STUDENTS WITH ACQUIRED BRAIN INJURY: A LEGAL ANALYSIS

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ABSTRACT

This article provides a comprehensive and current synthesis of the legislation, regulations, policy interpretations, and case law concerning students with traumatic and nontraumatic brain injury from pre-K to grade 12. The primary focus is the Individuals with Disabilities Education Act, but the scope extends to other applicable legal bases. The case law coverage includes the frequency and outcomes of not only court decisions but also rulings under the administrative investigation and adjudication processes of state and federal agencies.

STUDENTS WITH ACQUIRED BRAIN INJURY: A LEGAL ANALYSIS

The professional literature reveals that acquired brain injury generically includes both traumatic and nontraumatic brain injury. For example, Savage and Wolcott (1994) defined acquired brain injury as:

> an injury to the brain that has occurred since birth . . . . [that] can be caused by an external or by an internal occurrence. The term acquired brain injury refers to both traumatic brain injuries such as open or closed head injuries, and nontraumatic brain injuries, such as strokes and other vascular accidents, infectious diseases (e.g., encephalitis, meningitis), anoxic injuries (e.g., hanging, near-drowning, choking, anesthetic accidents, severe blood loss), metabolic disorders (e.g., insulin shock, liver and kidney disease), and toxic products taken into the body through inhalation or ingestion. (p. 4)

The express exclusion is forbrain injuries that are "congenital or . . . induced by birth trauma." (p. 4.)

Legal recognition of the special needs of children with acquired brain injuries has been not only belated but also incomplete in comparison to the professional literature. Prior to 1990, their coverage under the Individuals with Disabilities Education Act (IDEA) was imprecisely and often inaccurately under other classifications, such as mental retardation (now, intellectual disabilities), emotional disturbance, or specific learning disability (Begali, 1997). These other IDEA classifications are developmental in nature, whereas acquired brain injuries reflect a sudden change from a prior, usually typical, level of functioning. The sudden change in functioning poses special problems for not only the student but also the student's parents, peers, and teachers, who had not had previous time and experience for adjusting to this dramatically different situation.

Another significant difference for students with acquired brain injuries is that they, unlike students with developmental disabilities, have a store of previous knowledge that may be intact or splintered (Moody & Silliman, 2008). Their difficulty is in learning new information and in making associations. Similarly significant for their schooling, students with acquired brain injuries, except in the most extreme cases, often experience inconsistent rates of initial recovery across the physical, behavioral, language, and cognitive domains, resulting in the need for more frequent assessment and revision of goals. A final special feature is the interruption of the typical developmental course related to the age of the student at the time of injury and site of injury. For example, a young child who receives an open or closed head injury that results in damage to the frontal lobe circuitry may appear to be intact in functioning at the time immediately following the injury but may experience difficulties at a later stage in brain development.

Misclassification may result from misconstruing the belated difficulties as emanating from an emotional, behavioral, or learning disability. Indeed, lack of adequate training is a major contributing factor to the under-identification of these children under the IDEA (e.g., Glang, Todis, Sublette, Brown, & Vaccaro, 2010; Schutz, Rivers, McNamara, Schutz, & Lobato, 2010).

The literature is relatively replete with insights and techniques for effectively educating students with acquired brain injuries. For example, the specialized educational methods include customizing basic strategies (Adams & Adams, 2008; Arroyos-Jurado & Savage, 2008; Lucas, 2010), antecedent-based strategies (Kehle & Clark, 1996), discrete trial training (Devlin, Krenzer, & Edwards, 2009), learning style-based behavior intervention plans (Spear, 2005), multidisciplinary teams (Keyser-Marcus, Briel, Sherron-Targett, Yasuda, Johnson, & Wehman, (2002), the response to intervention model (Dykeman, 2009), self-monitoring treatment (Davies, Jones, & Rafoth, 2010), the structure-organization-strategy approach (D'Amato & Rothlisberg, 1996), and the team-based brain STARS intervention (Dise-Lewis, Lewis, & Reichardt, 2009).

In contrast, the literature lacks a comprehensive and current treatment of the law specific to K-12 students with acquired brain injuries. For example, Obringer and Coffey's (2010) canvassing of court decisions under the IDEA significant for students with physical disabilities and health impairments did not include any cases in which the plaintiff-student had an acquired brain injury. Similarly, most texts in special education law do not provide any treatment specific to students with acquired brain injuries. Serving as only a limited exception, Guernsey and Klare's (2009) text listed in its chapter for eligibility not only traumatic brain injury (TBI), which is an IDEA classification, but also minimal brain dysfunction and developmental aphasia, which are not. Finally, Denmead and Bonarrigo (1994) only provide an overview of the IDEA, without including the regulations, agency interpretations, and case law specific to students with acquired brain injuries.

The purpose of this article is to canvass the law—i.e., legislation, regulations, agency interpretations, and, within this framework, the case law—specific to students with TBI and non-traumatic brain injury (nTBI) from pre-K to grade 12. In this context, the acronym "nTBI" refers to acquired brain injuries from internal occurrences, such as strokes or aneurisms, while—like TBI—not extending to congenital or birth-induced brain injuries. Moreover, "case law" here refers to not only court decisions, but also published hearing and review officer decisions.

