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Protecting the Legal Interests of Children When Shocking, Restraining, and Secluding Are the Means to and Educational End

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NOTES

PROTECTING THE LEGAL INTERESTS OF CHILDREN WHEN SHOCKING, RESTRAINING, AND SECLUDING ARE THE MEANS TO AN EDUCATIONAL END

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INTRODUCTION

The quality of the education received by students with disabilities has improved steadily over the past forty years. This is no doubt the product of a growing body of research in cognitive and educational psychology. It is also the product of a commitment by Congress to ensure that students with disabilities have access to a free, appropriate public education.[1] While the law has generally protected the interests and the rights of students with disabilities, it does not adequately protect the interests of students who receive aversive therapies in the educational setting.

Students who are diagnosed with profound mental retardation,[2] autism, or emotional disturbances are potential candidates for aversive therapy.[3] Aversives include application of painful stimuli, including slapping, pinching, and electric shock; forced inhalation of painful or noxious sprays; food

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[1] *See* 20 U.S.C. § 1412(a)(1)(A) (2000 & Supp. IV 2004).

[2] Children diagnosed with profound mental retardation have an IQ of below 20 or 25, along with deficiencies in adaptive behavior; for example, communication skills, interpersonal skills, or awareness of health and safety. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR 42–46 (4th ed., text rev. 2000).

[3] *See* Patricia A. Amos, *New Considerations in the Prevention of Aversives, Restraint, and Seclusion: Incorporating the Role of Relationships into an Ecological Perspective*, 29 RES. & PRAC. FOR PERSONS WITH SEVERE DISABILITIES 263, 265 (2004).

deprivation; physical restraint by mechanical device or otherwise; and confinement in a "time-out room."[4] It is perhaps unsurprising that these methods have generated significant controversy in the special education community. Opponents of the use of aversive treatments argue that the use of aversives and restraints produces dehumanizing outcomes and leads to segregation of students from their peers and their communities.[5] Many educators and scholars feel that these techniques are akin to child abuse[6] and point to cases involving injuries and death suffered from the use of restraints.[7] However controversial, proponents of the use of aversives—and often the parents of the children receiving the therapy[8]—point to great success in changing and eliminating a wide range of behaviors, which results from their use.[9] Particularly, the use of mild electric

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[4] *See* N.Y. STATE EDUC. DEP'T, SUMMARY OF MAJOR REVISIONS TO THE REGULATIONS ON BEHAVIORAL INTERVENTIONS 1–2 (2006), *available at* http://www.vesid.nysed.gov/specialed/behavioral/summary1106.pdf; *see also* Amos, *supra* note 3.

[5] *See* APRAIS: The Alliance to Prevent Restraint, Aversive Interventions and Seclusion, http://aprais.tash.org (last visited Mar. 24, 2009).

[6] *See* Susan Jacob-Timm, *Ethical and Legal Issues Associated with the Use of Aversives in the Public Schools: The SIBIS Controversy*, 25 SCH. PSYCHOL. REV. 184, 192 (1996).

[7] *See* Joseph B. Ryan & Reece L. Peterson, *Physical Restraint in School*, 29 BEHAV. DISORDERS 154, 154 (2004). It is difficult to ascertain an exact figure for restraint related deaths in the United States; however, eight to ten per year is a conservative figure. *See id*; *see also* Coalition Against Institutionalized Child Abuse, Deaths in Facilities, http://www.caica.org/RESTRAINTS%20Death%20List.htm (last visited Feb. 22, 2009) (compiling stories of people with developmental disabilities who have been killed in incidents involving aversives and restraints); *infra* notes 48–52 and accompanying text.

[8] *See* Jennifer Sinco Kelleher, *Judge Backs Shock Treatment*, NEWSDAY (Melville, N.Y.), Sept. 9, 2006, at A13; *Parents Battle for Right To Shock Son with Autism*, AUGUSTA CHRON., Mar. 15, 2007, at A06; Editorial, *To Shock or Not To Shock*, CHI. TRIB., Mar. 19, 2007, at 16.

[9] *See generally* Judge Rotenberg Center: Letters from Parents of JRC Students, http://www.judgerc.org (follow "Papers and Documents" tab on top of page; then follow "Letters from Parents" hyperlink under "Comments from Parents") (last visited Mar. 24, 2009). *But see* Thomas R. Linscheid, *Are Aversive Procedures Durable? A Five-Year Follow-Up of Three Individuals Treated with Contingent Electrical Shock*, 2 CHILD & ADOLESCENT MENTAL HEALTH CARE 67, 75 (1993) (noting that little research exists on the long-term effectiveness of the treatment). The Judge Rotenberg Center is a residential facility that employs the use of aversives and has been the source of scrutiny by both state agencies and by the media. *See* Letter from James P. DeLorenzo, N.Y. State Educ. Dep't, to Matthew L. Israel, Ph.D., (June 12, 2006) (detailing health and safety concerns at the Rotenberg Center). *See generally* Jennifer Gonnerman, *School of Shock: Eight States Are*

shock therapy has, in some cases, proven successful in dramatically reducing the rate of life-threatening, self-injurious behavior ("SIB").[10] The use of these techniques has captured even the general public's interest and is frequently the topic of newspaper articles that question the necessity of the treatments.[11]

Disputes often occur between parents and school districts regarding the necessity of aversive therapies. In some instances, the school district refuses to, or, in accordance with state statute, may not implement a system of aversives at the parent's request.[12] In other circumstances, parents seek redress from the courts because of alleged civil rights violations stemming from the use of aversives.[13]

Sending Autistic, Mentally Retarded, and Emotionally Troubled Kids to a Facility That Punishes Them with Painful Electric Shocks. How Many Times Do You Have To Zap a Child Before It's Torture?, MOTHER JONES, Sept.–Oct. 2007, at 36 (detailing history of the Rotenberg School, providing personal accounts of aversive treatments, and describing Dr. Israel as a "radical"); Jennifer Smith, *Parents File Suit vs. State over School for Disabled*, NEWSDAY (Melville, N.Y.), Nov. 6, 2006, at A14 (reporting that a mother filed suit against New York State Department of Education for allowing her child and others to be placed in the Rotenberg School).

