

No. 6:07-cv-155-Orl-28GJK

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**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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**T.W., by and through his Parent Tracy M. Wilson**

Plaintiffs-Appellants,

v.

**THE SCHOOL BOARD OF SEMINOLE COUNTY, FLORDIA, and  
KATHLEEN MARY GARRETT**

Defendants-Appellees.

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**APPEAL FROM THE U.S. DISTRICT COURT  
FROM THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION**

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**BRIEF OF AMICUS CURAE COUNCIL OF PARENT  
ATTORNEYS AND ADVOCATES, THE ATLANTA LEGAL AID  
SOCIETY, THE NATIONAL DISABILITY RIGHTS NETWORK,  
TASH, THE ALABAMA DISABILITIES ADVOCACY  
PROGRAM, THE ADVOCACY CENTER FOR PERSONS WITH  
DISABILITIES, INC.  
IN SUPPORT OF APPELLANTS SEEKING REVERSAL OF THE  
LOWER COURT'S DECISION**

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**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

T.W., by and through his parent,            )  
Tracy M. Wilson,                                )  
  )  
          Appellants,                             )  
  ) APPEAL NO.: 6:07-155-Orl-28GJK  
v.    )  
  )  
THE SCHOOL BOARD OF                        )  
SEMINOLE COUNTY, FLORIDA                )  
and KATHLEEN MARY GARRET,                )  
  )  
          Appellees.                             )

**CERTIFICATE OF INTERESTED PERSONS  
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to 11<sup>th</sup> Cir. R. 26.1-1, as this brief is filed by *amici* and is a subsequent brief filed in this proceeding, the following is list of all entities known to have an interest in the outcome of this appeal “omitted from the certificate contained in the first brief filed and in any other brief that has been filed.”

**AMICI**

Atlanta Legal Aid Society, Inc.

The Georgia Advocacy Office (GAO)

TASH

The Alabama Disabilities Advocacy Program (ADAP)

The Advocacy Center for Persons with Disabilities, Inc. (The Advocacy Center)

The Counsel of Parent Attorneys and Advocates, Inc. (COPAA)

The National Disability Rights Network (NDRN)

This 7<sup>th</sup> day of July 2009.

Certified by,

s/Craig Goodmark  
Craig Goodmark  
Attorney for *Amicus*

## TABLE OF CONTENTS

<b>TABLE OF CONTENTS</b> .....	<b>IV</b>
<b>TABLE OF CITATIONS</b> .....	<b>V</b>
<b>STATEMENT OF THE ISSUES</b> .....	<b>X</b>
<b>STATEMENT OF <i>AMICI</i></b> .....	<b>XI</b>
<b>ARGUMENT AND CITATION OF AUTHORITY</b> .....	<b>1</b>
<b>I. GARRETT’S USE OF IMPROPER AND ABUSIVE RESTRAINTS IS CONTRARY TO CURRENT EDUCATIONAL STANDARDS AND SUBJECTED A STUDENT WITH DISABILITIES TO SUBSTANTIAL RISK OF SEVERE HARM</b> .....	<b>1</b>
<b>A. GARRETT’S ACTIONS</b> .....	<b>1</b>
<b>B. CURRENT STANDARDS FOR RESTRAINTS IN SCHOOL</b> .....	<b>1</b>
<b>II. YOUNGBERG AS THE APPROPRIATE STANDARD</b> .....	<b>5</b>
<b>A. CURRENT ACCEPTED PROFESSIONAL JUDGMENT, PRACTICE, OR STANDARDS FOR MANAGING BEHAVIORS OF STUDENTS WITH DISABILITIES</b> .....	<b>8</b>
<b>B. GARRETT’S ABUSE OF RESTRAINT TECHNIQUES ON STUDENTS WITH DISABILITIES IS A SUBSTANTIAL DEPARTURE FROM ACCEPTED PROFESSIONAL JUDGMENT, PRACTICE, OR STANDARDS</b> .....	<b>17</b>
<b>CONCLUSION</b> .....	<b>18</b>
<b>CERTIFICATE OF COMPLIANCE</b> .....	<b>18</b>
<b>CERTIFICATE OF SERVICE</b> .....	<b>20</b>

## TABLE OF AUTHORITIES

### **Federal Statutes**

20 U.S.C. §1400 <i>et seq.</i> .....	10
20 U.S.C. §1414(d)(3)(B)(i)(2009).....	10

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34 C.F.R. § 300.324(a)(2)(ii)(2009).....	11
34 C.F.R. § 300.530(e)(2009).....	11
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479 F.3d 1175, 1182 (9th Cir. 2007).....11

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## STATEMENT OF THE ISSUES

- I. WHETHER GARRETT'S USE OF IMPROPER AND ABUSIVE RESTRAINTS IS CONTRARY TO CURRENT EDUCATIONAL STANDARDS AND SUBJECTED A STUDENT WITH DISABILITIES TO SUBSTANTIAL RISK OF SEVERE HARM?
  - A. WHETHER GARRETT UTILIZED CURRENT STANDARDS FOR RESTRAINTS IN SCHOOLS?
  