LEGISLATION, REGULATIONS, AND AGENCY INTERPRETATIONS

The official sources of law include three successive levels. The strongest of these three levels is legislation, which for TBI and nTBI principally consists of a triad of federal laws—the IDEA, Section 504 of the Rehabilitation Act (§ 504) and the Americans with Disabilities Act (ADA). The next level consists of the regulations that the U.S. Department of Education has issued to fill in the gaps

in the IDEA and § 504 legislation with more detailed definitions and rules. Finally, serving at the margins of law is the interpretive guidance of the federal administrative agencies that enforce the IDEA and § 504 in relation to K-12 schools—the Office for Special Education Programs (OSEP) and the Office for Civil Rights (OCR), respectively. Although these agency interpretations are not binding, hearing/review officers and courts tend to view them as persuasive.

Individuals with Disabilities Education Act

The primary federal law that provides for identification of and individualized "free appropriate public education" (FAPE) for students with disabilities is IDEA. The definition of disability under the IDEA consists of two essential elements: 1) meeting the criteria for one or more recognized classifications, such as "specific learning disabilities" (SLD) or "other health impairment" (OHI), and 2) "by reason thereof," needing special education(§ 1402[3][A]).

From its original version in 1975 until its 1990 amendments, the IDEA did not separately recognize TBI or nTBI, with the negligible and oft-neglected exception of explicitly listing in the statutory definition of SLD the following in the "disorders included":

> perceptual disabilities, *brain injury, minimal brain dysfunction*[emphasis added], dyslexia, and developmental aphasia. (20 U.S.C. § 1402[30]

While repeating this definition, the IDEA added various other criteria, including 1) inadequate progress in one or more of 8 enumerated areas determined—depending on state law—via a severe ability-achievement discrepancy, response to intervention, or alternative research-based approach, and 2) an exclusion for "learning problems that are primarily the result of . . . motor disabilities" (§§ 300.8[c][10] and 300.307-300.311).

The 1990 amendments added TBI to the list of recognized disability classifications. The subsequent IDEA regulations provided the following definition of TBI:

> an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. The term applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem solving; sensory; perceptual and motor abilities; psychosocial behavior; physical functions; information processing; and speech. The term does not apply to brain injuries that are congenital or degenerative, or brain injuries induced by birth trauma. (§ 300.8[c][12])

In its explanatory comments accompanying the regulations, the U.S. Department of Education emphasized that this definition does not include all acquired brain injuries, only those resulting from external physical force, such as the "external physical force of near-drowning" (IDEA regulations commentary, 1992, p. 44,842). Conversely, addressing nTBI, the Department explained, "children whose educational performance is affected as a result of acquired injuries to the brain caused by internal occurrences may meet the criteria of one of the other disability categories, such as [OHI, SLD,] or multiple disabilities" (p. 44,842). Finally, the accompanying commentary clarified that the degree of impairment is not critical for TBI, just as long as the child evidences the resulting need for special education, that "the particular services provided to the child are determined on an individual basis" (p. 44,483). In subsequent policy letters OSEP confirmed the distinction between TBI and nTBI based on Congressional intent in light of professional practice (e.g., Letter to Harrington, 1993).

IDEA-Related State Laws

State laws may add to, not subtract from, the rights and requirements in the IDEA. A few of the corollary special education laws expressly extend coverage to children with TBI. For example, Ohio did so by adding the following to the IDEA definition of TBI: "an acquired injury to the brain caused by other medical conditions [besides an external physical force], including but not limited to, stroke, anoxia, infectious disease, aneurysm, brain tumors and neurological insults resulting from medical or surgical treatment" (OHIO ADMIN. CODE3301-51-012009). In contrast, Utah did so by including in its definition of OHI "an acquired brain injury which may result from health problems such as an hypoxic event, encephalitis, meningitis, brain tumor, or stroke" (UTAH ST. BD. OF EDUC. SPEC. ED. RULES II.J.9.a). Similarly making explicit the inference that OSEP made in the commentary accompanying the IDEA regulation, Florida expressly included acquired brain injury in its illustrations of the conditions that could qualify as OHI (FLA. ADMIN.CODE ANN. r. 6A-6.030152[1]).

Some other states maintain the federal definition of TBI but add requirements for the eligibility evaluation. For example, Alabama's regulations specify these minimum evaluative components: "1. vision/ hearing screening; 2. medical/neurological evaluation; 3. individual educational achievement evaluation to serve as initial post-trauma baseline measure" (ALA. ADMIN.CODE r. 290-8-9-.03[13]). Oregon's regulations are even more specific as to the various required assessments (OR. ADMIN.R.581-015-2175). Maine's regulations require that the evaluation "be done by a licensed professional

who is qualified to make the diagnosis" (ME. CODE R. Ch. 101, § 05-071[M][2]). Nevada includes special requirements for both the team and the components (NEV. ADMIN.CODE § 388.407[2]).

Section 504 and the Americans with Disabilities Act

An intertwined other pair of federal laws—§ 504 and ADA, provide overlapping protection under a generally broader definition of disability (Zirkel, 2011). For the entitlement to FAPE, this broader definition has three essential elements: 1) physical or mental impairment that 2) substantially limits 3) one or more major life activities (§ 705[20]). Among the various other differences from the IDEA (Zirkel, 2007), the first element does not have a limiting list, and the last element is not confined to learning. However, the § 504 regulations have long included "organic brain syndrome" (§ 104.3[j][2][i]).

