively support student-centered educational service planning…Many states and school districts have implemented innovative strategies to prevent conflict from escalating and to manage disputes as they arise." This reasoning certainly translates to a comparison of administrative hearing procedures with civil litigation.).

In sum, IDEA exhaustion requirement reflects a legislative policy decision that "agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992).

C. Unilateral Removal of a Student By a Parent Should not be Permitted to Defeat Exhaustion Requirements

Courts have been reluctant to allow parents to opt out of the IDEA through various tactics intended to circumvent the exhaustion requirement, including unilateral removal of a student from the school district.[3] Unlike a situation where a student has already matriculated from high school, a parent's unilateral action to remove a student from the district is wholly within their control and relatively easy to manipulate. *Compare Covington v. Knox County Sch. Sys.*, 205 F.3d 912, 917 (6th Cir. 2008) (exhaustion not required where student graduated from high school, injuries wholly in the past, and monetary damages the only remedy).

In *S.E. v. Grant County Bd. of Educ.*, 544 F.3d 633, 642 (6th Cir. 2008), a student with a section 504 plan under the Rehabilitation Act brought a claim that

[3] *See, e.g.*, *Charlie F. v. Bd. of Educ. of Skokie Sch. Dist. 68*, 98 F.3d 989 (7th Cir. 1996) (exhaustion required under IDEA, despite claim for only money damages because relief under the IDEA was available in principal); *Cave v. East Meadow Union Free Sch. Dist.*, 514 F.3d 240 (2d Cir. 2008) (finding exhaustion was required because complaint sought a modification of the IEP, even though plaintiffs renounced any claim that the IEP was deficient and did not plead an IDEA claim).

the district failed to implement components of the plan. Plaintiffs asserted futility because they had opted to remove their daughter from the district and home school. The court rejected the futility argument saying that the remediation of academic deficiencies is best left to educational experts through the administrative process. *Id*. at 642-43. Plaintiff's mere unilateral decision to home-school the student could not defeat exhaustion because the IDEA's administrative procedure "may have in-kind services and resources available to it for assistance of students . . . who have been aggrieved by the system. *Id*. at 643.[4] Thus, the operative question is whether the dispute is educational in nature and a remedy of in-kind services available, not whether the student is currently enrolled in the district.

Permitting parents to create the very circumstances that will be used to claim futility (i.e., unilateral removal to another district/agency) defeats the purposes of the IDEA's exhaustion requirements; further, it will embolden plaintiffs that wish to skirt the administrative process by recasting facts as non-educational, thereby depriving local educational agencies of the opportunity to resolve the issues informally, as well as depriving the student of a speedy and amicable resolution.

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[4] *Accord Doe v. Smith*, 879 F.2d 1340, 1343 (6th Cir. 1989) (parents' unilateral removal from school district to a private school does not excuse exhaustion requirement); *B.H. ex rel. K.H. v. Portage Public Sch. Bd. of Educ*., No. 1:08-CV-293, 2009 WL 277051, at *12 (W.D. Mich. Feb. 2, 2009) ("[t]he courts have unanimously rejected the argument that parents' unilateral decision to remove a child from the defendant school district renders exhaustion futile").

D. Public Policy Supports Requiring Plaintiffs-Appellants to Exhaust Their Administrative Remedies Under the IDEA

Plaintiffs-Appellants wish to circumvent the exhaustion requirement by claiming that it would be futile to proceed with the IDEA due process procedure. However, they do so only by recasting the facts in an attempt to take this case out of the realm of that procedure.

Plaintiffs-Appellants argue that they are excused from exhaustion because the parties have agreed to suspend services. No such agreement was made. D.P. and the District apparently agreed through mediation that he would change schools, not school districts. D.P. continued to attend school within the District and continued to receive special education services, with which Plaintiffs-Appellants were dissatisfied. Despite their continuing disagreement with D.P.'s educational program, the Paynes unilaterally made the decision to home-school D.P., rather than to exhaust their administrative remedies as required by pursuing an impartial due process hearing.

This case illustrates the very reasons that the IDEA exhaustion of administrative remedies requirement should be protected. This case, which was filed almost five years ago, is illustrative of the erroneous assumption that filing a due process hearing would have been a waste of time. Had D.P.'s parents exhausted their administrative remedies, the matter would have been heard before a hearing officer expeditiously. After the hearing officer's ruling, they would have

been permitted to seek relief from the courts if they so desired. It was D.P.'s parents' premature resort to the courts that created the needless delay that the legislature sought to avoid when it instituted the exhaustion of administrative remedies requirement.

