Battleground in the Classroom - Disabled Students and Section 1983 Claims

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by
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Education of children is one of the most ancient and honorable professions. However, litigation involving claims brought under 42 U.S.C. Section 1983 has significantly increased over the last 25 years; the trend includes cases brought on behalf of public school students, alleging injuries inflicted by teachers, coaches or other school personnel. A number of these cases involve students who are under physical or mental disabilities, and the application of Section 1983 principles to such situations can pose special problems to educators and to counsel defending them.

**BACKGROUND**

The statute in question, 42 U.S.C. Section 1983, provides in pertinent part as follows:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities
secured by the Constitution and laws, shall be liable to the party injured in an
action at law, suit in equity, or other proper proceeding for redress....


The statute, which was enacted to enable the Fourteenth Amendment to the United States
Constitution's guarantee of due process of law, was popularly known as the "Ku Klux Klan Act"
when it was passed in 1871.¹ It was passed at least partially in response to published reports of
violence directed particularly against newly freed slaves by the Ku Klux Klan, among others.²
See Johnson v. Newburgh Enlarged School District, 239 F.3d 246, 250 (2d Cir. 2001). A
provision for awarding attorneys’ fees to the prevailing plaintiff was enacted in 1976.³

In the aftermath of the Reconstruction era, Section 1983 cases were less frequently filed.
Then, in the 1970s, causes of action based on Section 1983 began appearing with more
regularity.⁴ In Kidd v. O’Neill, 774 F.2d 1252, 1258 (4th Cir. 1985), the Fourth Circuit analyzed
several of these newer cases, observing that:

contains an illuminating discussion of the origins of Section 1983 in the context of post-Civil

² “…Debates are replete with references to the lawless conditions existing in the south in 1871.”

undoubtedly helped fuel the resurgence in the number of cases filed under Section 1983,
discussed below.

⁴ See, Kidd v. O’Neill, 774 F.2d 1252, 1258 (4th Cir. 1985), which refers to a “…revival of
Section 1983…"
The legal right asserted in each case is the right to be free of bodily harm, of physical abuse, at the hands of government agents. In terms of common law origins, the core right is that recognized in the tort and crime of battery. The vexing conceptual problem in the evolution of Section 1983 "constitutional tort" jurisprudence has been whether, and if so where, the Constitution provides specific protection against the infliction of bodily harm by state agents, i.e., whether there is any constitutional, as opposed to state law, right to be free of such inflicted harms.5

SECTION 1983 VISITS THE SCHOOL SYSTEMS

Along with other scenarios, such as those involving false arrest and alleged mistreatment of prisoners, Section 1983 began to be utilized in the 1970s as a predicate for seeking money damages from public school systems and school officials, typically involving corporal punishment issues. For example, in Baker v. Owen, 395 F. Supp. 294 (M.D. N.C., aff’d 423 U.S. 907, 96 S. Ct. 210, 46 L. Ed. 2d 137 (1975), the plaintiff parents had insisted to the school that their child not be spanked. Notwithstanding, the child was given two licks with what was described as a “…drawer divider slightly thicker than a ruler.” The court acknowledged that parental rights came within the protection of the Constitution, but held that the parents’ wishes could not be allowed to restrict school officials’ discretion in accomplishing the essential

5 Kidd v. O’Neill, supra has been stated to have been partially overruled on other grounds by Justice v. Dennis, 834 F.2d 380, 383 (4th Cir. 1987). However, a review of that latter case reflects that the basis for the disapproval is less than clear. Justice stated. “The question is not, however, whether better instructions were possible, but whether the instruction taken as a whole, fairly and adequately state[d] the pertinent legal principles involved. [citation omitted]. We conclude that they did. To the extent that any of our previous decisions, including Kidd hold to the contrary, they are expressly overruled.” As mentioned, Kidd was an appeal from a summary judgment ruling, and did not involve any issue of jury instructions.
purpose of maintaining discipline. 395 F. Supp. at 301. In *Ingraham v. Wright*, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977), the Supreme Court declined to determine “…whether or under what circumstances corporal punishment of a public school child may give rise to an independent federal cause of action to vindicate substantive due rights under the due process clause.” 430 U.S. at 679, n. 47. The Court specifically declined to hold that corporal punishment (which does entail actions which in other contexts would be considered battery) violated constitutional rights, citing the long tradition of such disciplinary methods in education.

Notwithstanding the United States Supreme Court's disinclination to invade the province of school officials in the discipline of students, cases continued to be filed. In addressing these situations, the courts have recognized that not every state tort becomes a federally cognizable "constitutional tort" under Section 1983, simply because it may have been committed by a state official. *Baker v. McCollan*, 443 U.S. 137, 146, 99 S. Ct. 2689, 2695, 61 L. Ed. 2d 433, 443 (1979). The offending acts must also violate a right guaranteed under the United States Constitution or federal statute. *Cook v. Sheldon*, 41 F.3d 73 (2d Cir. 1994). The court in *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) characterized the reach of Section 1983 in public school cases as encompassing:

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6 In the case below, the Fifth Circuit Court of Appeals had specifically declined to hold that claims of excessive corporal punishment fell within the purview of Section 1983. "We think it a misuse of our judicial power to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of misconduct five licks would have been a more appropriate punishment than ten licks." *Ingraham v. Wright*, 525 F. 2d 909, 917 (5th Cir. 1976) (en banc).
...The right to be free of state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as to literally shock the conscience of a court. The existence of this right to ultimate bodily security, the most fundamental aspect of personal privacy, is unmistakably established in our constitutional decisions as an attribute of the ordered liberty that is the concern of substantive due process. Numerous cases in a variety of contexts recognize it as a last line of defense against those literally outrageous abuses of official power whose very variety makes formulation of a more precise standard impossible. [Footnote omitted] Clearly recognized in persons charged with or suspected of crime and in the custody of police officers, we simply do not see how we can fail to recognize it in public school children on the disciplinary control of public school teachers.7

SHOCKING THE CONSCIENCE

The "shock the conscience" criteria quickly became popular in federal courts. The emerging substantive due process right was characterized in Dockery v. Barnett, 167 F. Supp. 2d 597, 602 (S.D.N.Y. 2001), as reflecting “…the right to be free of state intrusion into the realms of …bodily security through means so brutal, demeaning, and harmful as to literally shock the conscience of the court.”