[10] Thomas R. Linscheid & Heidi Reichenbach, *Multiple Factors in the Long-Term Effectiveness of Contingent Electric Shock Treatment for Self-Injurious Behavior: A Case Example*, 23 RES. DEVELOPMENTAL DISABILITIES 161, 161–62 (2002). SIB is a disorder that causes a person to engage in repetitive behaviors that result in physical harm. *See* Jacob-Timm, *supra* note 6, at 185. The term specifically excludes "deliberate acts of self-harm observed among individuals with emotional disturbance such as suicidal gestures." *See id.* at 188. In one case, a child's SIB was so extreme that he "spent the majority of his time in physical restraint." *See* Linscheid & Reichenbach, *supra*, at 163. The use of automated electric shock therapy reduced the number of times the student hit his head from approximately one-hundred per minute to nearly zero. *See id.* at 168–69.

[11] *See, e.g.*, *Parents Battle for Right To Shock Son with Autism*, *supra* note 8; Editorial, *supra* note 8.

[12] *E.g.*, Phelan v. Bell, 8 F.3d 369, 371 (6th Cir. 1993) (noting that school district refused to allow student to wear a device that would deliver electric shock to inhibit child's SIB); Maniscalco *ex rel.* Rebelo v. Salinas Union High Sch. Dist., No. C-95-20314-JW, 1996 WL 266153, at *1 (N.D. Cal. May 15, 1996) (noting that school district failed to allow plaintiff the use of a SIBIS device as part of plaintiff's educational program). In some states, the use of aversive therapies is prohibited by statute. *See infra* note 143.

[13] *See, e.g.*, Joseph M. *ex rel.* B.M. v. Ne. Educ. Intermediate Unit 19, 516 F. Supp. 2d 424, 431, 435, 441 (M.D. Pa. 2007) (parents brought suit claiming, among other things, that their minor son's rights had been violated under 42 U.S.C. § 1983 when teacher's assistant employed various aversive techniques); M.H. v. Bristol Bd. of Educ., No. 3:98-CV-867 AVC, 2002 WL 33802431, at *1 (D. Conn. Jan. 9, 2002) (parents brought suit on behalf of child claiming that child's due process rights and rights under 42 U.S.C. § 1983 had been violated when he was restrained to a chair

What is clear from the controversies that arrive in the court system is that essential rights of the child are at stake—notably, the child's right to a free and appropriate public education.[14] What is overlooked, however, is the possibility that the child's and his parent's rights can become so distinct that they become separate from and perhaps hostile to each other. Both the parents of the child and the school districts weigh in—often in conflict—about what the most appropriate education plan is for the child. However, the current procedural framework does not adequately consider the child's interests. This is especially troublesome given the surprising prospect that many parents later report that they felt manipulated and coerced into allowing their children to receive aversive therapy.[15]

The law governing the use of aversives in the educational setting is the Individuals with Disabilities Education Act[16] ("IDEA"), which mandates that all children classified with disabilities have access to a free, appropriate public education.[17] The IDEA provides the process by which a student would receive aversive therapies for educational purposes. Within this framework, however, a child could too easily be subject to unnecessary aversives while another could be denied aversive therapies that he or she truly needs. To that end, the IDEA needs to be amended to deal more carefully with this particular class of cases. The severity of the consequences of receiving or being denied aversive therapy, coupled with the wide range of emotions that parents experience while shaping their child's future, compels the conclusion that the child should be afforded a high degree of procedural safeguards.

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while a teacher spat water on him); *cf. In re* Kauffman, 604 N.E.2d 1285, 1286 (Mass. 1992) (denying on procedural grounds request for habeas corpus relief for two wards at the Rotenberg Center who claimed that they were being " 'illegally and unlawfully restrained of [their] liberty' ").

[14] Controversies arrive in either state or federal court after a multi-layered administrative process. *See generally infra* notes 71–113 and accompanying text (detailing process).

[15] *See* Amos, *supra* note 3.

[16] *See* Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482 (2000 & Supp. IV 2004). The Act was reauthorized in 2004 as the "Individuals with Disabilities Education Improvement Act." *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647, 2647. For purposes of consistency with many legal and educational scholars, this Note will use the IDEA nomenclature.

[17] *See* 20 U.S.C. § 1412(a)(1)(A).

Part I of this Note will explore the use of three of the most severe aversive therapies in the educational setting and the ongoing debate in the educational and psychological communities about their effectiveness. Part II will introduce the legal issues raised by the use of aversives and demonstrate instances in which children have compelling, and often separate, superior legal interests from their parents. Part III suggests that Congress amend the IDEA to ensure that when aversive therapies are proposed for a child's education plan, there is judicial supervision on that limited question, a guardian ad litem is appointed for the child, and the court considers the necessity of the therapies according to the "best interest of the child" standard.

I THE USE AND THE PREVALENCE OF AVERSIVES IN PUBLIC SCHOOLS

A. *Restraint and Seclusion*

"The therapeutic benefit to children of restraints and seclusion remains one of the most contentious issues in the literature."[18] The term restraint, as used in behavior management, is one of any number of interventions which "restrict[] freedom of movement or normal access to one's body."[19] The three common types of restraints employed with children are physical, mechanical, and chemical.[20] Physical restraints involve one or more staff members exerting physical force upon the child to restrict his or her movement.[21] Mechanical restraints employ devices such as body jackets and leather or cloth straps as means to accomplish the same end.[22] The term "chemical restraint" is

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[18] David M. Day, *Examining the Therapeutic Utility of Restraints and Seclusion with Children and Youth: The Role of Theory and Research in Practice*, 72 AM. J. ORTHOPSYCHIATRY 266, 269 (2002).

[19] Sheila S. Kennedy & Wanda K. Mohr, *A Prolegomenon on Restraint of Children: Implicating Constitutional Rights*, 71 AM. J. ORTHOPSYCHIATRY 26, 27 (2001).

[20] Day, *supra* note 18, at 266.