- II. WHETHER THE APPLICATION OF *YOUNGBERG V ROMERO* IS THE APPROPRIATE STANDARD BY WHICH TO JUDGE/MEASURE RESTRAINT SECLUSION METHODOLOGIES IN A PUBLIC SCHOOL SETTING?
  - A. WHETHER GARRETT'S ABUSE OF RESTRAINT TECHNIQUES ON A STUDENT WITH DISABILITIES IS A SUBSTANTIAL DEPARTURE FROM ACCEPTED PROFESSIONAL JUDGMENT, PRACTICE, OR STANDARDS?

## STATEMENT OF *AMICUS*

### A. The Council of Parent Attorneys and Advocates (COPAA)

COPAA is an independent, nonprofit organization of attorneys, advocates, and parents in 43 states and the District of Columbia who routinely advocate on behalf of students with disabilities in public schools throughout the country. The primary goal of COPAA is to secure appropriate educational services for children with disabilities, echoing a Congressional finding that “[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.” 20 U.S.C. § 1400(c)(1)(2004).

COPAA attorneys have participated in countless special education hearings and many cases concerning a child’s mistreatment or unfortunate abuse or neglect in the school setting. COPAA has been *Amicus curiae* in United States Supreme Court in *Forest Grove Sch. Dist. v. T.A.*, No. 08-305, 2009 LEXIS 4645 (June 22, 2009); *Board of Education of New York v. Tom F.*, 552 U.S. 1, 128 S.Ct. 1 (2007); *Arlington Central School District Board of Education v. Murphy et al.*, 548 U.S. 291 (2006); *Winkelman v. Parma City School District*, 550 U.S. 516, 127 S.Ct. 1994 (2006); and *Schaffer v. Weast*, 546 U.S. 49 (2005). In the United State Circuit Courts of Appeal, some of the cases COPAA has participated in are: *Mr.*

*and Mrs. I v. Maine School Administrative District No. 55*, 480 F.3d 1 (1st Cir. 2007); *Board of Education of Montgomery County School Board v. S.G. et al.*, 230 F.App'x 330 (4th Cir. 2007); *Alegria ex rel Alegria v. District of Columbia*, 391 F.3d 262 (D.D.C. 2004). COPAA has attorneys, advocates and parent/guardian members in this Circuit and has recently been permitted to participate as *Amicus Curiae* in *R.W. v. Ga. Dept. of Educ. et al.*, No. 08-16528-G (11<sup>th</sup> Cir. filed Oct. 4, 2007).

COPAA focuses on providing training and resources to help each child obtain the free appropriate public education (FAPE) guaranteed by the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities in Education Improvement Act (collectively, IDEA), 20 U.S.C.A. §§ 1400 *et seq.* (West 2000 & Supp. 2006). COPAA brings to this Court the unique perspective of parents and advocates for children with disabilities and their first-hand experiences with the challenges faced by such children, whose success depends on the right to secure the FAPE promised by the IDEA. One of the keys to this success is the provision of a safe education environment based upon sound research-based principals of instruction and behavioral intervention.

COPAA also has a special interest borne by the concerns of parents of children with disabilities over the use and potential abuse of restraint in public schools. In June of 2008, after study and coordination with other organizations,

COPAA adopted a “Declaration of Principles Opposing the Use of Restraints, Seclusion and Other Aversive Interventions Upon Children with Disabilities.” <http://copaa.net/news/Declaration.html>. This has coincided with increased concerns throughout the United States and just completed Congressional hearings before the United States House of Representatives House Education and Labor Committee, *Examining the Abusive and Deadly Use of Seclusion and Restraint in Schools*, May 19, 2009, <http://edlabor.house.gov/hearings/2009/05/examining-the-abusive-and-dead.shtml>, and a Report of the United States Government Accounting Office. *Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers*, <http://www.gao.gov/new.items/d09719t.pdf>.

COPAA recently surveyed its members and identified one hundred eighty-five (185) reported incidents of aversive interventions in schools. In 71% of these reported incidents the child did not have a behavioral intervention plan containing research-based positive interventions, as required by Congress in IDEIA. In 71% of these cases the parent/guardian had not consented to the use of restraint, seclusion or aversives, 16% reported that they consented but understood the use of such techniques was to be limited to emergencies and crisis situations and 13% were unable to identify whether they had been consulted and consented, despite an

IDEIA requirement of “informed consent” to the services provided. See, [http://copaa.net/pdf/UnsafeCOPAAMay\\_27\\_2009.pdf](http://copaa.net/pdf/UnsafeCOPAAMay_27_2009.pdf).

COPAA’s “Declaration of Principles” is consistent with the research and literature as to the lack of effectiveness of restraint and seclusion and the dangers it causes. COPAA urges safeguards including explicit training of all persons administering seclusion, appropriate environments for the use of such interventions, termination of aversive intervention without minimum time limits and/or after the calming of the child, and uninterrupted visual and aural observation supported by vigorous oversight and parental notice, access, and report.

B. The Atlanta Legal Aid Society (ALAS)

ALAS is a Georgia non-profit law firm that assists poor persons in the five-county Metropolitan Atlanta area with their legal problems. The ALAS TeamChild Project represents students with disabilities in public school proceedings and provides self-help assistance to students and parents seeking appropriate educational services. TeamChild’s mission is to ensure that the unmet medical, educational and mental health needs of Atlanta’s low income youth are evaluated, identified and appropriately served. TeamChild attorneys represent and otherwise assist students in school disciplinary tribunals, administrative due process hearings

at the Office of State Administrative Hearings (OSAH), and in state and federal court.