Neal v. Fulton County Board of Education, 229 F.3d 1069 (11th Cir. 2000), involved allegations that the public school teacher struck a student with a heavy metal weight lock, knocking the student's eye "completely out of its socket." 229 F.3d at 1071. The court held that, under these circumstances, a claim for violation of Section 1983 had been properly made out. In so doing, however, the court acknowledged that: "...the kind of minor injury suffered by a student during the administration of traditional corporal punishment will rarely, if ever, be the

7 This pronouncement would seem to fly in the face of Ingraham, in which the Supreme Court struck a clear distinction between situations involving persons in official custody, and those with students in schools. However, as discussed below, other courts have adopted this reasoning seemingly without questioning the differences between custodial and school contexts.
kind of injury that would support a federal due process claim for excessive corporal punishment under the test we adopt today." *Id.* at 1076. The court concluded that in order to establish a violation of Section 1983, a plaintiff must exhibit "serious injury." *Id.*

This standard was refined in *Peterson v. Baker*, 504 F.3d 1331 (11th Cir. 2007). In that case, there was a hostile encounter between the student Peterson and his 8th grade teacher Baker. When Peterson attempted to leave Baker's classroom, the teacher grabbed him by the neck and, according to Peterson, squeezed him to the point where he could not breathe. Afterwards, red marks were visible on Peterson's neck. 504 F.3d at 1334-5. In evaluating Peterson's claim under Section 1983, the Eleventh Circuit stated that officials violate the substantive component of the due process clause of the Fourteenth Amendment only when their conduct "...can properly be characterized as arbitrary, or conscience-shocking, in a constitutional sense." The court held that in order to show conscience shocking conduct, a plaintiff must prove at a minimum that "(1) a school official intentionally used an amount of force that was obviously excessive under the circumstances, and (2) the force used presented a reasonably foreseeable risk of serious bodily injury." *Id.* at 1336. In determining whether the amount of force used was "obviously excessive," the court must look to the totality of the circumstances. Specifically, the court must evaluate (1) the need for the application of force, including corporal punishment, (2) the relationship between the need and the amount of force or punishment administered, and (3) the extent of the injury inflicted. *Id.* at 1336-7.

Although this “conscience-shocking” test has been criticized as “fuzzy,” it is still the operative test in school cases where Section 1983 violations are alleged, as evidenced by

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8 *Braley v. City of Pontiac*, 906 F.2d 220, 226 (6th Cir. 1990).
The durability of this standard is undoubtedly a function of, as observed in *Hall v. Tawney*, *supra*, the wide variety of potential abuse allegations which “makes the formulation of a more precise standard impossible.” 621 F.2d at 613.

Notwithstanding the United States Supreme Court's "hands-off" approach in *Ingraham*, and the Fifth Circuit’s expressed distaste for the judicial function being forced to include the handing down of value judgments as to what degrees of punishment of students might or might not be actionable, this is exactly the type of analysis in which the courts have engaged in deciding school cases arising under Section 1983. The underlying reasons for this phenomenon do not seem to have attracted much discussion by courts or commentators, and a thorough analysis would appear to deserve treatment in a separate paper. However, it is probably not unrelated to changes in societal attitudes towards corporal punishment in general. *Ingraham* relied at least to some extent on the degree of public acceptance of the role of corporal punishment in education. However, many school districts now prohibit such actions, or

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9 Except in the 5th Circuit. The standard enunciated by that Circuit provides that "...corporal punishment in public schools is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning." *Fee v. Herndon*, 900 F.2d 804, 808 (5th Cir. 1990). In most jurisdictions, the existence of an adequate parallel state remedy (i.e., the tort of battery), does not bar a claim sounding under Section 1983. Here again the Fifth Circuit standard differs; it will not recognize a Section 1983 claim where there are adequate state remedies. *Id.*

10 The “5 licks vs. 10 licks” example in *Ingraham v. Wright*, 525 F.2d at 917.
authorize its use only under very restrictive conditions.\textsuperscript{11} In any event, it continues to be a fertile field for litigation, as the cases cited in this paper attest.

In \textit{Kirkland v. Greene County Board of Education}, 347 F.3d 903 (11th Cir. 2003), allegations that a school principal repeatedly struck a student with a metal cane on the head, ribs and back, leaving a large knot of the student’s head, causing him to suffer continuing migraine headaches, were held to be actionable under Section 1983. Likewise, in \textit{Neal v. Fulton County Board of Education, supra}, knocking a student’s eye completely out of its socket by striking him with a metal weight lock, violated the student’s substantive due process rights. In \textit{P.B. v. Koch}, 96 F.3d 1298 (9th Cir. 1996), a school principal was held to have violated constitutional rights by slapping, punching, and choking multiple students when "there was no need to use force." 96 F.3d at 1304. The court in \textit{Metzger v. Osbeck}, 841 F.2d 518 (3d Cir. 1998) found that summary judgment for the defendant teacher was inappropriate, where the teacher allegedly grabbed a student around the neck, causing the student to lose consciousness and fall to the ground, sustaining a broken nose, lacerated lip and fractured teeth. Where a teacher struck a young student with a split paddle on two occasions, one of which caused bleeding, welts and a permanent scar, and the other of which caused severe bruises, a substantive due process violation was made out. \textit{Garcia v. Miera}, 817 F.2d 650 (10th Cir. 1987).