Moreover, the ADA amendments that went into effect on January 1, 2009, which also apply to the Section 504 definition of disability, expanded the scope of eligibility in more than one way (Zirkel, 2009). First, the amendments extended the illustrations of major life activities to include, among various others, "concentrating, thinking, . . . [and] the operation of a major recent bodily function, including but not limited to, functions of the . . . brain" (§ 12102[3][B]). Reversing previous case law, these amendments also broadened the coverage of the effects of brain injuries in two other notable respects:

> (D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
>
> (E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as . . . medication . . . .(§ 12102[3])

OCR, which is the applicable federal agency, recently confirmed its long-standing interpretation that the other two alternatives in the definition of disability—"record of" and "regarded as"—cannot be the basis of FAPE (2009), thus maintaining the focus on the three enumerated elements of impairment, substantial limitation, and major life activity. Moreover, as dicta, or peripheral statements in a recent case concerning another disability seemed to suggest (*James A. Garfield Local School District*, 2009), OCR may borrow the six-month duration that Congress provided for the "regarded as" alternative for determination of whether temporary or transitory conditions, such as concussions, qualify under the primary definition of disability.

ADMINISTRATIVE AND ADJUDICATIVE CASE LAW

This section extends beyond the traditional meaning of "case law," referring to court decisions, to include also the other avenues of legal dispute resolution for students with disabilities, which Zirkel & McGuire (2010) explained—hearing and review officer decisions under the IDEA and administrative investigations under the IDEA and § 504. Similarly for the sake of comprehensiveness, "published" in this context refers to not only court decisions in the official reporters, such as the *Federal Supplement* and the Federal Reporter, but also 1) the other court decisions in the Westlaw database (i.e., with "WL" citations), 2) hearing and review officer decisions, state complaint investigations, and OCR letters of finding in the *Individuals with Disabilities Education Law Reports* or in the even more extensiveSpecial Ed Connection® database (i.e., indicated with "LRP" citations).

Searching the Westlaw and Special Ed Connection® databases via multiple strategies respectively included the use of "brain" in combination with various other search terms and the topic index heading of "traumatic brain injury." Although the dividing line required judgment in some cases, the exclusions included cases were the student had congenital brain abnormalities (e.g., *Board of Education of Arlington Central School District*, 2003; *Cavanagh v. Grasmick*, 1999; *Tiffany K. v. Valparaiso Community Schools,* 2002) or birth-induced brain injuries (*M.S. v. Mullica Hill Board of Education*, 2008); *Kenton County School District v. Hunt*, 2004).

The resulting yield was a total of 53 cases, with the earliest decided in 1990 and the latest decided in 2010. In approximately two thirds of the cases, the description identified the child as TBI, although in a few of them the specified facts revealed that the correct characterization should have been nTBI (e.g., *Arlington Cent. Sch. Dist.*, 1998; *Morgan Hill Unified School District,* 2010). The distribution by forum was as follows: state complaint investigations – 2; OCR letters of findings – 10; hearing and review office decisions – 22; and court decisions – 19. The distribution of the cases according to the two time periods, including one case that had had a decision in each of them, was: 1990–1999 –16 cases; 2000–2010 – 37cases.

The Appendix tabulates the 53 cases within these forum groupings in terms of 1) the citation, 2) the issue(s), and 3) the outcomes. The citation consists of the parties' names, the location of the case, and the deciding forum. The forum designation "SEA," referring to the state education agency, encompasses both the administrative complaint resolution process and the hearing/review officer process, which may consist of one or two tiers (Zirkel & Scala, 2010), under the IDEA. The issue categories were as follows: eligibility (including child find); FAPE, including placement and

least restrictive environment (LRE); related services; discipline; compensatory education; reimbursement for tuition or independent educational evaluation (IEE); money damages; adjudicative issues, such as standing (i.e., whether the complainant had a direct stake in the case) or statute of limitations (i.e., whether the claim was sufficiently timely); attorney's fees and other representation issues; and legal bases other than the IDEA, such as § 504 or Fourteenth Amendment. In as much as some of the cases decided more than one issue, the 53 cases yielded 79 issue outcomes, which averaged approximately 1.5 issues per case. Based on previous research that revealed the need for categorizing outcomes more precisely than a dichotomous won-loss scale for each case (e.g., Chouhoud & Zirkel, 2008), the tabulation was according to the following outcome scale on an issue-by-issue basis:

P = completely in favor of the parent

(P) = inconclusively in favor of the parent (i.e., subject to further proceedings)

P/S = partially in favor of the parent and partially in favor of the district

(S) = inconclusively in favor of the district

S = completely in favor of the district

Due to the overlap among a few of the issue categories, coding frequency and outcome entries warranted special attention. For the sake of consistency and parsimony, the primary coding rule to avoid undue double entries was to reserve the separate entries for remedies to decisions on the merits, i.e., based on the applicable special criteria, for the three retrospective remedies—compensatory education, money damages, and tuition reimbursement. Conversely, the following entries for ordered remedies only appeared under other issues: 1) prospective remedies, such as revising the IEP or the placement, because they were relatively integral and unremarkable, were included in the entry (typically an outcome of "P") under FAPE; 2) denials of compensatory education or tuition reimbursement based solely on an entry of "S" for FAPE, without also addressing the criteria for these two remedies, were not repeated in the separate categories for these two remedies; and 3) denial of these remedies, i.e., an entry of "S" based on threshold grounds specific to adjudication, such asbeing moot or beyond the statute of limitation, were limited to the adjudicative issues category. Similarly, because the reimbursement category extends not only to tuition but also other similar parental expenditures, related services rulings that are based on the remedy rather than the entitlement are tabulated only in the reimbursement category.