ALAS provides direct representation to students with disabilities. ALAS focuses its representation on securing a free, appropriate public education for the low income, disabled children of Atlanta. ALAS's interest in this case is to ensure that students with disabilities have a safe environment to receive their educational services. Further, ALAS has represented students with severe disabilities, including students with severe autism and intellectual disabilities that make them uniquely vulnerable to use of restraint techniques that do physical and emotional harm.

ALAS's advocates for the use of positive behavioral intervention systems and works towards the elimination of harmful and abusive restraint techniques being used in school. ALAS seeks through representation and advocacy for the development of clear professional standards for use of emergency physical restraints in school and continues to press for the elimination of force as a means to control student behavior.

### C. The National Disability Rights Network (NDRN)

National Disability Rights Network, formerly the National Association of Protection and Advocacy Systems, is the non-profit membership association of protection and advocacy (P&A) agencies that are located in all 50 States, the

District of Columbia, Puerto Rico, and the Territories. P&A agencies are authorized under various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in a variety of settings. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. NDRN supports its members through the provision of training and technical assistance, legal support, and legislative advocacy and works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination.

The P&As across the country have advocated on behalf of students and their families on education issues for over thirty years. This has been a period of unprecedented change and opportunity as the promise of a free, appropriate and public education has expanded the opportunities for full inclusion of students with disabilities. However, students with disabilities continue to face major challenges. The P&As, pursuing a range of legally-based advocacy activities, routinely represent or assist parents of children with disabilities when a child has been subjected to abuse, neglect, and other mistreatment in schools. In January 2009 NDRN released a report, "School is Not Supposed to Hurt: Investigative Report on Abusive Restraint and Seclusion in Schools," to draw attention to the increasing numbers of children with disabilities facing injury and death due to abuse and

neglect in school settings, including the use of restraint and seclusion. NDRN advocates for the elimination of abusive restraint and seclusion.

Over its 29 year history NDRN has an extensive history as *Amicus curiae*. Recent examples include participation as *Amicus curiae* before the United States Supreme Court in *Forest Grove School Dist.v. T.A.*, \_\_\_ U.S. \_\_\_, 2009, WL 1738644 (June 22, 2009); *Board of Education of New York v. Tom F.* , 552 U.S. 1 (2007); *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006); *Winkelman v. Parma City School District*, 550 U.S. 516 (2006); and *Clark v. Arizona*, 548 U.S. 735 (2006). NDRN has also participated as *Amicus curiae* in a number of federal circuit court cases including for example, *Shook v. The Bd. of Cty. Comm. of the County of El Paso*, 543 F.3d 597 (10th Cir. 2008); *Sheely v. MRI Radiology Network*, 505 F.3d 1173 (11th Cir. 2007); *Mr. I, et al., v. Maine School Admn. Dist.*, 480 F.3d 1 (1st Cir. 2006); and *OPA v. Hartford Bd. of Educ.*, 464 F.3d 229 (2nd Cir. 2006).

#### D. TASH

TASH is an international grassroots leader in advancing inclusive communities through research, education and advocacy. Founded in 1975, TASH is a volunteer-driven organization that advocates for human rights and inclusion for people with the most significant disabilities and support needs -- those most vulnerable to segregation, abuse, neglect and institutionalization. People with

disabilities, by virtue of their disability, are often unable to speak out against abuses that would not be tolerated if they were imposed on others or in more accessible or open environments. The inclusive practices validated through research have been shown to improve outcomes for all people. TASH is particularly concerned about the use of restraint and seclusion in public schools, and advocates for the prevention of the use of such practices.

E. The Alabama Disabilities Advocacy Program (ADAP)

ADAP serves as the federally mandated Protection and Advocacy agency for the state of Alabama. Under this charge, ADAP's mission is to provide quality, legally-based advocacy services to persons with disabilities through protecting, promoting, and expanding their rights. Thus, ADAP is interested in ensuring that Alabamians are free from the use of restraint and seclusion in public schools, and advocates for the prevention of the use of such practices.

F. The Advocacy Center for Persons with Disabilities, Inc. (The Advocacy Center)

The Advocacy Center is Florida's protection and advocacy system, and provides protection and advocacy for persons with developmental disabilities, mental illness and other disabilities pursuant to federal and Florida law. *See* The Protection and Advocacy for Individual Rights Act of 1986, 42 U.S.C. §§ 10801, *et seq.*; Developmental Disabilities Assistance and Bill of Rights, 42 U.S.C. §§ 15043, *et seq.*; and Florida Governor's Executive Order 08-240 (Nov. 21, 2008).

The Advocacy Center is authorized to serve persons with disabilities who receive education services in public schools and are at risk for improper physical restraints. The Advocacy Center's client base consists of all persons with disabilities receiving public education services throughout the state of Florida. The Advocacy Center is not staffed with legal counsel sufficient to provide legal representation to each individual receiving these public education services. As discussed below and in this brief, this fact makes it critical that Florida's protection and advocacy system have participation in this matter.