II. Use of Restraints/Seclusion Is a Behavior Modification Tool Inextricably Intertwined with a Student's Educational Program

A. The Use of Seclusion as an Educational Tool is Open to Debate

The use of seclusion in schools for behavior modification is a subject that has been hotly debated by educational experts, advocacy groups and the legislature.[5] The House of Representatives Committee on Education and Labor recently requested that the United States Government Accountability Office (GAO) examine the issue. The GAO found no federal laws that restrict the use of seclusion and restraints in public and private schools, and widely divergent state

[5] *See* Congressional Research Service, Report for Congress 7-5700, *The Use of Seclusion and Restraint in Public Schools: The Legal Issues* (May 21, 2009); Statement of Gregory D. Kutz, U.S. Gov't Accountability Office, GAO-09-719T, *Seclusion and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers, Testimony Before the Committee on Education and Labor, House of Representatives* (May 19, 2009); Arne Duncan, U.S. Dep't of Educ., Letter to Chief State School Officers regarding the Use of Seclusions and Restraints in Public Schools (July 31, 2009); Nat'l Disability Rights Network, *School is not Supposed to Hurt: Investigative Report on Abusive Restraint and Seclusion in Schools* (Jan. 2009) *available at* http://www.napas.org/sr/SR-Report.pdf; Nat'l Sch. Bd. Ass'n, *Individuals with Disabilities Education Act (IDEA): Early Preparation for Reauthorization*, ISSUE BRIEF (Feb. 2010).

laws.[6] In response to congressional interest, the Congressional Research Service examined the legal issues concerning the use of restraint and seclusion techniques in schools, including their application to students covered by the IDEA.

Legislative examination of these issues culminated in the introduction of the Keeping All Students Safe Act, H.R. 4247, 111th Cong. (2010) by Representative George Miller (D-CA) in December 2009, which was ultimately passed by the House of Representatives in March 3, 2010. However, the Senate version of the bill (S. 2860) failed to garner the necessary support. Senator Christopher Dodd has re-introduced a new version of the Senate bill, S. 3895, 111th Cong. (2010) which is now pending before the Senate. The Senate's inability to reach agreement on a bill addressing seclusion and restraints illustrates the complexity of this issue and that diverging opinions exist.

While many decry the use of seclusion in schools, there is certainly no consensus. In fact, parents of seven students recently sued the New York State Education Department, alleging that its adoption of regulations restricting the use of aversives denied the students a free appropriate education. *Bryant v. New York State Educ. Dep't*, No. 8:10-CV-036, 2010 WL 3418424 (N.D. N.Y. Aug. 26,

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[6] Forty-one percent of states have laws, policies and guidelines regarding restraint or seclusion in schools. Ninety percent of states allow prone restraints. Nat'l Disability Rights Network, *supra*, at 4.

2010).[7] The district court found that the Education Department did not exceed its rulemaking authority and upheld the regulations.

The recent interest and debate highlights that, as of yet, there is no clear consensus regarding the use of seclusion as an educational tool. Nevertheless, whether one agrees or disagrees in principal with the utilization of these intervention techniques is beside the point; courts are not equipped to second-guess educational strategies recognized by state law and agreed to by parents. The IDEA leaves determinations of this sort to the administrative process.

B. Under Washington Law, Isolation is a Legitimate and Permissible Behavior Modification Technique

Washington state law specifically countenances the use of isolation as an aversive intervention special education strategy, like the safe room included in D.P.'s IEP and agreed upon by Plaintiffs-Appellants. *See* WAC 180-40-235(3)(d) (2003); WAC 392-172-394 (2003). The safe room was utilized with Mrs. Payne's knowledge that D.P. was isolated in the room with the door closed.

The IDEA explicitly requires an IEP team to consider behavioral intervention strategies and supports to address behavior that impedes a child's learning or that of others. 20 U.S.C. § 1414(d)(3)(B)(i). The IEP team, including

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[7] We cite this case not for legal precedent, but to illustrate the diverging viewpoints on the use of aversives in educational programs, like restraint and seclusion techniques.

Mrs. Payne, determined that containment in a safe room was an appropriate intervention technique to meet D.P.'s behavioral needs. Hence, the District fashioned an IEP for D.P. within the confines of state law.

C. Use of Isolation as an Intervention to Address Behavior that Impedes Learning is Inextricably Intertwined with the Educational Program

The Ninth Circuit has previously found that with respect to special education, "proper conduct and education are inextricably intertwined." *Doe by Gonzales v. Maher*, 793 F.2d 1470, 1491 (9th Cir. 1986). Where this is the case, exhaustion is required. On the other hand, where neither the genesis nor the manifestations of the conduct at issue are educational, exhaustion is not required. *Witte v. Clark County Sch. Dist.*, 197 F.3d 1271 (9th Cir. 1999).