[21] *Id.*

[22] *Id.* Other devices include cuffs and belts, papoose boards, five-point restraints (to restrain a child to a bed), and devices to restrain a child in a chair. *Id.*

used to describe the use of medications to sedate children and is not typically used in the school setting.[23]

Proponents of the use of restraint argue that it is an important tool in ensuring the safety of the student as well as of the other children when he or she is exhibiting aggressive behavior.[24] Some studies indicate that the use of restraint encourages children to develop coping skills and self-control.[25] Still others suggest that its use encourages students to verbalize their feelings because of the physical bond created between the student and the caretaker.[26]

The use of a "time-out" as an aversive behavioral management technique is employed by more than seventy percent of teachers of students with behavioral or emotional disorders.[27] While the definition of a time-out may differ between behavioral psychologists and educators,[28] the primary goal—reducing inappropriate student behavior by removing them from reinforcing environments—is consistent.[29]

Time-outs are typically categorized as exclusionary or non-exclusionary.[30] Exclusionary time-outs involve the removal of the student from the educational setting for a period of time when he

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[23] *See* Ryan & Peterson, *supra* note 7, at 155. As chemical restraint is not typically used in the school setting, it is beyond the scope of this Note.

[24] *See* Kennedy & Mohr, *supra* note 19.

[25] Michael A. Nunno et al., *Learning from Tragedy: A Survey of Child and Adolescent Restraint Fatalities*, 30 CHILD ABUSE & NEGLECT 1333, 1334 (reviewing literature).

[26] *Id.*; Day, *supra* note 18, at 271. Those who proffer this argument contend that there are two phases of a restraint procedure. During the first phase—the resistance phase—the child rejects the caretaker and struggles. During the second phase—the resolution phase—the child, bonded with the caretaker by his or her physical contact and "intense closeness," will be more willing to disclose his or her feelings. *See id.*

[27] Janice A. Grskovic et al., *Reducing Time-Out Assignments for Students with Emotional/Behavioral Disorders in a Self-Contained Classroom*, 13 J. BEHAV. EDUC. 25, 25 (2004). The statistic presented by the authors of this study does not indicate the relative number of teachers that employ non-exclusionary time-outs versus exclusionary time-outs. *See infra* notes 30–33 and accompanying text.

[28] *See* Joseph B. Ryan et al., *Using Time-Out Effectively in the Classroom*, TEACHING EXCEPTIONAL CHILD., Mar./Apr. 2007, at 60, 60. Behavioralists would characterize a time-out as a denial of the student's access to a reinforcing environment. Educators characterize the time-out interval as a period for calming down or cooling off. *Id.*

[29] *See id.*

[30] Grskovic et al., *supra* note 27, at 26.

or she exhibits a particular behavior.[31] A non-exclusionary time-out, on the other hand, involves the removal of a positive reinforcement while the student remains in the educational setting.[32] The student, therefore, continues to observe the classroom instruction but may not participate in the classroom activities.[33]

Seclusion is a specific type of exclusionary time-out which involves the isolation of a student to a "room or space from which he or she cannot escape."[34] The student remains in the time-out room until a certain period of time has elapsed.[35] Some proponents of the use of seclusion posit that it is generally therapeutic and may teach children coping skills and self-control.[36] Other studies suggest that children are cognizant as to why they are being secluded and may gain more control of their own behavior.[37]

While advocates of both restraint and seclusion time-outs announce therapeutic and safety benefits, many scholars are sharply critical of the practice. Most qualitative research on the subject espouses the need for more empirical studies.[38] Studies of the use of restraints on children with disabilities have been conducted almost exclusively in residential hospital settings.[39] While the use of physical and mechanical restraint has become more prevalent in the educational setting,[40] there are scant

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[31] *See id.* For example, a student who is showing aggressive behavior that is causing a disturbance in the classroom might be removed from the room for a period of time.

[32] *Id.*

[33] Ryan et al., *supra* note 28, at 61.

[34] Amos, *supra* note 3. The author argues that seclusion is a form of restraint especially in its frequent combination with chemical restraints. *See id.* Some scholars do not consider seclusion a form of a time-out. *See* Day, *supra* note 18, at 271. Time-outs are not effective when they are perceived as a punishment by the child and some psychologists have stated that the very theoretical basis for seclusion is punishment. *Id.*

[35] Ryan et al., *supra* note 28, at 62.

[36] Day, *supra* note 18, at 267.

[37] *See id.* at 272–73. However, peer review of these studies has led to widespread criticism. *See id.* at 273.

[38] *See id.* at 274 (suggesting that more research be completed to study the short- and long-term effects of seclusion and restraint); Kennedy & Mohr, *supra* note 19, at 28 (reviewing the literature).

[39] *See* Ryan & Peterson, *supra* note 7, at 156.

[40] *Id.*

recent studies on the use of restraint in schools.[41] This lack of research has led many scholars to be even more cautious of employing seclusion as a behavior intervention.

What little research has been conducted, skeptics argue, has demonstrated that there is little or no therapeutic benefit derived from restraint and seclusion.[42] Some warn that practitioners may become complacent with the procedures and overuse them.[43] Worse yet, some argue that caregivers will, and have, used restraint and seclusion for such dubious purposes as convenience, coercion, and retaliation.[44] Other studies suggest that children perceive the time-out rooms as a punitive measure,[45] calling into question their therapeutic benefit.[46] Even so, scholars who are generally opposed to the use of restraint and seclusion typically concede the necessity of the procedures in severe cases where all reasonable alternatives have been considered.[47]

Arguably the single most disturbing aspect of the use of restraint and seclusion is the alarmingly high number of children that are injured or killed while the techniques are being used. Forty-five children died in restraints in residential facilities between 1993 and 2003;[48] seven of these children were also in isolation.[49] More than half of the fatalities were due to some form of asphyxiation,[50] and ten children suffered a cardiac arrhythmia which led to cardiac arrest.[51] In one such instance, a twelve-year-old child asphyxiated and died during a manual restraint procedure in a residential facility after he threatened to run away.[52]

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[41] *See id.*

[42] *See* Kennedy & Mohr, *supra* note 19, at 33. Some studies have shown that the use of restraints runs directly contrary to modern psychological treatment for children with a conduct disorder. *See id.* at 31.

[43] *See* Day, *supra* note 18, at 267 (reviewing studies).

[44] Kennedy & Mohr, *supra* note 19.

[45] *See* Day, *supra* note 18, at 267 (reviewing studies).

[46] *See supra* note 42 and accompanying text.

[47] Day, *supra* note 18, at 267.

[48] Nunno et al., *supra* note 25, at 1335.

[49] *Id.* at 1336, 1338.

[50] *Id.* at 1337.

[51] *Id.* at 1336–37.