The Advocacy Center has direct interest in this Court's resolution of the issues presented, which relate to the improper physical restraint for children in public schools. The Advocacy Center serves children and youth with disabilities including those in public school settings and/or under the jurisdiction of local education agencies, who can come into contact with contracted or non-contracted staff, and therefore our substantial interests would be adversely affected by a district's proposed action regarding the use of improper physical restraints. In addition, improper physical restraints can result in permanent physical injuries or death; they can severely traumatize individuals and result in lasting adverse deleterious psychological effects. *Amicus* has further interest and concern that any use of improper physical restraints on children and youth by untrained educators is "shocking to the conscience" and should be eliminated from public schools.

## G. The Georgia Advocacy Office (GAO)

GAO is the designated Protection and Advocacy System for people with disabilities in the State of Georgia. GAO's mission is to work with and for oppressed and vulnerable individuals in Georgia who are labeled as disabled or mentally ill to secure their protection and advocacy. GAO is authorized by federal law to investigate the abuse, neglect and death of people with disabilities and provide advocacy services to people with disabilities who are subjected to abuse, neglect or other legal rights violations. See 42 U.S.C. § 15001 et seq. and 42 U.S.C. § 10801 et seq. GAO's federal mandate and authority extends to children with disabilities in educational settings. GAO seeks to ensure that children with disabilities in Georgia are protected from abuse and neglect in school settings, and are able to seek proper legal redress for any physical or emotional harms they experience in school settings.

## ARGUMENT AND CITATIONS OF AUTHORITY

### I. GARRETT'S USE OF IMPROPER AND ABUSIVE RESTRAINTS IS CONTRARY TO CURRENT EDUCATIONAL STANDARDS AND SUBJECTED A STUDENT WITH DISABILITIES TO SUBSTANTIAL RISK OF SEVERE HARM

#### A. GARRETT'S ACTIONS

As recounted by Appellant, Garrett's classroom management techniques included repeated use of dangerous restraint techniques and abusive physical controls on T.W. Appellant's Brief, p. 12. Garrett physically handled T.W. causing several bruises on his arms and legs. *Id.* Garrett embarrassed T.W. by tripping him as he exited from a darkened seclusion room. *Id.* Garrett "forced T.W. down to the floor so that he was laying [sic] on his stomach with Garrett straddling T.W. and Garrett's pelvic area on T.W.'s buttocks." *Id.* While employing this "prone restraint," Garrett pulled T.W.'s hands and legs behind his back until T.W. would follow the commands Garrett had given. *Id.* at 13. Garrett also pinned T.W. against a desk and pulled his arms behind his back for scratching an insect bite even after T.W. told Garrett she was hurting him. *Id.*

#### B. CURRENT STANDARDS FOR RESTRAINTS IN SCHOOL

Garrett's use of "prone" restraints on T.W. was abusive. While school restraint techniques may be used in emergency situations to control acute or

episodic aggressive behavior and ensure no harm comes to the student or others, **the abuse** of school restraint techniques serves no such purpose.

The research on restraints supports this conclusion. School restraint techniques may be employed to control acute or episodic aggressive behavior only when: (a) the student's actions pose a clear, present and imminent physical danger to himself/herself or to others; (b) less restrictive measures have not effectively de-escalated the risk of injury; (c) the restraint lasts only as long as necessary to resolve the actual risk of danger or harm; and (d) the degree of force applied does not exceed what is necessary to protect the student or other persons from imminent bodily injury. Jessica Butler, *Unsafe in the Schoolhouse: Abuse of Children with Disabilities*; The Council of Parent Attorneys and Advocates, Inc. (May 2009), [http://copaa.net/pdf/UnsafeCOPAAMay\\_27\\_2009.pdf](http://copaa.net/pdf/UnsafeCOPAAMay_27_2009.pdf). See also, The Council for Children with Behavioral Disorders, *Position Summary: The Use of Physical Restraint Procedures in School Settings*, p. 12 (May 2009), [http://www.casecec.org/pdf/seclusion/Position summary Restraint and Seclusion 5-09.pdf](http://www.casecec.org/pdf/seclusion/Position%20summary%20Restraint%20and%20Seclusion%205-09.pdf); National Association of State Mental Health Program Directors, *Six Core Strategies*© to Reduce the Use of Seclusion and Restraint in Inpatient Facilities (2005); *National Action Plan on Seclusion and Restraint*, U.S. Dept. of Health & Human Service, Substance Abuse & Mental Health Services Administration (May 2003); K.A. Huckshorn, *Re-Designing State Mental Health Policy to Prevent the*

*Use of Seclusion and Restraint*, 33 Administration and Policy in Mental Health 4 (2006).

Well recognized regulations and guidelines limit how, when and why a restraint technique may be employed. Strong and uncontested evidence exists calling for the elimination of prone restraint, identified as the most dangerous of restraint techniques. Experts caution staff to be “especially careful not to use their own bodies in a way that restricts ability to breathe, such as sitting or lying across a person’s back or stomach.” *Risks of Restraints: Understanding Restraint Related Positional Asphyxia*, Crisis Prevention Institute, Inc., at 4 (2005), <http://www.crisisprevention.com/pdf/riskofrestraints.pdf>.<sup>1</sup> As well, the use of restraints causes a person to struggle while they are unable to breathe increasing the person’s need for air and aggravating the physiological effects of the restraint. A. Morrison & D. Sadler, *Death of a Psychiatric Patient During Physical Restraint: Excited Delirium – A Case Report*, 41 *Medicine, Science, and the Law*, 46-50 (January 2001).