An increasing number of students in both the general and special education settings have behavior problems that interfere with their learning or the learning of others.[8] Nevertheless, "the growing expectation is that schools will deliver socially

[8] The United States Office of Special Education Program's Center on Positive Behavioral Interventions and Support has noted substantial numbers of student discipline referrals per year, increases in expulsions and suspensions, and that in 1998, 36% of parents feared for the physical safety of their oldest child in school. George Sugai et al., *Applying Positive Behavioral Support and Functional Behavioral Assessment in Schools* 4 (OSEP Center on Positive Behavioral Interventions and Support, TECHNICAL ASSISTANCE GUIDE 1 VERSION 1.4.4, 12/1/99); *see also* George Sugai & Robert R. Horner, *A Promising Approach for Expanding and Sustaining School-Wide Positive Behavior Support*, 35 SCH. PSYCHOL. REV. 245, 245 (2006) (noting that in many schools, teaching and learning are disrupted by problem behaviors).

acceptable, effective, and efficient interventions to ensure safe, productive environments where norm-violating behavior is minimized and prosocial behavior is promoted." Sugai, *supra*, at 5-6. By definition, students with disabilities that need special education and related services have problems with learning and skill development. Kevin P. Dwyer, *Disciplining Students with Disabilities*, 26 NAT'L ASS'N OF SCH. PSYCHOL. COMMUNIQUE 2 (1997). As a result, "[u]nlike their nondisabled counterparts, they may, in some cases, have difficulty demonstrating socially appropriate behaviors." *Id.*

Failing to address the behavior of students with special needs can amount to the denial of a free appropriate public education. *Id.*; 20 U.S.C. § 1414(d)(3)(B)(i). For example, a student with Tourette's Syndrome may use obscene language, which violates the discipline code and impedes the student's learning and that of others. As such, the behavior should be addressed in the student's IEP. *Id.* For a student with autism, some manifestations of the disability may be purely behavioral. An autistic student that bangs his or her hand on the desk over and over cannot be treated the same as a nondisabled student that does so to disrupt the class. *Id.* It is not hard to imagine that a student "who cannot speak clearly or communicate feelings or ideas can become extremely frustrated and may stomp out of the class or toss a pencil across the room." *Id.* These behaviors must be anticipated and addressed in a student's IEP.

Given that many of the issues that special education students face are per se behavioral and that such behaviors must be addressed to provide a student with a free appropriate public education, behavioral components of an IEP are inextricably intertwined with a student's educational program. Members of an IEP team can certainly disagree regarding the manner in which behavior is addressed in an IEP, but these decisions are nonetheless educational in nature. The use of a time-out or safe room is just one technique among many, including positive behavioral interventions, to address behavioral issues.[9]

In *C.N. v. Willmar Public Schools, Indep. Sch. Dist. No. 347*, 591 F.3d 624, 634-35 (8th Cir. 2010), the Eighth Circuit affirmed the dismissal of a section 1983 claim regarding the implementation of a student's behavior intervention plan. The plan explicitly permitted the use of seclusion and restraint to manage problem behaviors. The student's parent complained about the use of aversives, but did not challenge the IEP or request a due process hearing. *Id.* at 627-29. The Court concluded that "[b]ecause C.N's IEP authorized such methods, [the teacher's] use of those and similar methods…even if overzealous at times…was not a substantial

[9] *See* Amy Bitterman et al., *A National Sample of Preschoolers with Autism Spectrum Disorders: Special Education Services and Parent Satisfaction*, 38 J. AUTISM DEV. DISORD. 1509, 1509 (2008) (noting that while there is consensus that providing services at a young age is critical for students with autism spectrum disorder, there is disagreement over which interventions are the most effective).

departure from accepted judgment, practice or standards and was not unreasonable in the constitutional sense." *Id*. at 633.

On its face, D.P.'s IEP indicates that the purpose of the safe room was educational, that is, to address behaviors that were impeding his ability to learn. The use of isolation, an educational technique countenanced by state law and listed and agreed upon in a student's IEP, to address behaviors that impede learning is very different than situations of physical abuse where the courts have found futility and excused exhaustion.[10] Where alleged acts constitute discipline and not random acts of violence, such claims have been found to fall within the IDEA. *See Hayes v. Unified Sch. Dist. No. 377*, 877 F.2d 809, 812-13 (10th Cir. 1989) (finding that use of time-out room and in-school suspensions for discipline was related to educational program).