\textsuperscript{11} See, e.g., Pinellas County (Florida) Code of Student Conduct sec. 2-402 (11); Fulton County (Georgia) Schools District Policy JDA 5.12 (2011). It has been stated that 97 of the 100 most populous school districts in the country have barred corporal punishment. www.stophitting.com/index.php?page=100largest. However, see, Texas H.B. 359, 82d Leg., R.S. 2011, which authorizes school districts to adopt a policy allowing corporal punishment, subject to certain restrictions.
Conversely, in *London v. Directors of the Dewitt Pub. Sch.*, 194 F.3d 873 (8th Cir. 1999), no violation of Section 1983 was held to have occurred were a teacher, after ordering a noncompliant student who was engaged in horseplay to leave the school cafeteria, dragged the student from the cafeteria in a physical scuffle, banging the student's head on a pole while causing only minor injury. Likewise, in *Dacosta v. Nwachuka*, 304 F.3d 1045 (11th Cir. 2002), a college instructor was found not to have violated a student's substantive due process rights when he slammed the door on the student, causing her arm to shatter the glass window of the door, and become lodged in the glass pane. In *Peterson v. Baker*, supra, the teacher allegedly grabbed the student by the neck, squeezing him "...until I couldn't breathe." Red markings were subsequently visible on the student's neck. Under these circumstances, the teacher's conduct was determined not to be sufficiently "conscience-shocking" and no violation of Section 1983 was shown. In *Lillard v. Shelby Co. Bd. of Educ.*, 76 F.3d 716 (6th Cir. 1996), a single slap of a student by a teacher, and a suggestive rubbing of a female student's stomach, were held insufficient to allege a Section 1983 violation.

**Disciplinary Versus Non-Disciplinary Circumstances**

Some cases have attempted to distinguish between fact patterns which involve disciplinary actions including corporal punishment, and those involving alleged mistreatment occurring in non-disciplinary situations. *Neal v. Fulton Co. Bd. of Education*, supra, stated that the first inquiry in such cases was to determine whether the school official’s conduct constituted corporal punishment. 229 F.3d at 1072. Without precisely defining “corporal punishment,” it was stated that:
The touchstone of corporal punishment in schools appears to be the application of physical force by a teacher to punish a student for some kind of school-related misconduct.\textsuperscript{12}

The key inquiry is said to be "...not what form the use of force takes but whether the use of force is 'related to [the student's] misconduct at school and ... for the purpose of discipline.'" \textit{T.W. v. School Board of Seminole County, Fla.}, 610 F.3d 588, 599 (11th Cir. 2011). When the answer to that inquiry appears to be "no," some ambiguities arise. In \textit{T.W.}, supra, after making the above pronouncement, the Eleventh Circuit did not articulate an analysis which applies when the alleged use of force did not constitute corporal punishment.

In an earlier case, \textit{Webb v. McCullough}, 828 F.2d 1151 (6th Cir. 1987), a student on a school trip locked herself in the bathroom after being caught by the school principal with a boy and alcohol in her room. The principal broke down the door, which threw the minor plaintiff against a wall, and afterwards grabbed and slapped her. In analyzing the claim, \textit{Webb} noted that the record did not reflect that those actions were in any way disciplinary, and concluded that they possibly violated the minor plaintiff’s substantive due process rights: "The trier of fact could find that …[the principal's] need to strike Webb was so minimal or non-existent that the alleged blows were a brutal and inhumane abuse of [the principal's] official power, literally shocking to the conscience." 828 F.2d at 1159.

In \textit{Atlanta Independent School System v. S.F.}, 740 F. Supp. 2d 1335 (N.D. Ga. 2010), the court wrestled with distinctions to be drawn between disciplinary and non-disciplinary fact patterns. There, the court found that the alleged beating of the autistic student did not constitute disciplinary corporal punishment. The District Court noted the absence of guidance in this area

\textsuperscript{12} \textit{Id}. This would appear to be an apt, if perhaps obvious, observation, particularly to those who in younger days may have been the recipients of such actions.
(see, *T.W. v. School Board of Seminole County*, supra), but held that the “shock the conscience” standard still applied, even though there was no appellate determination as to the precise analysis to be used in evaluating whether the use of force by a school official rises to that level. The Court held that the analysis used in corporal punishment case would be utilized to determine whether the alleged conduct rose to the conscience-shocking level in the non-corporal punishment context. 740 F. Supp. 2d at 1353.

Physical confrontations between school personnel and students have led to differing results, depending on the Court's view of the incident's circumstances. The District Court in *Allen v. School Board of Broward County, Florida*, 782 F. Supp. 2d 1340 (S.D. Fla. 2011), was confronted with allegations that a teacher had twisted the student's arm causing an elbow lateral condyle fracture, necessitating surgery. After reviewing the facts in the light most favorable to Plaintiffs, the Court determined that the teacher's acts constituted corporal punishment, stating:

The application of force was not to restore order or break-up [sic] a fight between R.R.S. [the minor Plaintiff] and another student. Rather, Davis [the teacher] held onto R.R.S.'s arm and used physical force because he was sitting at a prohibited table and purportedly would not comply with Davis's orders....[H]e was punishing the student for non-compliance....Regardless of whether the level of physical discipline was proper in this situation, it was an application of force used to punish R.R.S. for a school-related misconduct. Thus, his actions constitute some level of corporal punishment.

782 F. Supp. 2d at 1346. Citing *Neal*, *Kirkland*, and *Dacosta*, all supra, the Court went on to hold that the alleged conduct, while forceful, did not rise to the conscience-shocking level, and entered summary judgment for the Defendants. This result, while undoubtedly correct, illustrates the analytical difficulties courts have experienced in addressing fact patterns which do not seem to fit the traditional descriptions of corporal punishment. The facts as recited in *Allen* would seem to indicate that the teacher, rather than inflicting punishment for disobedience, was
simply trying to maintain order in the cafeteria, forcing the student away from the "prohibited table" and away from where an altercation had taken place.

Conversely, in Hatfield v. School Board of Sarasota County, Fla., ___ F. Supp. 2d ___, 2011 WL 249475 (M.D. Fla. 2011), the Court held that allegations that a teacher slapped, punched and poked a disabled student, hit the student on the head with plastic bottles, struck her on the back of the head where the student had a "soft spot" from prior brain surgery, and inflicted other indignities, was held to state a claim for violations of Section 1983. There, although the Court analyzed the factual scenario in terms of excessive corporal punishment, there appeared no indication that any of the alleged acts were arguably necessary to maintain discipline, or were done as punishment for school-related offenses. Although Hatfield did not make a point of referring to the lack of any appellate guidance in non-corporal punishment scenarios, it seemed to have been forced into a disciplinary type of analysis by a decided lack of comfort in trying to utilize an approach specific to non-disciplinary case facts.