School based restraints used as aversive techniques to control behavior or impose negative consequences should never be used on children. *COPAA Report*, p. 10. Children should never be subjected to pain or noxious stimuli related to

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<sup>1</sup> “Simply restraining an individual prone restricts the ability to breathe, thereby lessening the supply of oxygen to meet the body’s demands.” .” Protection & Advocacy, Inc. (Investigations Unit) , *The Lethal Hazzard of Prone Restraint: Positional Asphyxiation*, (April 2002), <http://www.disabilityrightsca.org/PUBS/701801.pdf>

school based restraints. *Id.* Restraints should not be used if medically or psychologically contraindicated for a student. *Id.* Given the physical and emotional injuries inflicted by abusive restraint techniques, such limitations must exist to ensure student and educator safety.

There is no question that abusive restraints can be dangerous to both the child restrained and those using the restraints. They involve physical struggling that affects the ability to breathe. United States General Accounting Office, Report to Congressional Requesters, *Improper Restraint or Seclusion Use Places People at Risk*, GAO/HEHS-99-176 (September 1999). Further, children are particularly likely to be subjected to restraints and to die while restrained.<sup>2</sup> *Id.* at 7. Also, those employing the restraint can be severely injured. *Id.* at 9. Abuse of school restraint techniques does not ensure a safe classroom, does not further any legitimate or research-based behavior management system and has never been

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<sup>2</sup> N. Cotton, *The Developmental-Clinical Rationale for the Use of Seclusion in the Psychiatric Treatment of Children*, 59 *American Journal of Orthopsychiatry* 442, 442–50 (1989).) See also K.R. Delaney & L. Fogg, *Patient Characteristics and Setting Variables Related to Use of Restraint on Four Inpatient Psychiatric Units for Youth*, 56 *Psychiatric Services* 186, 186-92 (2005); K. Earle & S. Forquer, *Use of Seclusion with Children and Adolescents in Public Psychiatric Hospitals*, 65 *American Journal of Orthopsychiatry* 238, 238–44(1995); D. Fassler & N. Cotton, *A National Survey on the Use of Seclusion in the Psychiatric Treatment of Children*, 43 *Hospital and Community Psychiatry* 370, 370–74 (1992); M. Nunno et al., *Learning From Tragedy: A Survey of Child and Adolescent Restraint Fatalities*, 30 *Child Abuse & Neglect* 1333, 1333–42 (2006); J.B. Ryan & R.L. Peterson, *Physical Restraints in Schools* (2002) (unpublished manuscript, at the Michigan Positive Behavioral Support Network-PBS) available at <http://www.bridges4kids.org/PBS/articles/RyanPeterson2004.htm>.

recognized as serving any pedagogical purpose.<sup>3</sup> W. Mohr et al., *Adverse Effects Associated With Physical Restraint*, 48 *Canadian Journal of Psychiatry* 5 (June 2003).

## II. *YOUNGBERG* AS THE APPROPRIATE STANDARD

The District Court relied on *Neal v. Fulton County Bd. of Educ.*, 229 F.3d 1069, 1072 (11th Cir. 2000). *Neal* involved the excessive use of force in a corporal punishment case. Corporal punishment cases have traditionally been decided under Fourth Amendment grounds. See *Ingraham v. Wright*, 430 U.S. 651 (1977) (corporal punishment claims may not be based on 14th Amendment substantive due process; but rather the Fourth Amendment's overriding function ... is to protect personal privacy and dignity against unwarranted intrusion by the State.).

In 1982, the Supreme Court in *Youngberg v. Romero*, 457 U.S. 307 (1982) established rights of involuntarily committed persons with intellectual disabilities under substantive due process. It held that the liberty interests of confined individuals include, *inter alia*, "the right to personal security constitutes a 'historic

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<sup>3</sup> Restraint and seclusion are not effective means to calm or teach children but tend to have the opposite effect, producing anxiety, fear, and a decreased ability to learn. Wanda K. Mohr & Jeffrey A. Anderson, *Journal of Child and Adolescent Psychiatric Nursing*, p. 330 (Jul-Sep 2001). Reports that physical restraints are effective in any manner are based on anecdotal evidence and subjective case reports. D. Day, *Examining the Therapeutic Utility of Restraints and Seclusion with Children and Youth: The Role of Theory and Research in Practice*, 72 *American Journal of Orthopsychiatry* 266-278 (2002).

liberty interest' protected substantively by the Due Process Clause.” Id. at 315. The Court 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.