[52] Coalition Against Institutionalized Child Abuse, Jason Tallman, http://www.caica.org/NEWS%20Tallman%20Main%20Page.htm (last visited Mar. 24, 2009). The child was restrained by two attendants, face down on a pillow. *Id.*

Interestingly, though the controversy has led to many calls for widespread policy reform in medical and residential health care facilities, it has not led to similar cries in the education community.[53] Similarly, the strict guidelines for restraint seen within areas such as the medical community and in law enforcement are not found consistently in the educational setting.[54] The American Psychological Nurses Association, for example, provides standards for appropriate methods of restraint and seclusion, continuous monitoring of the patient, and a debriefing with the patient following release.[55]

B. Electric Shock

The use of electric shock in an educational setting is employed in only the most extreme cases. Electrical shock in this setting is delivered over a brief period of time to an individual area of the body.[56] Typically, the shock is delivered over a period for approximately one second to a patch of skin on one of the child's extremities.[57] The use of this type of therapy is called for in cases where the child displays inappropriate behaviors that are self-injurious,[58] stereotypical,[59] or aggressive.[60] Devices used to treat self-injurious behavior[61] typically deliver a shock automatically in response to a specific, targeted behavior.[62] Systems designed to target aggressive behaviors deliver a similar shock to a student upon the activation of the device by a teacher

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[53] *See* Amos, *supra* note 3, at 266.

[54] *See* Ryan & Peterson, *supra* note 7, at 155.

[55] *See* AM. PSYCHIATRIC NURSES ASS'N, SECLUSION AND RESTRAINT STANDARDS OF PRAC. 8–13 (rev. 2007), *available at* http://www.apna.org/files/public/APNA_SR_Standards-Final.pdf. The guidelines also include standards for training and reporting. *See id.* at 1–13.

[56] Johnny L. Matson & Debra Farrar-Schnieder, *Common Behavior Decelerators (Aversives) and Their Efficacy*, 3 CHILD & ADOLESCENT MENTAL HEALTH CARE 49, 50 (1991).

[57] *Id.* The severity of the shock has been likened to the sting of the snap of a rubber band. Jacob-Timm, *supra* note 6, at 189.

[58] Matson & Farrar-Schnieder, *supra* note 56.

[59] *Id.* Stereotypical behaviors in a severely disabled child may include behaviors such as habitual rocking. *Id.*

[60] *Id.*

[61] Self-Injurious Behavior Inhibiting Devices ("SIBIS"). Linscheid & Reichenbach, *supra* note 10, at 162.

[62] *See, e.g.*, *id.*

or a caregiver.[63] In such cases, the student wears the device and remote receiver in a backpack, and the teacher carries the transmitter,which is stored in a small, secure box with a photo of the student on the outside.[64]

Those who support the use of electrical shock as a therapeutic aversive therapy often point to its effectiveness in drastically reducing targeted behaviors in a short period of time.[65] Moreover, some positive secondary effects are often reported such as increased socialization skills.[66] Some academics indicate that the therapy ends many students' dependence on potentially injurious restraining techniques.[67] Researchers, however, point out that few studies have been conducted measuring the long-term effectiveness of the therapy.[68] Still others note the existence—albeit rare—of abuse, that is, misusing the delivery of electric shock.[69] Much of the controversy that has garnered the public's attention, though, comes from the anecdotal stories from former students and their families who come forward to report their emotional experiences during treatment.[70]

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[63] Nathan A. Blenkush, Robert E. von Heyn & Matthew L. Israel, The Effect of Contingent Skin Shock on Treated and Untreated Problem Behaviors (2007) (unpublished psychological study), http://www.judgerc.org/effectsofshock.html. The device, a Graduated Electronic Decelerator ("GED") delivers a slightly stronger shock than a typical SIBIS and lasts for two seconds. *See id.*

[64] *Id.*

[65] *See, e.g.*, Matson & Farrar-Schnieder, *supra* note 56 (case study where a student reduced self-injurious behavior to nearly zero in five days); *see also supra* note 10 and accompanying text (stating that mild shock therapy dramatically reduced the rate of life-threatening SIB in several psychology studies).

[66] Jacob-Timm, *supra* note 6, at 189.

[67] *See id.* at 187.

[68] *See* Linscheid, *supra* note 9.

[69] Peter Gerhardt et al., *Social Policy on the Use of Aversive Interventions: Empirical, Ethical, and Legal Considerations*, 3 J. AUTISM & DEVELOPMENTAL DISORDERS 265, 270 (1991).

[70] *See* Gonnerman, *supra* note 9, at 36–38. In that article, a student reported that he still had nightmares about the electrical shock therapy and often felt suicidal during the treatment. *Id.*

II. UNDERLYING LEGAL PRINCIPLES

A. *The Administrative Process Under the IDEA*

The IDEA enumerates several general categories of disabilities,[71] which would, depending on the individual student, qualify him or her for special education services.[72] The students who most often receive aversive therapies—those with autism, mental retardation, and emotional disturbances—are included within these categories.

Each child with a disability receives special education services in accordance with his or her Individualized Education Program ("IEP").[73] The IEP is the result of a collaborative process between school district personnel, the parents, and—"whenever appropriate"—the child.[74] The plan contains a statement of the child's present academic achievement[75] and defines annual goals designed to meet the child's needs and measure his progress.[76] Additionally, the IEP contains a statement of any modifications to the child's education program to accommodate his disability.[77] The modifications of the

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[71] 20 U.S.C. § 1401(3)(A)(i) (2000 & Supp. IV 2004). The enumerated categories are "mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, . . . orthopedic impairments, autism, traumatic brain injury, other health impairments or specific learning disabilities." *Id.* Presumably, it is from the necessity of matching a student with disabilities with one of the enumerated categories that the term "classified student" has emerged in educational parlance.

[72] *See id.* § 1401(3)(A)(ii). The child must be classified within one of the enumerated categories of disability and "by reason thereof, need[] special education and related services." *Id.*

[73] *See id.* § 1414(d)(1)(A)(i).

[74] *Id.* § 1414(d)(1)(B). The "IEP Team" is comprised of the child's parents, a general education teacher, a special education teacher, a representative of the local education agency, individuals with special expertise regarding the child, and the child him or herself. *Id.*

[75] *Id.* § 1414(d)(1)(A)(i)(I).

[76] *Id.* § 1414(d)(1)(A)(i)(II).

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Id. § 1412(a)(5)(A).