Thus, whether the school defendant’s alleged actions were in a disciplinary context or not, the “conscience shocking” test set forth in Neal, Peterson, and Garrett, supra, still obtains. In developing an analytical framework in the context of cases which do not arise under traditional corporal punishment, courts should include as a consideration the extent to which school personnel themselves are at risk in dealing with student behavior. Particularly with older (and larger) students, including those who exhibit adverse behavioral issues, teachers and other school personnel run the risk of injury themselves in fulfilling their duty to maintain order, protect students and foster a good educational environment.13 This has received little if any

attention from courts to date, but should, when applicable, receive consideration when reviewing "the totality of the circumstances."

Undoubtedly, it would seem to be more difficult for a plaintiff to demonstrate that the actions complained of rose to the level of conduct which could be termed conscience-shocking, where those actions derived from an attempt to maintain discipline, however misguided. Any disciplinary aspect, or absence thereof, would certainly appear to be a factor properly to be taken into account in analyzing whether the totality of the circumstances arguably demonstrate conscience-shocking behavior in any event. A comparison of Allen, supra, and Hatfield, supra, indicates that while the general principles guiding a court's inquiry remain the same in each instance, non-corporal punishment cases may well prove more problematic to defend, and easier to prosecute.

QUALIFIED IMMUNITY – AN EFFECTIVE SHIELD OR ILLUSORY PROTECTION?

The doctrine of qualified immunity provides the government officials, including school personnel acting in their official capacities, a shield from liability for civil damages, if their actions do not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 817-19, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982).

The qualified immunity doctrine is said to have developed as an attempt "...to balance the strong policy of encouraging the vindication of the civil rights by compensating individuals when those rights are violated, with the equally salutary policy of attracting capable public officials and giving them the scope to exercise vigorously the duties with which they are charged, by relieving them from the fear of being sued personally and thereby made subject to monetary liability." Rodriguez v. Phillips, 66 F.3d 470, 475 (2d Cir. 1995). It has also been
described as a method by which to accommodate the conflict between the goals of Section 1983 in deterring governmental abuse and remedying unlawful government transgressions on one hand, and the societal interest in not unduly burdening legitimate government operations on the other. Johnson v. Newburgh Enlarged School District, 239 F.3d 246, 250 (2d Cir. 2001). The doctrine has also sometimes referred to as "good faith" immunity, Scheuer v. Rhodes, 416 U.S. 232, 247-248, 94 S. Ct. 1683, 1692, 40 L. Ed. 2d 90, 103 (1974), although Harlow v. Fitzgerald, supra, made it clear that the test is an objective one, and that the actor’s subjective good faith, or lack thereof, is not relevant to the analysis. 457 U.S. at 815-819. It has been stated that only in exceptional cases will government actors have no shield against claims made against them in their individual capacities. Id. See also, e.g., Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L. Ed. 2d 271 (1986) (qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law”).

In determining whether qualified immunity applies, courts apply a two-part inquiry: it must first be decided whether there were any alleged constitutional or statutory violations at all, and second, if necessary, the court must decide if such violations were so "clearly established" at the time of the alleged violations that a reasonable person would have known of them. County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998); Harlow v. Fitzgerald, supra. What this means is that government officials are entitled to qualified immunity unless their supposedly wrongful act was already established as wrongful, to such a high degree that every objectively reasonable official standing in the defendant's place, would be on notice that what the defendant was supposedly doing would be clearly unlawful given the circumstances. Long v. Slaton, 508 F.3d 576, 584 (11th Cir. 2007). If it is “objectively reasonable” for the official to believe that he or she is not violating a constitutional

On its face, case law, particularly in the Eleventh Circuit, seems to establish a significant burden for a plaintiff to overcome the defense of qualified immunity. It is the plaintiff's burden to demonstrate that the defendant, at the pertinent time and given the specific circumstances of the case, had fair notice that his or her conduct would clearly violate federal law. *Id.* In attempting to fulfill this burden of demonstrating that the law at the time of the alleged offense clearly established that defendant's conduct would violate Constitution, a plaintiff must point to either "...(1) earlier case law...that is materially similar to the current case and therefore provided clear notice of the violation or (2) general rules of law from a federal constitutional or statutory provision or earlier case law that applies with 'obvious clarity' the circumstances, establishing clearly the unlawfulness of the defendant's conduct." (emphasis supplied). *Id. See also, Willingham v. Loughnan*, 321 F.3d 1299, 1303 (11th Cir. 2003), which held that pre-existing, factually similar cases are usually needed to demonstrate that officials were fairly warned that the application of force in question violated the victims constitutional rights. *Long, supra*, specified that where the applicable standard is a highly general one, pre-existing case law which has applied general principles to specific circumstances will almost always be necessary to draw a line that is capable of giving fair and clear notice that an official's conduct violates federal law. 508 F.3d at 584. *Hadley v. Gutierrez*, 526 F.3d 1324, 1333 (11th Cir. 2008), held that for a right to be clearly established, previous case law must have developed it in a concrete factual context so as to make it obvious to all reasonable government actors in the defendant's
place that what he is doing violates federal law.\textsuperscript{14} See also, \textit{Crawford v. Carroll}, 529 F.3d 961, 977 (11th Cir. 2008).

Based on the above cases, it would seem reasonable to argue that unless an identical or at least very similar fact situation had arisen in a prior case,\textsuperscript{15} a school official would have a virtually ironclad qualified immunity defense to virtually any Section 1983 claim alleging wrongful acts perpetrated upon students. In practice, however, this defense has proven considerably more porous in school cases.

In \textit{Johnson v. Newburgh Enlarged School District, supra}, Plaintiffs alleged that the Defendant gym teacher had assaulted the minor student. Holding that the teacher was not entitled to qualified immunity, the Second Circuit determined that in the analysis of a claim of

\begin{footnotesize}
\textsuperscript{14} Unlike other interlocutory rulings, a denial of a summary judgment based on qualified immunity is immediately appealable, but only if the question is one of law. \textit{Rodriguez v. Phillips}, supra at 475, \textit{citing}, \textit{Cohen v. Beneficial Industrial Loan Corp.}, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 2d 1528 (1949). Where the qualified immunity issue turns on questions of fact, this immediate appellate remedy does not lie. \textit{See, Kaminsky v. Rosenblum}, 929 F.2d 922, 926 (2d Cir. 1991); M. Cox, Litigating a Claim Against a Government Official After a Denial of a Dispositive Motion Raising Qualified Immunity, \textit{19 ABA Section of Litigation, Pretrial Practice and Discovery} no. 2, p. 4 (2011).