Since 1982, *Youngberg* has been widely held to apply to all situations where people are confined to a variety of institutions and a wide variety of factual scenarios. See, e.g. *Kyle K. v. Chapman*, 208 F.3d 940, 942 (11th Cir. 2000)(failure to properly treat a child with autism’s self-abusive behavior); *Dolihite v. Maughnon*, 74 F.3rd 1027 (11th Cir. 1996)(failure to prevent adolescent’s suicide attempt at a mental health facility); *Spivey v. Elliott*, 29 F.3d 1522 (11th Cir. 1994)(applies to children confined to a school for children with hearing impairments); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir.1987) (applies to children in foster care system),

In 1996, the Eight Circuit, apparently in a case of first impression, held that *Youngberg* applies to determine whether a child in special education substantive due process rights was violated. *Heidemann v. Rother*, 84 F.3rd 1021, 1029 (8th Cir. 1996). Relying in part on *Heidemann*, a district court in Connecticut agrees. *M.H. v. Bristol Bd. of Educ.*, 169 F. Supp. 21, 31 (D. Conn. 2001)

A percentage of students will at times present extreme behaviors that may not respond to traditional means of discipline or classroom reinforcement. However, schools have the responsibility to respond with strategies that rely on research-based evidence and not with interventions that are harmful and inappropriate nor inconsistent with professional judgment. Schools are charged with the responsibility for maintaining order, providing a healthy school culture, and a safe environment for students to receive their educational services.

Healthy schools maintain a climate of physical and emotional safety and trust that is crucial to learning and child development. Restraint undermines all students' sense of safety. Restraint creates the potential for serious physical or psychological injury to students at the hands of those entrusted with their well-being. As well, restraints are universally condemned by the scientific literature.<sup>4</sup>

Procedures to keep all students safe, including those with the most serious behaviors, need to be embedded in a coherent system of graduated supports and services that ensures properly administered positive behavioral interventions based on scientifically researched principles. L. Eber et. al., *Wraparound as a Tertiary Level Intervention for Students with Emotional/Behavioral Needs*, 40 *Positive Behavior Interventions & Support* 16, 16-23 (2008). To ensure the safety within those confined spaces, educators are called upon to maintain order and safety using

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<sup>4</sup> See discussion and citations, *infra*, p. 3-5.

professional judgment and accepted practices and standards. Thus, *Youngberg*, and not *Neal*, should be used to review Garrett's actions.

A. CURRENT ACCEPTED PROFESSIONAL JUDGMENT,  
PRACTICE, OR STANDARDS FOR MANAGING BEHAVIORS  
OF STUDENTS WITH DISABILITIES

Under *Youngberg*, the Court must first ascertain the current professional judgment, practice or standard for appropriate behavior management of students with disabilities in special education environments. Next, the Court will consider the conduct in question compared to such standards to determine whether the two are so divergent so as to indicate that “no professional judgment was ever exercised.” *Youngberg*, 457 U.S. at 321.

While there is little scientific investigation and no proof of the efficacy of restraint, there is, however, much evidence of their risks. D. Ferleger, *Human Services Restraint: Its Past and Future*, 46 *Intellectual And Developmental Disabilities* 154–165 (2008). The majority of professionals now view restraint as interventions of last resort for preventing harm to self or others. L. Norwood, Jean Summerfield, Marsha D. Koelliker, *The State of Restraint Utilization in the New Millennium: Practical Recommendations for Positive Intervention: Final Report of the Restraint Monitoring and Policy Project of Equip for Equality*, p.6 (2000), <http://www.equipforequality.org/publications/restraintreport.php>. In fact, not only is restraint not an effective means to calm or teach children, but its use tends to

have the opposite effect, producing anxiety, fear, and a decreased ability to learn. See, *infra*, p. 4.

Conversely, Positive Behavior Support has scientific and research based support demonstrating it to be a feasible and valued approach for improving the social climate of schools and supporting intervention programming for students with high-risk problem behavior. R. Horner & G. Sugai, *School-Wide Positive Behavior Support. Implementers' Blueprint and Self-Assessment*, University of Oregon, OSEP Center on Positive Behavior Support, (<http://www.osepideasthatwork.org/toolkit/pdf/SchoolwideBehaviorSupport.pdf>).

PBS involves the application of positive behavioral interventions and systems to achieve socially important behavior change. PBS has four interrelated components, namely, systems change activities, environmental alterations activities, skill instruction activities, and behavioral consequence activities. H.R. Turnbull *et al.*, *IDEA Requirements for Use of PBS: Guidelines for Responsible Agencies*, 3 *Journal of Positive Behavior Interventions* 11 (Winter 2001).

However, it is critical to distinguish emergency procedures from proactive programming. An effective technology of positive behavioral support must include as part of the behavioral consequence interventions specific procedures for providing support in dangerous situations. A clear distinction must be made between crisis intervention strategies for infrequent use in emergency situations

and ongoing proactive programming designed to produce substantive positive change. Crisis intervention procedures must not be allowed to turn into on-going restraint, or be used as a defense for the absence of effective programming. R. H. Horner et al., *Towards a Technology of “Nonaversive Behavioural Support,”* 15 *Research and Practice for Persons with Severe Disabilities* 125, 125-32 (1990).