In practice, a student's behavior plan and its implementation is a key component of a student's IEP, as made apparent by the IDEA's affirmative requirement that behavior be addressed. Overzealous implementation of a student's behavior plan that is part of an IEP that does not amount to random

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[10] *See, e.g.*, *McCormick v. Waukegan Sch. Dist.*, 374 F.3d 564 (7th Cir. 2004) (nature of claim not educational and no exhaustion required where student was made to run laps and do push-ups in contravention of his IEP and suffered permanent physical injuries); *compare Kutasi v. Las Virgenes Unified Sch. Dist.*, 494 F.3d 1162 (9th Cir. 2007) (where district allegedly kept child out of school and hampered parental IEP attendance resulting in educational injury, parents were required to exhaust administrative remedies).

violence remains educational in nature. To find that a student's approved behavior plan, even a poorly implemented one, is "completely non-educational," is inconsistent with the plain meaning and the practical realities of the IDEA.

III. Alleged Imperfect Implementation of a Behavior Intervention Contained in an IEP Must First be Addressed in a Due Process Hearing

Plaintiffs-Appellants argue that the manner in which the safe room was implemented takes the dispute out of the educational sphere and permits them to bypass the IDEA's exhaustion of administrative remedies requirement. However, where there is disagreement over whether an IEP has been appropriately implemented, this matter should be resolved by a hearing officer.

The IDEA explicitly states that a complaint may be filed regarding "the *provision* of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6) (emphasis added). This necessarily encompasses implementation issues, as implementation of the IEP is the manner in which a free appropriate public education is provided. Moreover, it has been found that the IDEA exhaustion requirement applies to a broad spectrum of claims. *M.T.V. v. DeKalb County Sch. Dist.*, 446 F.3d 1153, 1158 (11th Cir. 2006).

Interpreting an IEP and/or determining whether a party has failed to implement an IEP is best done at the administrative level with the input and expertise of educators and special education service providers. A hearing officer, with the benefit of testimony and evidence, is best suited to assess and make a

determination of the in-kind services (referred to as "compensatory education") that may be required to remedy educational regression experienced as a result of a failure to implement an IEP.[11]

Here, D.P.'s claim is essentially an allegation that the District failed to implement the IEP consistent with its interpretation. Where there is a dispute about what is required under the IEP, administrative exhaustion is required before bringing a court action alleging a failure to implement.

IV. Where it is Unclear whether *Witte* or *Robb* Controls, the Matter Should Be Resolved at the Administrative Level

Plaintiffs-Appellants explicitly urge this Court to extend *Witte* to circumstances where an alleged failure to properly interpret and adhere to an IEP led to purely psychological injury and educational loss. This is precisely what

[11] *See, e.g.*, *C.N. v. Willmar Public Sch., Indep. Sch. Dist. No. 347*, 591 F.3d 624 (8th Cir. 2010) (parent failed to exhaust administrative remedies because she did not pursue administrative remedies prior to withdrawing student from school on claims that seclusion and restraint permitted by the behavior plan were improperly implemented); *S.E. v. Grant County Bd. of Educ.*, 544 F.3d 633 (6th Cir. 2008) (dismissing claim for compensatory education for failure to implement because plaintiff failed to exhaust administrative remedies); *J.M. v. Allegany-Limestone Cent. Sch. Dist.*, No. 07-CV-539C, 2009 WL 3191442 (W.D. N.Y. Sept. 30, 2009) (declining to second-guess hearing officer's determination that circumstances requiring restraint were unlikely to recur, where parents challenged the manner in which staff physically intervened when student became out of control); *R.M. v. Waukee Cmty Sch. Dist.*, 589 F.Supp.2d 1141 (S.D. Iowa 2008) (requiring exhaustion for parent's claim that school did not comply with requirement of behavior plan that they be notified each time the student is placed on time-out).

Robb declined to do. Accepting Plaintiffs-Appellants argument represents an unwarranted and unprecedented extension of the guiding principals described in *Robb* and *Witte*.

In *Witte*, 197 F.3d at 1273, a 10-year-old student with Tourette's syndrome suffered physical injury when school officials force fed him oatmeal to which he was allergic, choked him to make him run faster, and forcibly restrained him. The court excused the administrative exhaustion requirement because the plaintiff sought only monetary damages, which is not relief available under the IDEA, and because all educational issues had been resolved to the parties' mutual satisfaction through the IEP process. *Id*. at 1275-76. In *Witte*, the parties reached agreement on the student's educational program through "informal administrative procedures," damages were retrospective only, and the injury alleged centered on physical abuse. *Id*. These factors distinguished *Witte* from prior cases where the courts did not excuse exhaustion based on a request for monetary damages.