\textsuperscript{15} The general rule seems to be that only decisions of the United States Supreme Court, the circuit court of appeals having jurisdiction of the location of the incident, or the highest court of that state, can constitute case law sufficient to clearly indicate to the official that the conduct transgresses constitutional bounds. \textit{Hamilton v. Cannon}, 80 F.3d 1525, 1532 n. 7 (11th Cir. 1996).
\end{footnotesize}
qualified immunity, the question is “...not what a lawyer would learn or intuit from researching case law, but what a reasonable person in [the government actor’s] position should know.” 239 F.3d at 251. Further, Johnson held flatly that the absence of legal precedent does not necessarily yield a conclusion that the law is not clearly established. *Id.*

*Dockery v. Barnett, supra*, also addressed claims of qualified immunity in a school context. There, it was alleged that a special education teacher had abused an autistic student, and school authorities had failed to take appropriate action to halt the abuse. In discussing qualified immunity, the Court held:

> The extent of protection afforded defendants depends upon the ‘objective legal reasonableness’ of defendants’ actions ‘assessed in light of the legal rules that were ‘clearly established’ at the time [they were] taken. See *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (quoting *Harlow*, 457 U.S. at 818-19, 102 S. Ct. 2727). Defendant is entitled to summary judgment on qualified immunity grounds only if, drawing all inferences in favor of plaintiffs, no rational jury could conclude that it was objectively unreasonable for him to believe that his actions did not violate a clearly established right.

The *Dockery* court’s citation to *Anderson v. Creighton* is interesting. There, the U.S. Supreme Court upheld the District Court’s summary judgment for a law enforcement officer, charged with conducting a warrantless search without probable cause. In so doing, the qualified immunity doctrine was described as “...shielding [officials] from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.” 483 U.S. at 638, 107 S. Ct. at 3038. The Court in *Dockery* seemingly twisted *Anderson*’s logic from one broadly upholding qualified immunity to one severely restricting it.

The key analytical flaw in the *Dockery* opinion appears to be that the court failed to follow the Supreme Court’s admonition concerning the precise delineation of the right supposedly trampled upon by the defendant. Justice Scalia’s majority opinion in *Anderson* pointed out that it was erroneous to characterize the “constitutional right” at an excessively
general level. Rather, any analysis must focus on the specific application of that right alleged in the particular case. Otherwise, the qualified immunity protection would be converted into a rule of pleading, which plaintiffs could manipulate into an avoidance of qualified immunity simply by pleading only an abstract Fourteenth Amendment, Fourth Amendment, or other constitutional violation.

In Dockery, the Court flatly held that the student had a ‘... constitutional ‘right to be free from the use of excessive force’ in a ‘non-seizure, non-prisoner context,’” citing Johnson v. Newburgh Enlarged School District, supra at 602. Such a characterization would appear to be excessively broad, fulfilling Justice Scalia’s expressed concern that allowing an excessively general definition of the “right” would lead inexorably to the result of qualified immunity becoming no more than a pleading issue. Dockery relied heavily on the allegations of the operative Complaint, and while acknowledging that a number of these allegations were contradicted by the deposition testimony, simply held that the record was sufficient to create a dispute of fact as to whether the teacher’s handling of the students was disproportionate to what was necessary under the circumstances, without going into any detail as to exactly what evidence created the fact issue.

The issue of what does or does not constitute “excessive force” in school situations is not the only one to bedevil courts. Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821 (11th Cir. 1997)(en banc), followed Anderson’s rationale in an en banc decision overruling the initial opinion. There, the defendant teachers were accused of strip searching two second grade students who had been accused by other students of theft of money. (Interestingly, each minor plaintiff accused the other of being responsible for the theft. The search yielded nothing.) The court recognized Anderson’s guiding principle that “...courts must not permit plaintiffs to
discharge their burden by referring to general rules and to the violation of abstract ‘rights,’” Jenkins v. Talladega City Bd. of Educ., 95 F.3d 1036, 1040 (11th Cir. 1996), and upheld a summary judgment for defendants, over a vigorous dissent.\textsuperscript{16} Jenkins, 115 F.3d at 828.

Jenkins recognized that New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985) was the leading case with respect to the constitutionality of school searches, but pointed out that while T.L.O. had enunciated a two-fold test for such searches,\textsuperscript{17} it had perhaps pointedly refrained from specific application of that test to the circumstances of the search of T.L.O.’s handbag. Given this, the Court held that the law, at the time of the incident, had not developed to the degree of clarity which would indicate to the school defendants that their actions were unconstitutional.

The dissent disagreed, citing several cases in which student strip searches had been denounced, characterized among other things as “...demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission.” Beth G. v. City of Chicago, 723 F.2d 1263, 1272. See also, Justice v. City of Peachtree City, 961 F.2d 188, 192 (11th Cir. 1992). It would have held that T.L.O., as inexact as it was, constituted a bright enough line to tell school personnel that strip searches must be strictly avoided, with the possible exception of situations involving suspected guns or drugs.

\textsuperscript{16} The initial opinion, authored by Judge Kravitch, who wrote the dissenting opinion, had reversed the summary judgment by a 2-1 split.

\textsuperscript{17} (1) whether the action was justified at its inception, and (2) whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place. 469 U.S. at 341-2, 105 S. Ct. at 742-3.
The question arises whether the different results in these cases stem from a general disinclination among some courts to extend the same qualified immunity protection to teachers and school personnel, as given to other governmental officials. The reasons for this assumption, to the extent it exists, is puzzling. Perhaps it rests on the assumption that children need more constitutional protection than prisoners.