Table 1 provides a summary of the frequency and outcomes on an issue-by-issue basis supported by the more detailed analysis in the Appendix. The following outcome entries were combined for this synthesis with "P/S" (n = 4) into a single intermediate category due to their respectively small frequencies: "(P)" = 4, and "(S)" = 0.

Examination of Table 1 reveals that the most frequent issue, accounting for approximately one third of the issue outcomes, was FAPE, with the overlapping and high-stakes remedy of reimbursement being a relatively distant second. Due to the small n's for most of the issues, the percentage distribution was expressly included only on an overall basis, but compensatory education and reimbursement were the only issues where the "P" rulings out numbered the "S" rulings. For the overall percentages, the issue outcomes favored districts on an approximately 2:1 basis without including the intermediate rulings; however, the parents' success rate was closer to the districts' upon considering the intermediate results at least partially in their favor—especially because all of the inconclusive outcomes were in their direction—and upon recognizing that the ultimate unit analysis was the case, not each separate issue.

Table 1.

Total Number and Outcomes Distribution of the Case Issues

Issues	No.	For Parent: P	Intermediate: (P) and P/S	For School District: S
Eligibility	6	1	0	5
FAPE	28	11	1	16
Related Services	4	1	0	3
Discipline	4	1	0	3
Compensatory Education	5	1	4	0
Reimbursement	13	6	2	5
Money Damages	2	0	0	2
Representation Issues (e.g., Atty. Fees)	5	0	2	3
Adjudicative Issues	7	1	1	5
Other Legal Bases	5	0	1	4
TOTAL	79	28% (n = 22)	14% (n = 11)	58% (n = 46)

As a narrative supplement to Table 1, the next section provides a summary of the cases in each issue category. It is limited to a brief overview, with only limited illustrative citations (which are included in the Appendix and, thus, not repeated in the References). It also includes subsequent legal developments that confirmed or revised the state of the law for the specific case coverage in each category.

Eligibility

This threshold category was the subject of relatively various rulings but all at the administrative level and mostly via the investigatory rather than adjudicatory processes. As a result, procedural issues predominated. In contrast, the parents lost the two adjudicatory cases, each being a hearing officer decision, seemingly due to lack of legal awareness or acceptance specific to TBI. For example, in *Fulton County School System* (1995), the parents unilaterally placed their child in a private school and sought tuition reimbursement after the district changed their child's classification from OHI to TBI. The hearing officer decided in the district's favor, concluding that the change in classification was simply due to the state's incorporation in the early 1990s of the new IDEA classification of TBI; the child met the criteria in the stated legal definition. The remaining cases were focused on alleged procedural violations, although two of the OCR rulings were for "child find" claims, which are partially substantive (*Addison Central Supervisory Union*, 2005; *Albuquerque Public Schools*, 2005). More specifically, in both of these cases OCR found insufficient information to conclude that the district had reason to suspect that the student met the three-element definition of disability; thus, the district's failure to evaluate the student in each case did not violate § 504.

FAPE

The frequent issue of FAPE reveals the application of the two-pronged standard that the Supreme Court established in the landmark case of *Board of Education v. Rowley* (1982) and, subsequent to the many adjudications thereafter, Congress codified in the 2004 amendments to the IDEA. In *Rowley*, the Supreme Court ruled that FAPE amounted to procedural compliance and, as a substantive matter, an individualized educational program (IEP) reasonably calculated to confer educational benefit. The subsequent hearing/review officer and lower court decisions developed a harmless-error approach to most procedural violations. As a result, the 2004 amendments to the IDEA (§ 1415[f][3][E]) largely limited adjudicatory determinations of denial of FAPE based on procedural violations to those that resulted in a deprivation of educational benefit. The major exception was for determinations that the district had significantly impeded the parents' opportunity for participation in the IEP process.

Although the several cases in this category varied in terms of forum, facts, and outcome, the federal district court's decision in *Stanley v. M.S.C. of Southwest Allen County Schools* (2009) illustrates the adjudicatory application of the procedural and substantive standards for FAPE. The child at issue was a 15-year-old female with nTBI; she had the IDEA classification of multiple disabilities, attributable to a stroke at the age of three. Dissatisfied with the district's IEP, the parents arranged for a unilateral private placement and filed for a due process hearing to obtain reimbursement. After six-session hearing that included district and parent expert witnesses who specialized in brain injuries, the hearing officer issued a 79-page decision that resolved in the district's favor the long litany of the parents' procedural and substantive claims; the hearing officer found that the parents had preponderantly proven one procedural violation but concluded that it did not impede the child's right to FAPE or significantly deprive the parents' of their opportunity to participate in the program/placement process. The review officer affirmed this decision with minor modifications. Upon the parents' appeal, the federal district court concluded that the district's IEP met the substantive standard for FAPE, reminding the parents that this criterion was a matter of reasonable calculation as distinct from the placement that was "better or even the best" (p. 983). Similarly, the court examined and rejected each of the parents' several procedural challenges, with the similar legal reminder that a procedural violation that does not also deny the student educational benefit or deny parental participation does not, in and of itself, constitute a denial of a FAPE (p. 962).