[77] *See id.* § 1414(d)(1)(A)(i)(IV)–(VI).

program include, among other things, any time spent outside of the regular education program and all related services provided to the student.[78]

The IEP Team must consider that, where possible, each child with special needs should be educated in a setting with children who are not disabled.[79] This comports with current educational theory that suggests that the child will benefit not only cognitively but will develop more suitable social relationships with peers.[80] Where appropriate, students attend regular classes—that is, they are "mainstreamed"—and receive ancillary services from special education teachers either in the regular class setting or for a period of time each day outside of the regular classroom.[81]

The child's plan for aversive therapies would necessarily appear on the IEP as a related service,[82] and its necessity would be determined initially by the IEP Team. The IEP is subject to review on an annual basis at minimum, but more frequently as appropriate.[83] Unless the parent provides otherwise, the IEP

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[78] These modifications might include such items as special transportation services, speech and language therapy, physical therapy, occupation therapy, and other supportive services.

[79] 20 U.S.C. § 1412(a)(5)(A).

[80] *See* Elizabeth Palley, *Challenges of Rights-Based Law: Implementing the Least Restrictive Environment Mandate*, 16 J. DISABILITY POL'Y STUD. 229, 230 (2006).

[81] Adherence to the requirement that children be placed in the so-called "least restrictive environment" has led many school districts to devise plans where students receive special services in their home district. N.Y. STATE EDUC. DEP'T, ANNUAL PERFORMANCE REPORT FOR 2005–06, at 42 (2007), http://www.vesid.nysed.gov/specialed/spp/apr2007/june07.pdf. Ninety-three percent of students in New York receive special education services concurrently with time spent in a general education classroom. *See id.* The majority of New York's special education students are removed from their general education classes for services less than twenty-one percent of total school time per day. *See id.* These services include, among others, speech and language therapy, reading support, physical therapy, occupational therapy, and psychological services. For many students with severe disabilities, however, this arrangement is simply not feasible. Some children, for instance, must receive educational services in a special school, in a residential school setting, or in their homes. In New York State only 6.9% of the nearly 390,000 students with disabilities were placed in settings outside of their home district. *Id.*

[82] For a discussion of the classification of aversive therapies as a related service under 20 U.S.C. § 1401, see *infra* Part III.A.

[83] 20 U.S.C. § 1414(d)(4)(A)(i).

Team would reconvene to make any amendments to the child's education plan.[84]

The local educational agency[85] is responsible for providing each child classified with a disability with services that meet the standard of a "free appropriate public education."[86] The Supreme Court has held that an appropriate education "is provided when personalized educational services are provided."[87] Of great importance is that the Court has opined that the requirement of an "appropriate education" under the IDEA does not rise to the level of the best possible education for the child.[88] It determined that Congress used the term "appropriate" to recognize that there are settings that are "not suitable environments for the participation of some handicapped children"[89] and that "it is clear that ['appropriate' does] not mean a potential-maximizing education."[90]

It is to be expected that parents and schools would disagree as to what is "appropriate" for a child. Congress contemplated that such disputes would arise, and the plain text of the IDEA sets out an administrative framework to resolve them.[91] Parents

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[84] *Id.* § 1414(d)(3)(D), (F). A parent may, for example, provide that minor changes be made to the IEP without reconvening the IEP Team. The parent would receive the amended IEP in writing if he or she so requested. *Id.* § 1414(d)(3)(F). Such a minor revision could be a change that increases a student's speech services from once per week to twice per week.

[85] A local educational agency is "a public board of education or other public authority legally constituted within a State for either administrative control or direction of . . . public elementary schools or secondary schools in a city, . . . school district, or other political subdivision of a State." *Id.* § 1401(19)(A).

[86] *Id.* § 1412(a)(1)(A). The lay perception of the word "child" in the statute is refuted by its text. Persons with disabilities aged three to twenty-one are entitled to a free appropriate public education, including those who have been suspended or expelled from their school. *Id. But cf. id.* § 1412(a)(1)(B) (allowing certain limitations for incarcerated persons aged eighteen to twenty-one and individuals aged three to five and eighteen to twenty-one where application of the IDEA would be inconsistent with state law).

[87] Bd. of Educ. v. Rowley, 458 U.S. 176, 197 (1982).

[88] *See id.* at 197 n.21; *see also* Loren F. *ex rel.* Fisher v. Atlanta Indep. Sch. Sys., 349 F.3d 1309, 1312 n.1 (11th Cir. 2003); Gregory K. v. Longview Sch. Dist., 811 F.2d 1307, 1314 (9th Cir. 1987); Springdale Sch. Dist. No. 50 v. Grace, 693 F.2d 41, 43 (8th Cir. 1982); *cf.* Barnett *ex rel.* Barnett v. Fairfax County Sch. Bd., 927 F.2d 146, 154 (4th Cir. 1991) (holding that a local educational agency must balance the special needs of the child with a disability with the economic needs of the agency).

[89] *Rowley*, 458 U.S. at 197 n.21.

[90] *Id.*

[91] The "plain text" of the United States Code may be daunting for a parent who—as is often the case—attends these administrative hearings unrepresented by

are entitled to certain procedural safeguards under the IDEA if they feel that the child is not receiving a free appropriate public education.[92] Upon receipt of a complaint from the parents in respect to action taken or not taken,[93] the local education agency must respond with particularity to the subject matter of the complaint.[94] If both parties agree, they may attend mediation at the cost of the state[95] and, if they resolve the situation, execute a binding document detailing the resolution.[96] If the parties are unable to use the mediation process successfully, each retains its right to a due process hearing without delay.[97]

Mediation, though encouraged, is not mandatory, and a party who does not wish to participate may demand to move directly to a due process hearing.[98] Prior to this hearing, the parents and local education agency—along with the IEP Team—meet for the purpose of resolving the dispute.[99] This meeting, unlike the mediation process, is mandatory.[100] If at this time, the parents and the local education agency resolve the dispute, they will execute a legally binding agreement.[101] However, if the agency has not resolved the dispute to the satisfaction of the

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counsel. Where aversives are in issue, the difficulty in navigating the IDEA's framework is highly detrimental to the child, implicating the need for reform in this limited context.

[92] *See* 20 U.S.C. § 1415(a) (Supp. IV 2004). The local education agency must make a copy of the procedural safeguards available to the parents at once per year. *Id.* § 1415(d)(1)(A). Additionally, local education agencies that maintain websites may make a copy of the procedural safeguards available via the Internet. *Id.* § 1415(d)(1)(B).