However, overlooked by this approach is the fact that teachers and other school personnel need protection, too. Like law enforcement officers, including jailers and prison guards, school personnel are often called upon to make split-second decisions concerning discipline, protection of the health and safety of students, as well as the teachers themselves, without any legal background, and well before any advice from counsel can be obtained. Courts need to enforce the holding and the spirit of *Anderson v. Creighton, supra*, and provide qualified immunity to school personnel charged with Section 1983 violations, unless and until it is shown that prior law truly was so clearly established that no reasonable official could have any doubt as to the unconstitutionality of their conduct.18

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18 The dissent in *Jenkins* justified its position by arguing that, for example, there has never been a prior 1983 case in which school officials had been accused of selling foster children into slavery; but it does not follow that if such a case arose, the officials would be immune simply because no previous case had found liability in those circumstances. 95 F.3d at 1041; 115 F.3d at 825. In this extreme example, the dissent was surely correct. However, in almost all cases in which qualified immunity is an issue, the facts and prior law are much cloudier. This is precisely why the doctrine of qualified immunity was developed in the first place.
ALLEGED PSYCHOLOGICAL INJURIES

Only a few cases have discussed the extent to which alleged psychological, as opposed to physical, abuse of a student can constitute a violation of Section 1983. In Abeyta v. Chama Valley Independent School District No. 19, 77 F.3d 1253 (10th Cir. 1996), the court addressed a Section 1983 complaint against the teacher who allegedly called a student a prostitute in front of the class, over a period of several weeks. The student's classmates were also permitted to taunt her over a period of weeks. The court stated:

We next consider whether plaintiff’s allegation of psychological abuse states an actionable claim. Defendant argues that psychological abuse absent physical contact or a threat to bodily integrity is not a deprivation of constitutional rights. No published authority addresses this particular issue in a school context. In other contexts, however, even extreme verbal abuse typically is insufficient to establish a constitutional deprivation. Cf. Collins v. Cundy, 603 F.2d 825, 827 (10th Cir. 1979) (holding that the verbal abuse where sheriff laughed at person and threatened to hang him did not state constitutional deprivation actionable under Section 1983).

The Abeyta court recognized that the allegations against the teacher, if true, would constitute flagrant misconduct. However, the court stated that it was "... sure that the actions alleged in the instant case did not reach that level [forcible stomach pumping abuse condemned in Rochin v. California, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 2d 183 (1952) – whether they were done with indifference or with deliberate intent to cause psychological harm."

Plaintiffs in Abeyta referred to White v. Rochford, F.2d 381 (7th Cir. 1979), a non-school case in which three minor children were left by police in an abandoned car on a cold evening, after arresting the car's driver. The Abeyta court pointed out that in White, however, it was clear that the plaintiff children were in significant physical danger, and that more than mere psychological abuse was involved. Plaintiffs there also relied on an unpublished opinion by the District Court of New Mexico, McGinnis v. Cochran, Case No. 85-261-M. (D. N.M. Jun. 3,
1985), in which an 11-year old special education student misbehaved in course class, whereupon the teacher then required each class member to write "I will kill you, Billy" one hundred times. The following day, the teacher directed the students to wad up the papers and throw them at plaintiff. A number of the papers struck the plaintiff, including one in which a stone or other hard object apparently had been placed. Again, it was evident that more than mere psychological abuse had occurred, including the minor plaintiff being struck by a stone or other hard object at the teacher's instance.

In *T.W. v. Garrett*, Fla. 610 F.3d 588 (11th Cir. 2010), the defendant teacher was alleged to have restrained a special education student on several occasions, called the student names, made unflattering remarks about the child's mother, and placed him in a small room with the door closed for "cool down" on several occasions, causing distress. Even in the face of these and other allegations pertaining to the teacher's personal life and professional practices, the court held that a violation of Section 1983 had not been shown. The court referred to the requirement discussed above that risk of significant injury must be shown, in affirming a summary judgment entered on the teacher's behalf.\(^{19}\)

Likewise, in *Minnis v. Sumner Co. Bd. of Educ.*, ____ F. Supp. 2d ___, 2011 WL 1196935 (M.D. Tenn. 2011), a special education teacher was accused of leaving bruises on the autistic student’s arm on one occasion by grabbing him to prevent him from running wildly, then, approximately a year later, grabbing the student’s head and shaking it to redirect him. Citing *T.W.*, supra, the court granted Defendants’ Motions for Summary Judgment, stated:

\(^{19}\) See the more extended discussion of the Eleventh Circuit's treatment of Plaintiffs' psychological injury claims below, pp. 15-16.
“It appears that courts have not yet recognized – but have also not ruled out – the proposition that ‘psychological harm unaccompanied by serious physical injuries can be sufficient to satisfy the injury requirement’ for stating a claim for a substantive due process violation in the school context.” ___ F. Supp. 2d at ___, 2011 WL 1196935 at 7-8.

Thus, allegations of psychological injury, standing alone, can rarely if ever constitute the basis for a Section 1983 claim. In Brown v. Ramsey, 121 F. Supp 2d 911, 923 (E.D. Va. 2000), the court stated that it was unaware of any reported corporal punishment case which survived a summary judgment motion, where plaintiff had not sustained a physical injury, but instead claimed to suffer from post-traumatic stress disorder or other psychological injury.

The Abeyta court left open the possibility that some extreme showing of gross psychological abuse could meet the Section 1983 criteria, but left no doubt that such abuse would necessarily need to be extreme indeed.

**The Case of the Disabled Student**

Some of the more perplexing cases involving the application of Section 1983 principles to school situations arise when the student involved is under some sort of physical or mental disability. In the recent past, statutory and other provisions have been made for the education of such students in a public school setting.\(^{20}\) These include requirements that a disabled child be educated in a "least restrictive setting," meaning that the special education student must be "mainstreamed" into regular education classes whenever possible.\(^{21}\) Several cases have involved claims by these students of abuse and mistreatment on the part of school authorities.


In *Brown v. Ramsey, supra*, a first grade student with Asperger's syndrome\(^\text{22}\) brought an action under Section 1983, claiming that a violation of the student's civil rights had occurred as a result of the use of a restraint hold applied during a special education class. The student claimed that this hold had "suffocated" him or caused him to experience a choking sensation. *Id* at 913. The defendant teachers readily admitted placing the student in a restraint hold on several occasions, but contended that the restraint used was in complete compliance with approved school system policy, and was only used when the student acted in such a way as to present a danger to himself or to others.