Illustrating one of the differences among the various forums, *Prince George's County Public Schools* (2009) was a decision arising from the SEA's complaint resolution process, which is an administrative investigation rather than adjudication. A major difference, in addition to the procedure for fact-finding, is that the SEA's investigation has a much more emphatic and rigorous focus on procedural violations. Thus, in this case, the decision was in the parents' favor for each of the four procedural claims, resulting in various orders for corrective action against the district without consideration of the benefit-effect or parent-participation questions of the adjudicatory standard for FAPE. Yet, in this case the remedy for compensatory education was in conclusive, delegating to the IEP team the determination of "the nature and amount of compensatory services or other remedy, necessary to redress the loss of services that have resulted from the [identified] violations" (p. 5).

Similarly evidencing the procedural emphasis in the corresponding administrative complaint resolution process of OCR, the parents' claims of denial of FAPE, largely based on alleged lack of implementation or procedural safeguards, failed in the three OCR cases due to lack of sufficient evidence to substantiate the complaints. Reflecting the broader but overlapping coverage

of § 504 in relation to the IDEA, the focus in one of the three cases was an IEP rather than a 504 plan (*Dalton City Schools*, 2006).

Related Services

The related services cases were not frequent or particularly precedential. The key criterion typically is the fact-intensive determination of whether the child needed the particular service to benefit from special education, which is the central element of the definition in the IDEA regulations (§ 300.34[a]). For example, in *Los Angeles Unified School District* (1997), the hearing officer decided that the evidence preponderated in the district's favor that the child, an eight-year-old with TBI, no longer needed physical therapy, thus upholding its discontinuation of this related service in the child's IEP.

Discipline

Despite its legally complex provisions specific to disciplinary changes in placement, the IDEA's only pertinent case was a hearing officer decision, *Manteca Unified School District* (2008). The district proceeded to expel a 17-year-old student with nTBI and post-traumatic stress disorder for assaulting another student after the IEP team determined that was not a manifestation of her disability. Seeking to protect their child from this disciplinary change in placement, the parents filed for an impartial hearing to challenge the procedure for and substance of the manifestation determination. However, after the requisite expedited hearing, the hearing officer decided that the district had complied with the applicable procedural requirements and that the child's disability was not the cause of, or substantially and directly related to, the assault, which is the primary criterion for manifestation determinations under the IDEA (§ 1415[k][1][E][i]).

The overlapping but less detailed rules for changes in placement under § 504 yielded three OCR complaint investigation cases, with the successful one being based on the district's failure to conduct a manifestation determination (*Habersham School District*, 2008). The other two failed for lack of evidence of discrimination in terms of disparate treatment of the child as compared with other children in the district.

Compensatory Education

All five of the rulings in this category were hearing or review officer decisions, with the outcome at least partly or inconclusively in the parents' favor. Where the hearing/review officer has decided that the district has denied FAPE to the child and the remedy at issue is compensatory education, the typical question is how much, not whether, compensatory education is due. For example, in *Morgan Hill Unified School District* (2010), the hearing officer,

after deciding that the district had had not met the requisite procedural and substantive standards for appropriateness, granted most but not all of the parents' requests for compensatory education services as equitably tailored to the extent of the denial of FAPE.

Tuition Reimbursement

The Supreme Court initially developed and the 1997 amendments of the IDEA subsequently codified the relevant multi-step test, or set of standards, for reimbursement of tuition and other expenses. These steps include determining whether the district's proposed placement was appropriate, the parents' unilateral placement was appropriate, and the parents engaged in unreasonable conduct, such as failing to provide the district with timely written notice (§ 1412[a][10][C]). For the first step, the two-pronged standard for FAPE applies. If the district does not meet this standard, the Supreme Court has established that at the second step, the standard for appropriateness is relatively relaxed (*Florence County School District Four v. Carter*, 1993). Finally, the last step, which is a balancing of the equities, may reduce or eliminate this remedy.

The frequency of cases that account for a ruling in this issue category is relatively high in light of its high-stakes nature of this remedy; by unilaterally expending tuition or other expenses for their child's special education and/or related services, parents are gambling that they will be able to obtain reimbursement via adjudication. The outcomes, as tabulated according to the aforementioned coding rule, have preponderated moderately in the parents' favor because hearing/review officers and courts typically apply these steps in sequential order. Thus, upon determining that the district did not meet the standards for FAPE, the adjudicator, in accordance with the relaxed standard of *Carter*, determines that the parents' unilateral placement is appropriate, leaving only the equitable factors to reduce or eliminate the reimbursement entitlement. For example, in *McMillan v. Cheatham County Schools* (1997), after deciding that the district's proposed home-based program for a 21-year-old student did not meet the procedural and substantive standards for FAPE, the federal district court concluded—with expert testimony providing support—that the parents' unilateral placement in a residential facility was appropriate. However, as an equitable matter, the court ordered reimbursement only "to the extent that such expenditures were reasonable."

Money Damages

The frequency of cases concerning the remedy of money damages is small, and the outcomes are uniform. The reason is, as *J.L. v. Ambridge Area School*

District (2009) illustrates, that in almost every jurisdiction, the courts have concluded that this remedy is not available under the IDEA.

Representation Issues

The major representation issue is attorneys' fees, which is available to prevailing parents under the IDEA. For example, in *B.R. v. Lake Placid Central School District* (2009), the court concluded that parents of a student with TBI who obtained a consent decree that resolved most of the issues in their favor qualified as prevailing parties, but at a reduced hourly rate because their requested amount was not reasonable in terms of the locally prevailing rate.