Behavioral management and discipline of disabled students in public schools must not impinge on that student’s right to meaningful public education. Under IDEA, 20 U.S.C. §1400 *et seq*, schools are required to accommodate all manifestations of a student’s disabilities, including those behaviors that impact the child’s learning. *See* 20 U.S.C. §1414(d)(3)(B)(i)(2009). When a student’s behavior “impedes the child's learning or that of others,” the IEP Team must “consider the use of *positive behavioral interventions and supports*, and other strategies, to address that behavior.” 34 C.F.R. §300.324(a)(2)(ii)(2009). When eligible students violate the code of conduct and must be removed from their educational environment

[t]he LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine— (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

34 C.F.R. §300.530(e)(2009). When the behavior at issue is related to a student's disability, the student is not disciplined as non-disabled students. *Id.* In that instance, the IEP Team must

(1) Either— (i) Conduct a **functional behavioral assessment**, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a **behavioral intervention plan** for the child; or (ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

34 C.F.R. §300.530(f)(2009).

IDEA has long addressed a dark tradition of disabled students being subjected to harmful disciplinary actions by school administrators. *Honig v. Doe*, 484 U.S. 305, 323-324 (1988) (Congress intended to “strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school.”). See also, *Preschooler II v. Clark County Sch. Bd. of Trs.*, 479 F.3d 1175, 1182 (9th Cir. 2007) (noting clear constitutional prohibition of excessive physical abuse of schoolchildren and heightened protections for disabled pupils); *Stuart v. Nappi*, 443 F. Supp. 1235, 1242-1242 (D. Conn. 1978) (IDEA's predecessor statute prohibited expulsion of student for disciplinary reasons); *Cf. Shelton v. Maya Angelou Pub. Charter Sch.*,

578 F. Supp. 2d 83 (D.D.C. 2008) (child with a disability removed from his or her current placement based on a disciplinary violation must continue to receive educational services, regardless of whether the conduct is found to be a manifestation of the child's disability).

IDEA establishes the standard for professional judgment. IDEA requires that the student's educational planning team, the IEP team, determine behavior management methodology and discipline. Further, IDEA expressly identifies the use of positive behavioral supports, applied behavioral analysis and individualized behavioral modification as appropriate behavior management tools.

T.W.'s individualized educational plan, if properly implemented, could have addressed his aggressive language and self-injurious behavior through behavioral instruction outlined in his educational goals. T.W.'s disruptive behaviors should have been addressed using applied behavioral analysis, to determine their function for T.W., and based on that analysis a behavioral intervention plan should have been developed. Finally, if T.W. violated the student code of conduct, his behaviors should have been reviewed to determine whether they were manifestations of his disability and if so, T.W.'s IEP Team should have reconvened to review and modify his educational plan. These actions are required by the IDEA and nothing in the abusive use of restraint techniques employed by

Garrett even closely resembles the current accepted notions of discipline for disabled students in school.

Further, Garrett's use of "prone" restraints is contrary to current accepted professional standards for educators working with disabled students. Current accepted practices in education of students with autism do not include physically restraining students during non-emergency behavioral episodes. *See generally*, The Council for Children with Behavioral Disorders, *The Use of Physical Restraint Procedures in School Settings*, p. 10 (May 2009). Clearly, current educational practice does not support using a prone restraint on an student with autism engaging in self-injurious behavior such as scratching a bug bite. Finally, no research exists to support educators provoking students with autism into a behavioral episode and then applying a physical restraint in response to the clearly foreseen episode.

On the contrary, the national code of ethics for educators states that educators, "[s]hall make reasonable effort to protect the student from conditions harmful to learning or to health and safety." *National Education Association, Code of Ethics* <http://www.nea.org/home/30442.htm>. The Code also requires that educators not, "intentionally expose the student to embarrassment or disparagement." *Id.* Garrett's actions not only exposed T.W. to harm, but actually served to create the dangerous situation by which the harm existed. As well,

Garrett's restraints were not only unsafe but they were humiliating and the cause of significant emotional distress and educational regression for T.W. Appellant's Brief, p. 25-27.

Further, the current accepted method of behavior modification and management is the use of positive behavioral intervention systems (PBIS). U.S. Department of Education, Office of Special Education Programs, *Positive Behavioral Interventions and Supports: Effective Schoolwide Interventions* <http://www.pbis.org/>. Nationally, educators have recognized that inappropriate restraints and abusive restraint techniques serve no legitimate pedagogical purpose. On the contrary, when seeking to modify behavior, current scientific research and empirical data support the use of applied behavioral analysis and positive behavioral interventions. Applied in the classroom, educators collect data on "target behaviors" that they are seeking to modify or eliminate. Once the data is collected and analyzed, educators provide both behavioral instruction to the student, essentially teaching the student the appropriate behavior, and then use positive behavioral interventions to reinforce the student's use of the appropriate behavior. The use of PBIS works on the individual level, school level and most effectively when entire school systems re-focus behavioral intervention from negative to positive.

This shift in educational philosophy recognizes that negative consequences, including using non-emergency restraints, expose students to greater risk than benefit. Recently, the United States Government Accountability Office presented testimony before the House of Representatives Committee on Education and Labor regarding the use of seclusion and restraints in public and private schools. *Testimony Before the House Committee on Education and Labor*, U.S. Government Accountability Office, May 2009. The Report first provided an overview of federal and state laws related to the use of restraints and seclusions in public and private schools. The report then sought to verify whether allegations of student death and abuse from the use of these techniques were widespread, and finally accumulated facts and circumstances surrounding selected cases where restraint resulted in abuse or death of a student.