[93] *See id.* § 1415(b)(6).

[94] *See id.* § 1415(c)(2)(B)(i)(I). This response is not necessary where the agency has previously sent written notice to the parents regarding the subject matter of their complaint. *Id.*

[95] *Id.* § 1415(e)(2)(D).

[96] *Id.* § 1415(e)(2)(F).

[97] *Id.* § 1415(e)(2)(A)(ii). The use of mediation is greatly encouraged by the IDEA. Procedures must be in place by the state or local education agency to allow parents to meet with disinterested parties to "encourage the use, and explain the benefits, of the mediation process." *Id.* § 1415(e)(2)(B)(ii). If parties ultimately agree to attend a mediation session, their discussions are kept confidential and may not be used as evidence in subsequent due process hearings or in civil actions. *Id.* § 1415(e)(2)(G).

[98] *Id.* § 1415(f)(1)(A).

[99] *Id.* § 1415(f)(1)(B)(i).

[100] *Id.*

[101] *Id.* § 1415(f)(1)(B)(iii). Either party may void the settlement agreement within three business days. *Id.* § 1415(f)(1)(B)(iv).

parents within thirty days, the due process hearing will commence.[102]

The "due process" safeguards afforded to the parties include the right to be accompanied by counsel and by others who are knowledgeable of education of students with disabilities,[103] the right to access of the student's evaluations through discovery,[104] and the right to call and cross-examine witnesses.[105] The due process hearing is presided over by an impartial hearing officer who has knowledge of the applicable law[106] and the applicable procedural standards.[107] At the close of the hearing, the officer renders a binding decision as to "whether the child received a free appropriate public education."[108]

Any party may appeal the decision of the impartial hearing officer.[109] Where the hearing was conducted by the local education agency, the party must appeal to the state education agency.[110] When all administrative avenues have been exhausted, "any party aggrieved" may file suit in a district court of the United States or in a state court of competent jurisdiction.[111] The federal courts have consistently recognized that a claim may not be brought under the IDEA until the entire administrative process has been exhausted.[112] The courts, however, have restrained their review of the administrative

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[102] *Id.* § 1415(f)(1)(B)(ii).

[103] *Id.* § 1415(h)(1).

[104] *Id.* § 1415(f)(2)(A).

[105] *Id.* § 1415(h)(2).

[106] *See id.* § 1415(f)(3)(A)(i)(II)–(ii).

[107] *Id.* § 1415(f)(3)(A)(iii).

[108] *Id.* § 1415(f)(3)(E)(i). The hearing officer must decide whether the child received a free appropriate public education on substantive grounds with few exceptions. *Id.* She may only determine that a child did not receive a free appropriate public education based on matters alleging procedural violations in limited circumstances. *See id.* § 1415(f)(1)(E)(i)–(ii).

[109] *Id.* § 1415(g)(1).

[110] *See id.*; *id.* § 1415(g)(2).

[111] *Id.* § 1415(i)(2)(A).

[112] *See, e.g.*, Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 526 (2007); Bell v. Anderson Cmty. Sch., No. 1:07-cv-00936-JDT-WTL, 2007 WL 2265067, at *8 (S.D. Ind. Aug. 6, 2007); *cf.* Mosely v. Bd. of Educ., 434 F.3d 527, 533 (7th Cir. 2006) (holding that a failure to exhaust under the IDEA is an affirmative defense and that the plaintiff need not do so to make clear its exhaustion in its pleading).

hearings by assigning significant weight to the finding of the impartial hearing officer below.[113]

B. *Clarifying the Rights Afforded by the IDEA:* Winkelman

A fundamental purpose of the IDEA is to "ensure that the rights of children with disabilities and parents of such children are protected."[114] At the forefront of the enumerated rights in the IDEA is the right to a free appropriate public education with the goal of preparing students with disabilities "for further education, employment, and independent living."[115]

The combination of the rights granted by the IDEA and the provision that "any party aggrieved" may bring a civil action has led to considerable disagreement among the courts as to whose rights are being violated and who may bring an action to enforce them. Prior to the Supreme Court's decision in *Winkelman v. Parma City School District*,[116] the circuit courts were split as to whether the rights under the IDEA inhered exclusively in the child with disabilities or in both the child and his or her parents.[117] The question turned on whether the parents' rights under the IDEA were merely procedural or whether they were also afforded substantive rights.[118] In *Winkelman*, the Court resolved the circuit split in the context of whether a parent could

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[113] *See generally* Bd. of Educ. v. Rowley, 458 U.S. 176, 204–08 (1982) (detailing legislative history of IDEA's administrative process in relation to district court review). This current deferential standard could allow aversive therapies to be implemented with too little judicial supervision. *See infra* Part III.B.

[114] 20 U.S.C. § 1400(d)(1)(B).

[115] *Id.* § 1400(d)(1)(A).

[116] 550 U.S. 516.

[117] *See id.* at 521–22 (discussing various circuits' rulings on whether only the child or both the parents and the child have the right to a free appropriate public education in the context of the parent filing suit pro se).

[118] *Compare* Cavanaugh *ex rel.* Cavanaugh v. Cardinal Local Sch. Dist., 409 F.3d 753, 757 (6th Cir. 2005) (holding that the IDEA confers on parents procedural rights, which "exist only to ensure that the child's substantive right to a [free appropriate public education] is protected and do not confer on the parents a vicarious, substantive right to a [free appropriate public education]"), *overruled by Winkelman*, 550 U.S. 516, *and* Collinsgru *ex rel.* Collinsgru v. Palmyra Bd. of Educ., 161 F.3d 225, 236 (3d Cir. 1998) (holding that Congress did not intend to create joint rights in parents and children within the context of the IDEA), *overruled by Winkelman*, 550 U.S. 516, *and* Wenger v. Canastota Cent. Sch. Dist., 146 F.3d 123, 126 (2d Cir. 1998) (per curiam) (holding that a parent is entitled to his own action under IDEA where procedural rights were violated), *with* Maroni v. Pemi-Baker Reg'l Sch. Dist., 346 F.3d 247, 253 (1st Cir. 2003) (holding that parents are "parties aggrieved" for both substantive and procedural claims under the IDEA).