Two other representation issues, which could alternatively be classified as in the adjudicative category, merit mention here, because Supreme Court decisions arising subsequent to the pertinent TBI or nTBI cases have solidified the law specific to these rulings. First, in *Los Angeles Unified School District* (1997), the hearing officer ruled that the parent was not entitled to recovery of expert witness fees under the IDEA. More recently, the Supreme Court made this rule the law of the land, subject to any future amendments to the IDEA (*Arlington Central School District Board of Education*, 2006). Second, in *Wenger v. Canastota Central School District* (1998), the Second Circuit Court of Appeal upheld the trial court's rejection the parents' independent IDEA claim because they proceeded to federal court *pro se*, i.e., without a lawyer; however, the Supreme Court subsequently ruled that parents have the right to proceed *pro se* because they have independent and enforceable rights under the IDEA (*Winkelman v. Parma City School District*, 2007).

Adjudicative Issues

Various technical issues may arise as part of the adjudicatory process, often determining at the threshold whether the parents are entitled to proceed to the merits of their case. For example, in *J.P. v. Enid Public Schools* (2009), the court ruled that the parents were precluded from obtaining compensatory education because they had not filed for an impartial hearing within the two-year statute of limitation that Congress provided in the 2004 Amendments of the IDEA.

An adjudicatory issue that is specific to the IDEA is the stay-put provision, which requires the child to remain in the last agreed-upon placement from the filing for the hearing until completion of the resulting adjudicatory proceedings. For example, in *Arlington Central School District* (1998), the review officer ruled that the student with TBI and emotional disturbance, who was in an out-of-state residential placement under his IEP, was entitled to remain in that placement during the proceedings in which his parents challenged the appropriateness of the transition services and the district's decision to graduate him.

Other Legal Bases

Alternatively or additionally to claims under the IDEA, parents resort to OCR's complaint resolution process under § 504 or they seek judicial relief under § 504, the ADA, or—through Section 1983—the U.S. Constitution, such as the Fourteenth Amendment due process clause. As combined review of the summary in Table I and the more specific listing in the Appendix reveal, the most other legal basis for parents of students with TBI or nTBI has been § 504 or the ADA. For these sister statutes, parents have fared better via the OCR investigatory process than in the courts. However, the remedy of money damages is only available in court actions under these various civil rights bases. Parents have generally failed to meet the rigorous evidentiary standards for this remedy. The limited exception is *J. L. v. Ambridge School District* (2009), in which—as mentioned above—the court's first ruling was to reject, as unavailable, money damages under the IDEA. In contrast, the court denied the district's motion to dismiss the parents' alternative claim for money damages under § 504, thus preserving the decision in this matter for further proceedings, which have not been reported. However, the same claim would have failed in most other jurisdictions; the Third Circuit—which covers Delaware, New Jersey, and Pennsylvania—is the only federal appellate court that does not require proof of bad faith or gross misjudgment, i.e., intentional discrimination, under § 504 and its sister statute, the ADA.

DISCUSSION

The federal legislative and regulatory framework focuses on the belated recognition and definition of the TBI classification under the IDEA, whereas the different eligibility coverage under § 504 and its interrelated sister statute, the ADA, was subject to judicial narrowing and recent Congressional broadening without any separate developments specific to TBI or nTBI. The respective administering agencies for students in elementary and second schools—OSEP for the IDEA and OCR for § 504 and the ADA—have added reinforcing clarifications. More specifically, OSEP has clarified that students with nTBI may qualify, depending on whether they meet the applicable two-part definition of disability, under the IDEA. Correspondingly, OCR repeated, in the wake of the broadening effect of the recent ADA amendments, its longstanding clarification that the basis for FAPE is still the three elements of the first prong (i.e., impairment + substantial limitation + major life activity)—not the alternate record of and "regarded as" prongs—of the § 504 and ADA definition of disability.

In contrast, the case law—treated broadly to include the administrative investigatory avenues (i.e., the SEA and OCR complaint resolution processed under the IDEA and § 504, respectively) and the administrative adjudicatory avenues (i.e., the SEA hearing and review officer decisions, depending on whether the state has a one-tier or two-tier system under the IDEA)—specific to students with TBI and nTBI does not focus on eligibility. Not revealing whether districts under- or mis-identify such students, thecase law instead—in terms of its frequency distribution—focuses on 1) the "meat and potatoes issues" of FAPE (including LRE), related services, and the remedies of reimbursement and compensatory education, and 2) the technical and intrinsic issues of the judicial process, here divided into the representation and adjudicative categories. Moreover, the 1990 amendments of the IDEA seemed to signal the effective start of the case law, at least in terms of identifiably mentioning then TBI as well as TBI diagnoses, and the cases almost doubled during the most recent decade. These trends tended to generally align with IDEA case law more generally, including theissue distribution (e.g. Gorn, 1996) and the frequency escalation (e.g., Zirkel & D'Angelo, 2002).

Similarly, the outcomes distribution of the issue rulings reflected the overall trends in special education case law (e.g., Zirkel & D'Angelo, 2002). Based on the polar outcomes of conclusive wins and losses, districts fared much better than did parents. However, upon taking into consideration the intermediate outcomes, which at least partially favored the parents, and—per the general definition of prevailing plaintiff for purposes of attorneys' fees (i.e., changing the position of the parties on any one of the main issues)—viewing the case as the overall unit of analysis, the disparity in favor of districts is much more modest.