The *Brown* court pointed out that the cases in which plaintiffs' claims had survived a summary judgment motion all involved severe physical injuries, citing *Hall v. Tawney, supra*, *Garcia v. Miera, supra*, and *Webb v. McCullough, supra*. To this list could be added *Neal v. Fulton Co. Bd. of Educ., supra*. The court contrasted these cases with those in which only minor physical injuries, if any, had been shown, and motions to dismiss or for summary judgment had been granted.

*Brown* did not focus on the minor plaintiff's status as a handicapped student. Rather, the court analyzed the fact situation presented under the principles outlined in the cases discussed above, student's medical condition was in its discussion of the requirement in *Hall* that plaintiff

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22 Asperger's syndrome is a neurological disorder which is in the family of autism. 121 F. Supp. 2d at 912. It is currently characterized as one part of the condition Autism Spectrum Disorder (ASD). See, American Psychiatric Association, *Diagnostic and Statistical Manual* DSM IV-TR (4th ed. 2000), diagnostic criteria 299.00, 299.80. It should be noted that the diagnostic criteria for ASD are being significantly revised in the upcoming DSM5, scheduled for release in May 2013, www.dsm5.org.
show that the actions of school authorities were disproportionate to the need presented. The court pointed out that the evidence, including the testimony of the student himself, showed clearly that the restraint holds were employed only in response to bad behavior by the student, and that state law explicitly authorized the use of the restraint in certain situations. *Id.* at 924. The court ultimately entered summary judgment in favor of defendants.

The same type of analysis was utilized in *Minnis v. Sumner Co. Bd. of Education, supra*. There, the alleged injuries consisted of some minor bruising on the student’s arm on one occasion, and some alleged pain when the teacher grabbed the student’s head and shook it to redirect the student. Pointing out that all of the alleged acts, even if misguided, had at least some arguable relation to legitimate teaching purposes, the court contrasted those cases in which a substantive due process violation had been made out, and those in which it had not. Without characterizing the alleged injuries as *de minimus*, the court held that the alleged actions “...simply do not rise to the level of a ‘conscience-shocking,’ brutal and inhumane abuse of authority.” __ F. Supp. 2d at __, 2011 WL 1196935 at 10.

In *Dockery v. Barnett*, 167 F. Supp. 2d (S.D.N.Y. 2001), the minor plaintiffs were autistic students, who brought an action under Section 1983 against school officials alleging, among other things, that the students were force-fed, grabbed by the teacher and teacher’s aide causing bruises and cuts, and scratched by the teacher. In addition, they allegedly sustained psychological injuries. It was also alleged that the school district had an unconstitutional policy prohibiting employees from communicating with parents about dangers facing their children. In denying summary judgment, the court observed:

Along with the scratches and bruises, the children have faced severe psychological injuries. Johnson allegedly suffered from an increase in violent and self injurious conduct, as well as the onset of such behavior as compulsive masturbation, which required him to be placed on an antipsychotic medication.
Dockery allegedly became uncharacteristically violent, kicking, headbutting and spitting with increased frequency and intensity. On their face, their injuries do not seem particularly serious, but the issue is better reserved for a jury -- especially considering that the alleged abuses continued over the course of an entire school year, and plaintiffs in this case are autistic children, who are more vulnerable and less capable of communicating than other children.

(Emphasis supplied). Id. at 604.

In T.W. Garrett, supra, the minor plaintiff had been diagnosed with Pervasive Developmental Disorder, and was a student in defendant Garrett's classroom for autistic students. His history was replete with instances of adverse behavior, classroom disruption and other issues. Plaintiff alleged that the teacher restrained the student, used profanity towards him and other students, made fun of him, called him names, made unflattering remarks about the student's mother, and would intentionally provoke the student in order to be able to restrain him and place him in a "cool down" room with the door closed. Although plaintiff's mother noticed bruises on the student on two occasions, there is no evidence that these bruises were the result of any actions by the teacher. Plaintiff contended that the student had sustained psychological injury, including worsening behavior, nightmares, distrust of authority and reluctance to attend school. In reviewing the evidence in light of the "totality of the circumstances," the Eleventh Circuit found that the measures taken by the teacher with respect to the student were either directly related to the teacher's effort to maintain good discipline in the classroom, or, even if the force utilized was somewhat excessive, it was not totally unrelated “…to the need for the use of force.” 610 F.3d at 601-602. The court took into account the disability of the minor plaintiff, as forming part of the overall evidence in the case.
The Plaintiff as well as the Amici in the case, urged the court to formulate a special rule applicable to cases involving autistic students, or others under some sort of similar disability.\textsuperscript{23} The court declined to address these contentions, simply taking note of the abilities and disabilities of the student as a part of the totality of the circumstances under its analysis. It is worth noting that Dockery v. Barnett, supra, relied upon by Plaintiff and Amici, did not go so far as urged by those parties. It merely pointed out that the status of the student as disabled, was one of the factors to be considered in the Court's analysis.

In doing so, the T.W. court implicitly declined to expand substantive due process as applied to these types of Section 1983 cases. In considering the "totality of the circumstances," rather than creating a special rule for disabled students, the court appeared to be suggesting that such claims are perhaps better left to be litigated in state court, where an adequate remedy is already provided. Such an analysis is not surprising in light of the fact that federal courts have been particularly wary to expand substantive due process to include torts arising out of the state public school systems. Since public education is primarily a function of the state, federal courts have given particular deference to the state court system in the realm of discipline in public schools. To illustrate this point, the Fifth Circuit in Ingraham v. Wright, 525 F.2d 909, 919 (5th

\textsuperscript{23} The brief submitted by the Atlanta Legal Aid Society, for instance, urged the Eleventh Circuit to adopt the standard set forth in Youngberg v. Romero, 457 U.S. 307 (1982) which establishes rights of involuntarily committed persons with intellectual disabilities. Youngberg held that a substantive due process claim exists “when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.” Id. at 323.
Cir. 1976), aff’d on other grounds, 430 U.S. 651 (1977), cited a passage by former United States Supreme Court Justice Abe Fortas in which he explained:

Judicial interposition in the operation of the public school systems of the nation raises problems requiring care and restraint .... By and large, public education in our nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.