proceed pro se in federal court asserting rights under the IDEA,[119] holding that the IDEA conveys rights to parents as well as to their children.[120] The Court rejected the contention that parents enjoyed only procedural rights and stated that the "IDEA does not differentiate . . . between the rights accorded to children and the rights accorded to parents."[121] Parents, therefore, may be "part[ies] aggrieved" under the provision of the IDEA that allows them to bring a civil action.[122]

The breadth of the Court's holding with respect to the rights afforded parents was criticized in Justice Scalia's dissent.[123] In fact, he described as a "startling proposition" the Court's determination that the IDEA does not differentiate between the rights afforded to children and the rights afforded to their parents.[124] He argued that "[p]arents and children are distinct legal entities under the IDEA."[125] Justice Scalia pointed to the plain text of the IDEA stating that it makes clear that the parents of a child do not have a right to the education itself and that the free appropriate public education "obviously inheres in the child."[126] He sharply criticized the Court for its failure to properly apply the language "party aggrieved"[127] and pointed out that—contrary to the Court's contention—a scheme in which the parents and their children had independent rights would not

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[119] *Winkelman*, 550 U.S. at 522. In *Winkelman*, parents brought suit under the IDEA alleging that the school district failed to provide a free appropriate public education. *Id.* at 520. The parents brought action both in the name of their child and in their own name. *Id.* at 520–21. The Court considered whether the parents, proceeding pro se, could assert their own rights under the IDEA or, alternatively, whether the parents could represent their child's interests pro se. *Id.* at 520. Finding that the parents enjoyed rights under the IDEA, the Court did not need to address the question of whether the parents could represent their child pro se. *Id.* at 535.

[120] *Id.* at 529.

[121] *Id.* at 531.

[122] *See id.* at 526.

[123] *See id.* at 535–36 (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Thomas, J.). Justice Thomas joined with Justice Scalia, concurring in the judgment in part and dissenting in part. *Id.* at 535.

[124] *Id.* at 540. He further notes that if that proposition "were so, the Court could have spared us its painful effort to craft a distinctive parental right out of scattered procedural provisions." *Id.*

[125] *Id.* at 541 (internal citations omitted). Justice Scalia pointed out that even the petitioners' amici agreed that Congress' intent was that parents and children should have independent rights under the IDEA. *See id.*

[126] *Id.* at 538.

[127] *Id.* at 542 ("Congress has used the phrase 'party aggrieved,' and it is this Court's job to apply that language, not to run from it.").

prove difficult to administer and had, in fact, been in place in a majority of jurisdictions prior to this opinion.[128]

The Court in *Winkelman* did not destroy the rights of the child in its determination that her parents have rights under the IDEA. However, its conclusion that the rights of the child and the parent are difficult to disentangle[129] does not address the possibility that children may have interests adverse to their parents in certain circumstances. Certainly, the Court's muddy model does not foreclose the argument. While parents and children may have the same right to bring a cause of action alleging a violation of a right contained in the same provision of the IDEA, their interests in that right may nevertheless be adverse to each other. The plain text of the IDEA seems to contemplate that parents and children may have disagreements as to the child's educational plan. It provides that "whenever appropriate" the child should sit as a member of his or her IEP Team,[130] the body that will analyze the child's educational progress and set goals for the upcoming year.[131] If Congress had contemplated that the parents' and the child's interest would always be identical, there would be no reason to have the child collaborate as a member of the IEP Team.

C. *Conflicts in Interests of Parents and Their Children*

There are instances in the law where the courts have recognized that a child has a separate, compelling interest in the outcome of litigation that is adverse to her parents' interest. The Supreme Court has long recognized that parents have an interest in the rearing of their children.[132] It has stated that children are protected "from their own immaturity by requiring parental consent to or involvement in important decisions by minors."[133] It is also a long held maxim that parents enjoy a liberty to direct the upbringing and the education of their children.[134]

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[128] *Id.* at 541–42.

[129] *See id.* 531–32 (majority opinion).

[130] 20 U.S.C. § 1414(d)(1)(B) (2000 & Supp. IV 2004).

[131] *See supra* notes 78–82 and accompanying text.

[132] *Winkelman*, 550 U.S. at 542 ("It is not a novel proposition to say that parents have a recognized legal interest in the education and upbringing of their child.").

[133] Bellotti v. Baird, 443 U.S. 622, 637 (1979).

[134] *See* Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534–35.

The Court, however, has also recognized that, in some instances, a child can exercise rights superior to those of her parents. Specifically, there are situations in which the rights implicated by a minor's decision are so "grave and indelible" that they warrant special consideration.[135] In respect to abortion, for example, the Court has said that "the unique nature and consequences of the . . . decision make it inappropriate 'to give a third party an absolute' " power in the decision-making process.[136] It has recognized that the minor should be able to show either that she is mature enough to make an informed decision or, even if she is not, that the decision would be in her best interest.[137] Employing similar logic, courts have recognized that minors may be able to assert superior adverse rights in immigration cases.[138] In *Polovchak v. Meese*,[139] the Seventh Circuit stated that it was the "finality of the decision and its grave and potentially irreversible consequences . . . that [made the] case analogous to" the analysis in *Baird*.[140]

In most cases, the use of—or, in some cases, the denial of—aversive therapies implicates such "grave and indelible" consequences. Proponents argue that without the therapies, the child would fail to receive potentially life-saving medical or psychological treatment.[141] Opponents point to the possible long-term psychological damage suffered by the child, the deprivation of the child's fundamental liberties, and the risk of serious physical injury or even death.[142] Here, however, the child is unlikely to be able to assert her own rights in administrative or court appearances due to either her age or due to the severity of her disability. It is therefore appropriate, if not necessary, for the IDEA to be amended to ensure that the child's rights are properly protected.

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[135] *See Baird*, 443 U.S. at 642–43. In *Baird*, the Court noted that a pregnant minor was facing a potentially severe detriment that was not mitigated by her minority. *Id.* at 642.

[136] *Id.* at 643 (quoting Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976)).

[137] *Id.* at 643–44.

[138] *See* Polovchak v. Meese, 774 F.2d 731, 737 n.10 (7th Cir. 1985).

[139] 774 F.2d 731 (7th Cir. 1985).

[140] *Id.* at 737 n.10. In that case, a seventeen-year-old immigrant was able to remain in the United States though his parents wanted him to return to the U.S.S.R. *Id.* at 738.

[141] *See supra* Part I.

[142] *See supra* Part I.