Finally, this broad definition of case law shows that parents of students with TBI and nTBI may benefit from choosing among the available avenues (Zirkel & McGuire, 2009), depending on such factors asthe nature of the case, whether the parents have attorney representation, and what form of relief that they seek. For example, in the cases tabulated in the Appendix, parents fared at least slightly better for procedural FAPE cases via the complaint investigatory processes of SEAs and OCR than by resorting to hearing/review officer and court decision making, which are generally much more costly due to the relative need for attorney representation. As with any other frequency, outcomes, or other trends analysis for case law, the "iceberg issue" of whether the published cases are representative of those that are settled or unpublished serves as an inevitable limitation in terms of generalizability (e.g., D'Angelo, Lutz, & Zirkel, 2004).

In sum, this relatively comprehensive and current canvassing of the various sources of law specific to students with TBI and nTBI in pre-K through grade 12 serves as a primer of special education law for parents, advocates, and

school personnel with a special interest in these children. It provides a focused foundation for starting to understand the issues and forums subject to formal resolution under our legal system. The extent of the case law to date, unlike autism (Zirkel, 2010), is proportional to the relatively low frequency in the school population. Although TBI and nonTBI are purportedly of low incidence, not only their distinctive and dramatic status but also the imprecise data of their extent and effects (e.g., CDC, 2010) cause them to be obviously of high importance.

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Appendix: *Case Law Citations, Issues, and Outcomes*

	Elig.	FAPE	Rel. Serv.[a]	Disci-pline	Comp. Ed.	Reimb.[b]	$$ Dam.	Rep. Issues[c]	Adjud. Issues[d]	Other Basis[e]
SEA Complaint Investigation:										
Cecil County Pub. Sch., 110 LRP 5522 (Md. SEA 2009)	S									
Prince George's County Pub. Sch., 110 LRP 5530 (Md. SEA 2009)		P			(P)					
OCR Letters of Findings:										
Addison Cent. (VT) Supervisory Union, 106 LRP 23636 (OCR 2005)	S									
Albuquerque (NM) Pub. Sch., 106 LRP 9766 (OCR 2005)	S									
Dalton City Sch., 106 LRP 35895 (OCR 2006)		S		S						
Greenfield Village (OH) Exempted Sch. Dist., 39 IDELR ¶ 161 (OCR 2003)										
Habersham (GA) Sch. Dist., 108 LRP 63789 (OCR 2008)		S		P						
Laramie County (WY) Sch. Dist., 108 LRP 48400 (OCR 2007)				S						
Madison County (AL) Sch. Dist., 52 IDELR ¶ 111 (OCR 2009)	P									

	Elig.	FAPE	Rel. Serv.[a]	Disci-pline	Comp. Ed.	Reimb.[b]	$$ Dam.	Rep. Issues[c]	Adjud. Issues[d]	Other Basis[e]
Mansfield (WA) Sch. Dist. No. 207, 22 IDELR 1050 (OCR 1995)		P								
Naperville (IL) Cmty. Unit Sch. Dist. No. 203, 108 LRP 39615 (OCR 2007)		S								
Washoe County (NV) Sch. Dist., 51 IDELR ¶ 52 (OCR 2008)		P/S								
Hearing or Review Officer Decisions:										
Arlington Cent. Sch. Dist., 28 IDELR 1130 (N.Y. SEA 1998)		S							P (s-p)	
Atascadero Unified Sch. Dist., 27 IDELR 1163 (Cal. SEA 1998)						S (rel. serv.)				
Capistrano Unified Sch. Dist., 42 IDELR 99 (Cal. SEA 2004)		S								
Chariho Sch. Dist., 110 LRP 2794 (R.I. SEA 2009)		S				S				
Council Rock Sch. Dist., 32 IDELR ¶ 80 (Pa. SEA 2000)					P	S				
Cranston Sch. Dep't, 109 LRP 53420 (R.I. SEA 2009)			P							
Decatur City School Sys., 106 LRP 21080 (Ga. SEA 2005)		P				P (IEE + rel. serv.)				

	Elig.	FAPE	Rel. Serv.[a]	Discipline	Comp. Ed.	Reimb.[b]	$$ Dam.	Rep. Issues[c]	Adjud. Issues[d]	Other Basis[e]
DeKalb County Sch. Dist., 21 IDELR 426 (Ga. SEA 1994)			S							
Dep't of Educ., State of Hawaii, 109 LRP 54700 (Hawaii SEA 2009)		S								
Fulton County Sch. Sys., 29 IDELR 1031 (Ga. SEA 1999)	S	S								
Hollister Sch. Dist., 26 IDELR 632 (Cal. SEA 1998)		S				S (rel. serv.)				
Lincoln & Lincoln-Sudbury Pub. Sch., 104 LRP 6414 (Mass. SEA 2004)		P			P/S	P				
Long Beach Unified Sch. Dist., 52 IDELR ¶ 114 (Cal. SEA 2009)	S									
Los Angeles Unified Sch. Dist., 26 IDELR 618 (Cal. SEA 1997)			S			P (IEE)		S (e.w.f)		
Manteca Unified Sch. Dist., 50 IDELR ¶ 298 (Cal. SEA 2008)				S						
Milwaukee Pub. Sch., 20 IDELR 1427 (Wis. SEA 1994)		S								
Morgan Hill Unified Sch. Dist., 110 LRP 24090 (Cal. SEA 2010)		P			P/S	P/S (AT)				
Muscogee County Sch. Dist., 32 IDELR ¶ 48 (Ga. SEA 1999)		P								