In other words, it is the duty of the states, not the federal courts, to determine under what circumstances punishment is appropriate and to ascertain the level of punishment due in a corporal punishment. As discussed above, the U.S. Supreme Court relied at least in part on the traditional view of the role of corporal punishment in education, at least in many communities.

It would appear to be probably too late to urge strict adherence to the principle of deference enunciated in *Ingraham* by the Supreme Court, as evidenced by the cases discussed here. However, alteration of the constitutional standard, as requested by Plaintiff and the Amici in *T.W.*, would have allowed even the most minor offense against a disabled student to be classified as a constitutional violation. If the court altered the constitutional standard as requested by the Amici in *T.W.*, it would require courts to draw artificial lines to determine when and for whom the constitutional standard should be changed. For instance, courts would be forced to grapple with new questions while considering the appropriateness of the constitutional standard such as: Which disabilities should or should not be considered when altering the constitutional standard? For example, should a student with a specific learning disability, such as reading, but who is otherwise perfectly intelligent, be classified as "disabled" for the purposes of a Section 1983 analysis? Should the standard be altered if a child is physically disabled but mentally sound? Should the constitutional standard be altered for children who are young and vulnerable
but not disabled? If so, at what point does a child stop being vulnerable? At age eight? Nine? Ten? The result of this proposition is a sobering example of why the Eleventh Circuit and others have historically cautioned against the unnecessary expansion of substantive due process rights.

As with other cases involving autism or other mental or emotional disability, plaintiff’s damages claims in T.W. included psychological injuries. The court addressed these claims as follows:

Unlike the plaintiffs whose claims we considered in Neal, Peterson, and Kirkland, T.W. presents evidence of psychological injury. Viewed in the light most favorable to T.W., this evidence establishes that Garrett's conduct aggravated T.W.'s developmental disability, exacerbated his behavioral problems, and caused symptoms of post traumatic stress disorder. This Court has never considered whether corporal punishment that causes only psychological injuries can amount to a violation of substantive due process. We are mindful that students like T.W., who suffer from severe developmental disabilities, are particularly vulnerable to psychological harm, and that psychological injuries can be as traumatic, if not more traumatic, than physical injuries. It is clear that "[p]laintiffs have not fared well where psychological damage forms either the sole basis of or is an element of the plaintiff's substantive due process claim," Dockery v. Barnett, 167 F. Supp. 2d 597, 603 (S.D.N.Y. 2001), but we can imagine a case where an exercise of corporal punishment -- even one that causes only psychological injury -- "might be so severe that it would amount to torture equal to or greater than the stomach pumping abuse condemned in Rochin," Abeyta ex rel. Martinez v. Chama Valley Indep. Sch. Dist., 77 F.3d 1253, 1258 (10th Cir. 1996); see also Rochin v. California, 342 U.S. 165, 72 S. Ct. 205 (1952).

We need not decide whether corporal punishment that causes only psychological harm is categorically below the constitutional threshold. After considering the totality of the circumstances, including T.W.'s psychological injuries, we conclude that Garrett's conduct was not so arbitrary and egregious as to support a complaint of a violation of substantive due process. We do not condone the use of force against a vulnerable student on several occasions over a period of months, but no reasonable jury could conclude that Garrett's use of force was obviously excessive in the constitutional sense. Peterson, 504 F.3d at 1336-38; see also Brown ex rel. Brown v. Ramsey, 121 F. Supp. 2d 911, 923-25 (E.D. Va.)

Thus, the Eleventh Circuit followed Abeyta in its recognition that there could be, under some hypothetical future circumstance, some situation in which the alleged infliction of psychological injury alone could support a claim under Section 1983 against school authorities, at least in a
case involving a handicapped student. However, the rejection of plaintiff’s contentions in T.W maintains the principle that only the most extreme showing could suffice to present a submissible claim for psychological injuries. See also, Minnis v. Sumner Co. Bd. of Education, supra.

**CONCLUSION**

Cases involving children are always attractive ones from a plaintiff’s standpoint, appealing as they do to the natural sympathy of the average citizen towards children. This is especially true in instances involving students who are forced to live with a disability, be it physical, mental or emotional. The reported incidence of autism (to take but one example) has increased markedly in the United States, although there is disagreement concerning the actual etiology of this increase. This indicates that the problem faced by school officials in addressing the educational and behavioral needs of such students is likely to increase rather than decrease as time advances.

To date, courts have rejected attempts to formulate special legal principles for disabled children in Section 1983 cases in school settings. Rather, the condition of the particular student is taken into account in the court's analysis of the totality of the circumstances presented in the case. This would appear to be the proper approach, under the principles enunciated in Hall v. Tawney and its progeny. Section 1983 was conceived and enacted into law as a means to protect individuals under disability. In 1871, those individuals were freedmen and others who lived in fear for their lives because of state-tolerated violence. In today’s world, the application of

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Section 1983 in *Hall* and the other cases discussed here appear entirely adequate to vindicate the rights of disabled students in deserving cases.\(^{25}\)

Of particular concern is the possibility that attempts to enlarge the reach of 42 U.S.C. Sec. 1983 in cases involving disabled students would lead to further uncertainty in an area of the law which is already fraught with some lack of certitude. Teachers and other school personnel who deal with special education students must sometimes make virtually instantaneous decisions when confronted with student behavior which could prove disruptive or even dangerous. The Fifth Circuit has questioned the efficacy of judicial micromanagement of educational decisions in *Ingraham, supra*. Forcing educators to make decisions on pain of becoming a target defendant should not be encouraged beyond the limits discussed in the cases discussed above.

\(^{25}\) That said, the above cases make it obvious that school personnel must take painstaking care, particularly with respect to disabled students, to ensure that the "totality of the circumstances" are well-documented in school records. The IDEA statute, 20 U.S.C. § 1400 et seq., requires that an Individual Education Plan (IEP) be prepared and maintained for every student attending under a disability. Instructional and behavioral issues are among the subjects to be covered and agreed upon by schools and parents. If approached correctly, the IEP represents an excellent opportunity to gain consensus, and avoid later disputes, between parents and school authorities concerning what should and should not be done with respect to a particular student. When disputes do arise, the IEP can be an excellent record on which to demonstrate that the student was treated in accordance with accepted standards and the consensus of the parents and the school.