In examining cases nationwide, the report focused on ten cases that illustrated recurring themes that (1) children with disabilities, like T.W., were sometimes restrained even when they did not appear to be physically aggressive and their parent did not give consent, (2) facedown or other restraints, like those employed by Garrett, block air to the lungs and can be deadly; and (3) teachers and staff are untrained in the proper use of restraint and these same teachers retain their employment following the incidents of abuse. *Id.* at p. 7. The GAO Testimony confirms the existence of the alarming improper use of restraint techniques in

public schools. The majority of the GAO testimony recounts numerous case studies of students subjected to abusive restraint techniques by public school employees. *Id.*

Similarly, the NDRN published a voluminous report of abusive restraint incidents in schools. *See generally*, National Disability Rights Network, *School is Not Supposed to Hurt: Investigative Report on Abusive Restraint and Seclusion in Schools*, (January 2009) (“NDRN Report”). The NDRN Report identified that the *Joint Commission on Accreditation of Healthcare Organizations* has stated that the “use of restraint or seclusion poses an inherent risk to the physical safety and psychological well being of the [individual being restrained] and the staff.” *Id.* at 8 (citing 2006-07 *Standards for Behavioral Health Care*, Joint Commission on Accreditation of Healthcare Organizations (“Joint Commission”)). As well, *Amicus* have compiled almost two hundred incidents where students have been subjected to restraints, seclusion, and the use of aversives. Jessica Butler, *Unsafe In the Schoolhouse: Abuse of Children with Disabilities*, Council of Parent Attorneys and Advocates, Inc., May 2009 [http://copaa.net/pdf/UnsafeCOPAAMay\\_27\\_2009.pdf](http://copaa.net/pdf/UnsafeCOPAAMay_27_2009.pdf).

These reports recognize that without proper regulatory guidance school employees have used restraint techniques unnecessarily and without regard for

student's educational, emotional or physical well-being.<sup>5</sup> Currently, over half of the U.S. states have passed laws or promulgated regulatory materials regarding the proper use of restraints in school. *Id.*<sup>6</sup>

B. GARRETT'S ABUSE OF RESTRAINT TECHNIQUES ON STUDENTS WITH DISABILITIES IS A SUBSTANTIAL DEPARTURE FROM ACCEPTED PROFESSIONAL JUDGMENT, PRACTICE, OR STANDARDS

As explained above, abuse of restraint techniques is widely understood as dangerous and harmful. Further, such actions do not comport with federal laws contemplation of appropriate behavior modification or accepted practices when disciplining students with disabilities. Restraints in school setting are for emergency purposes and according to current pedagogical standards only to be used when all lesser invasive and restrictive measures have been exhausted. See, *infra*, p. 2.

Garrett's repeated restraints on T.W. cannot be justified by any data, methodology or professionals standards currently employed by modern educators. Her actions were not discipline as they violated IDEA's requirements to provide

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<sup>5</sup> See GAO Report, Appendix I, p. 33-58.

<sup>6</sup> See generally, Connecticut, C.G.S.A. § 46a-152; Illinois, 23 IL ADC 1.285(d),(h)(2); Maine, ME ADC 05-071 ch. 33 § 4; Massachusetts, 603 CMR 46.04, Michigan, [http://www.michigan.gov/documents/mde/Seclusion\\_and\\_Restraint\\_Standards\\_180715\\_7.pdf](http://www.michigan.gov/documents/mde/Seclusion_and_Restraint_Standards_180715_7.pdf); Kansas, <http://www.ksde.org/Default.aspx?tabid=3119>; Minnesota, <http://cfl.state.mn.us/mdeprod/groups/Compliance/documents/Manual/002438.pdf>; New Hampshire, <http://www.ldanh.org/docs/nhdoePhysicalRestraintDocument%5B1%5D.pdf>; North Dakota, [http://www.dpi.state.nd.us/speced/guide/ED\\_doc3\\_7\\_07\\_1.pdf](http://www.dpi.state.nd.us/speced/guide/ED_doc3_7_07_1.pdf)

procedural protections to ensure students whose behaviors were manifestations of their disabilities were not punished for those acts. Garrett's actions are not behavior modification or intervention as they failed to adhere to the accepted practice of using applied behavioral analysis and positive behavioral support. Garrett's abuse of restraint techniques was a negative consequence of T.W.'s exhibiting behaviors clearly related to his disability. Garrett's conduct did not attempt to redirect T.W. by reinforcing appropriate behavior. Garrett applied brute force and humiliation as a negative consequence of T.W.'s target behaviors. Finally, Garrett's conduct diverged so far from any acceptable educational practice or judgment that they should be deemed illegal.

### **CONCLUSION**

For the foregoing reasons, *Amici* urge this Court to reverse the lower court's decision and remand the case to the District Court for a trial on the merits.

### **CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 5,997 words (based on the Microsoft Word word processing word count function), excluding the parts of the brief exempted by Fed.R.App.P.

32(a)(7)(B)(iii) and was produced in Times New Roman (a proportionally-spaced typeface), 14-point type.

**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

T.W., by and through his parent,	)	
Tracy M. Wilson,	)	
	)	
Appellants,	)	
	)	APPEAL NO.: 6:07-155-Orl-28GJK
v.	)	
	)	
THE SCHOOL BOARD OF	)	
SEMINOLE COUNTY, FLORIDA	)	
and KATHLEEN MARY GARRET,	)	
	)	
Appellees.	)	

**CERTIFICATE OF SERVICE**

This is to certify that I have this day served a copy of the foregoing **Brief of *Amicus Curiae*** by depositing the same documents in the U.S. mail, addressed properly with adequate postage to counsel as follows:

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