	Elig.	FAPE	Rel. Serv.[a]	Disci-pline	Comp. Ed.	Reimb.[b]	$$ Dam.	Rep. Issues[c]	Adjud. Issues[d]	Other Basis[e]
Richmond Elementary Sch. Dist., 104 LRP 4695 (Cal. SEA 2003)		P				P				
Rim of the World Unified Sch. Dist., 104 LRP 44822 (Cal. SEA 2004)		P				P				
Shrewsbury Pub. Sch., 103 LRP 25903 (Mass. SEA 2003)		P			P/S					
Student with a Disability, 110 LRP 31766 (N.Y. SEA 2010)									S (sol)	
Court Decisions:										
B. R. v. Lake Placid Cent. Sch. Dist., 52 IDELR ¶74 (N.D.N.Y. 2009)								P/S (a. f.)		
Blackmon v. Springfield R-XII School Dist., 198 F. 3d 648 (8th Cir. 1999)		S								
Brown v. Wilson County Sch. Dist., 747 F. Supp. 436 (M.D. Tenn. 1990)		P				P				
CJN v. Minneapolis Pub. Sch., 323 F .3d 630 (8th Cir. 2003)		S								
Emory v. Roanoke Sch. Dist., 432 F .3d 294 (4th Cir. 2005)									S (st. + sol)	
Green ex rel. J. G. v. Dist. of Columbia, 45 IDELR ¶ 240 (D.D.C. 2006)									S (m. + IHO)	

	Elig.	FAPE	Rel. Serv.[a]	Discipline	Comp. Ed.	Reimb.[b]	$$ Dam.	Rep. Issues[c]	Adjud. Issues[d]	Other Basis[e]
J. L. v. Ambridge Area Sch. Dist., 622 F. Supp. 2d 257 (W.D. Pa. 2008), *further proceedings*, 52 IDELR ¶ 156 (W.D. Pa. 2009)							S			(P) (504/ ADA)
J. P v. Enid Pub. Sch., 53 IDELR ¶ 112 (W.D. Okla. 2009)		S							S (sol)	
K. U. v. Alvin Indep. Sch. Dist., 166 F. 3d 341 (5th Cir. 1998)										S (504 + Const.)
L. L. v. Vineland Bd. of Educ., 128 F. App'x 916 (3d Cir. 2005)								(P) (u.p.l.)		
McMillan v. Cheatham County Sch., 25 IDELR 398 (M.D. Tenn. 1997)		P				P/S	S			
Mandy S. v. Fulton County Sch. Dist., 205 F. Supp. 2d 1358 (N.D. Ga. 2000), *aff'dmem.*, 273 F. 3d 1114 (11th Cir. 2001)		S							S (st. + sol)	
Roberts v. Kindercare Learning Ctr., 86 F .3d 844 (8th Cir. 1996)										S (ADA)
Robertson v. Arlington Cent. Sch. Dist., 229 F. 3d 1136 (2d Cir. 2000)										S (Const.)
Stallings v. Gilbert Unified Sch. Dist., 2009 WL 3165452 (Ariz. Ct. App. 2009)		S								
Stanley C. v. M.S.D. of Sw. Allen County Sch., 628 F. Supp. 2d 902 (N.D. Ind. 2009)		S				S (rel. serv.)		S (a.f.)		

	Elig.	FAPE	Rel. Serv.[a]	Disci-pline	Comp. Ed.	Reimb.[b]	$$ Dam.	Rep. Issues[c]	Adjud. Issues[d]	Other Basis[e]
Suggs v. Dist. of Columbia, 679 F. Supp. 2d 43 (D.D.C. 2010)									(P) (IHO)	
Wenger v. Canastota Cent. Sch. Dist., 146 F. 3d 123 (2d Cir. 1998), *cert. denied*, 526 U.S. 1025 (1999), *on remand*, 41 IDELR ¶ 5 (N.D.N.Y 2004)								S (p.s.)	S (m.)	S (504 + Const.)
Wright v. Saco Sch. Dep't, 18 IDELR 505 (Me. Super. Ct. 1991), *aff'd*, 610 A.2d 257 (Me. 1992)			S							

[a]This issue category broadly includes supplementary aids and services, such as 1:1 aides.
[b]These reimbursement rulings were with regard to tuition except, where indicated, for an assistive technology (AT) device, an independent educational evaluation (IEE), or related services (rel. serv.).
[c]The representation issues are designated as follows: a.f. = attorneys' fees; e.w.f. = expert witness fees; p.s. = proceeding *pro se*; and u.p.l. = unauthorized practice of law (by the parents' lay advocate).
[d]These adjudicative issues had the following abbreviated designations: IHO = impartial hearing officer; m. = mootness; sol = statute of limitations; st. = standing; s-p = stay-put.
[e]These legal bases other than the IDEA had the following abbreviated designations: ADA = Americans with Disabilities Act; Const. = Constitution (via § 1983); 504 = Section 504. They only applied to court decisions, because 1) the SEA complaint resolution process is exclusive to the IDEA; 2) the OCR complaint process is exclusive to § 504 and the ADA (and, thus, would yield redundant entries); and 3) impartial hearing decisions are rare under § 504, and the LRP database has not published any yet concerning children with TBI or nTBI.