Three years later, the Ninth Circuit revisited the exhaustion issue in *Robb,* 308 F.3d 1047. A fourth grade student with cerebral palsy was removed from the classroom for "peer tutoring" by junior high school students, without the supervision of a teacher. The tutoring took place on the floor of a dim hallway. Student's parents brought a suit under section 1983, seeking monetary damages for "lost educational opportunities" and "emotional distress, humiliation,

embarrassment, and psychological injury," without first seeking a due process hearing. *Id*. at 1048. The Court held that "when a plaintiff has alleged injuries that could be redressed to any degree by the IDEA's administrative procedures and remedies, exhaustion of those remedies is required." *Id*. Whether exhaustion is required depends on the source and nature of the alleged injuries, not the remedy requested. In *Robb*, the injuries were "part and parcel of the educational process." *Id*. at 1054 n.4.

Moreover, the Court found that "it would be inappropriate for a federal court to short-circuit the local school district's administrative process based on the possibility that some residue of the harm…allegedly suffered may not fully be remedied by the services Congress specified in the IDEA. We are not ready to say that money is the only balm." *Id.* at 1050. In *Robb*, unlike in *Witte*, the parties did not take advantage of the IDEA administrative process, they did not claim physical injury, and they requested money damages to compensate for psychological and educational injuries that may be remedied by the IDEA. *Id*. at 1053-54.

This case parallels *Robb*. Plaintiffs-Appellants never sought a due process hearing, despite the fact that mediation did not resolve all outstanding educational issues and they continued to be unhappy with the District's program. They allege no physical injury. They allege ongoing injuries of a psychological and educational nature, and explicitly request relief that can be awarded in-kind under

the IDEA. This Court correctly noted that "Payne's arguments…are unavailing. Even though monetary damages are not ordinarily available under the IDEA, she may not avoid the exhaustion requirements by requesting only monetary damages. Neither may she avoid those requirements by attempting on appeal to recast her damages as retrospective only when her complaint clearly alleges ongoing injuries." *Payne*, 598 F.3d 1123, 1128 (citations omitted). This is exactly what Plaintiffs-Appellants seek to do.

Although it is true that the facts must be viewed in the light most favorable to Plaintiffs-Appellants, the legal issue in this case weighs in favor of exhaustion; the decision regarding whether exhaustion is required is ultimately a question of law. *Hoeft v. Tucson Unified Sch. Dist*., 967 F.2d 1298, 1303 (9th Cir. 1993). The dissent in this case is concerned that the majority opinion places this case on the wrong side of the *Robb*/*Witte* dividing line. However, if the facts fall somewhere in between, this signals that the matter ought to be resolved by a hearing officer that will have the benefit of testimony of educational experts. Otherwise, courts are in the position of making judgments on educational issues to decide the initial question. Ambiguity is a red flag that exhaustion is required.

When the genesis and manifestations of the problem are debatable, the debate should be settled at the administrative level; the strong interests in favor of administrative exhaustion support this outcome. As the court in *Charlie F.* noted,

> Perhaps Charlie's adverse reaction to the events of fourth grade cannot be overcome by services available under the IDEA and the regulations, so that in the end money is the only balm. But parents cannot know that without asking, any more than we can. Both the genesis and the manifestations of the problem are educational; the IDEA offers comprehensive educational solutions; we conclude, therefore, that at least in principle relief is available under the IDEA.

Charlie F., 98 F.3d at 993; *see also Robb*, 308 F.3d at 1052-54. At the least, an administrative proceeding will result in a clear record in which the technical issues are explored by educational experts, rather than the courts. Where allegations of psychological harm have an educational source and adverse educational consequences, educational agencies must first be given the opportunity to right the wrong. Extending *Witte* to cases involving alleged psychological injury undermines the IDEA's statutory scheme and legislative intent, and will encourage civil litigation and negatively impact judicial efficiency, all to the detriment of both students and school districts.

CONCLUSION

For the foregoing reasons, the National School Boards Association respectfully requests that the Court affirm the decision of the Ninth Circuit Court of Appeals in this matter.

Respectfully submitted,

/S/ Lenore Silverman
Lenore Silverman
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Dated: October 13, 2010

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I hereby certify that on this 13th day of October 2010, I caused this Brief of Amici Curiae to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following CM/ECF users:

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