III. A PROPOSED FRAMEWORK FOR ENSURING THAT CHILDREN'S RIGHTS ARE AFFORDED DUE WEIGHT IN CASES INVOLVING AVERSIVES.

The IDEA should be amended to create a more permanent framework and to ensure uniform protection for children in need of or already receiving certain aversive therapies throughout the United States.[143] It is critical that it provide for more procedural safeguards in cases where certain aversive therapies are involved. This includes immediate judicial supervision on the limited question of whether the most severe aversive therapies are appropriate for the individual child. Moreover, it must provide that a guardian ad litem be appointed for the child to ensure that his or her interests—which due to, among other things, the possibility of restraint and restriction of movement—may be adverse to the interests of his or her parents. Finally, the court must frame the issue of whether or not the aversive therapies are appropriate based on an elevated standard, to wit, the "best interests of the child" standard.

As a threshold matter, the IDEA must define aversive therapies and provide some sort of classification system. The entire scope of aversive therapies includes a wide spectrum of techniques,[144] not all of which require the same level of judicial oversight. A simple classification system such as mild, moderate, and severe could be sufficient so long as minimum standards—both for their implementation and for training of personnel who would employ them—were enumerated in the IDEA.[145] While a complete taxonomy of aversive therapies is not within the scope of this Note, it does argue that the most severe techniques—

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[143] Several states have developed rules regarding the use of aversives in the public schools. Some allow the use of certain aversives with restrictions, *e.g.*, COLO. REV. STAT. § 27-10.5-115 (2008) (excluding all but restraint in limited emergency situations), MINN. STAT. § 121A.67 (2008); OHIO ADMIN. CODE 5122:26-163 (2008), while some states categorically exclude their use, *e.g.*, N.C. GEN. STAT. § 115C-391.1(h) (2008). New York takes a rather moderate approach by excluding the use of aversives but implementing a procedure for child-specific exceptions. BD. OF REGENTS, THE UNIV. OF THE STATE OF N.Y., SUMMARY OF AMENDMENTS TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION 4–6 (2006), http://www.vesid.nysed.gov/specialed/behavioral/interventions-606.pdf. A child would, therefore, be entitled to aversive treatment so long as a professional panel approves of the treatment. *Id.* at 5–6.

[144] *See supra* note 4 and accompanying text.

[145] An Ohio statute refers to a classification system that includes "minor" and "major" aversive therapies. *See* OHIO ADMIN. CODE 5122:26–163(B)–(C).

namely seclusion, restraint, and electrical shock—deserve immediate judicial oversight.[146]

The current process by which a child's education plan is developed, as delineated by the IDEA, is problematic when the most severe aversive therapies are in issue. The administrative process provides procedural safeguards for parties to ensure that the student receives an educational benefit. Nonetheless, these procedures fall short of effectively protecting the child who is to receive—or to be denied access to—aversive therapies. It is critically important that in this limited category of cases, that the administrative process be altered to allow prompt resolution of any questions involving aversives. Furthermore, analysis of the child's plan for aversive therapies should not turn on whether the therapies are "reasonably calculated" to provide "educational benefits";[147] rather, the relevant standard should be raised to an examination of whether the therapies are in the "best interest of the child."

A. *Aversives Are Properly Within the Purview of the IDEA Despite Their Medical Benefit*

As a threshold matter, it is interesting to consider why aversive therapies fall under the gambit of the IDEA at all. After all, the fundamental purpose of the IDEA—"to ensure that all children with disabilities have available to them a free appropriate public *education*"[148]—seems inconsistent with the current scheme of allowing an IEP team or an impartial hearing officer to order or to withhold severe aversive therapies for children. In fact, if aversive therapies were not within the reach of the IDEA, local education agencies would lose both financial

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[146] That is not to say that a program employing less severe aversive techniques would not implicate some of the same concerns. While repeated exposure to unpleasant odors may seem facially less invasive than seclusion, if a child is especially sensitive to that treatment, the long-term negative psychological effects may be as damaging as some of the more facially "severe" therapies.

[147] Bd. of Educ. v. Rowley, 458 U.S. 176, 207 (1982); *see also infra* note 165 and accompanying text.

[148] 20 U.S.C. § 1400(d)(1)(A) (2000) (emphasis added). The federal courts' analysis of legal questions arising under the IDEA often iterates this statutory principle. *See, e.g.*, Cedar Rapids Cmty. Sch. Dist. v. Garret F. *ex rel.* Charlene F., 526 U.S. 66, 68 (1999); Smith v. Indianapolis Pub. Sch., 916 F. Supp 872, 875 (S.D. Ind. 1995); Curtis K. *ex rel.* Delores K. v. Sioux City Cmty. Sch. Dist., 895 F. Supp. 1197, 1205 (N.D. Iowa 1995).

responsibility for and control over the administration of the therapies.

The question of whether the benefit received from electric shock therapy, restraint, or seclusion is "educational" rather than "medical" is not answered with a bright-line test and depends greatly on the treatment's intended use. It may be said, for example, that a child who engages in repetitious self-injurious behavior that threatens his or her health receives more of a medical benefit than an educational benefit.[149] On the other hand, a child who receives similar treatment to control explosive behaviors directed at other children may be said to be receiving more of an educational benefit than a medical benefit.[150] The extent to which the treatment is medical might lead to the erroneous conclusion that aversives do not belong within the purview of the IDEA whatsoever.

The IDEA is not silent on the use of medical services in the classroom. The definition of " 'free appropriate public education' " includes both special education and "related services"[151] that are provided in conformity with the child's IEP.[152] "Medical services" are enumerated as a related service but only "for diagnostic and evaluation purposes."[153] The Court has recognized though "that the phrase 'medical services' . . . does not embrace all forms of care that might loosely be described as 'medical' in other contexts."[154] In addition, "school health services," that is, those services that ensure that the child is able receive the free appropriate public education contained within his IEP, are included in the scope of services contemplated by the IDEA.[155] The Court, therefore, has upheld as appropriate such services as medical catheterization[156] and

[149] Obviously, if the self-injurious behavior is such that it prevents the child from participating in the educational process whatsoever, a successful implementation of SIBIS will have an educational benefit.

[150] A child in this instance might not be able to participate in an educational setting whatsoever without the use of the aversive.

[151] *See* 20 U.S.C.A. § 1401(9) (West 2008).

[152] *Id.* § 1401(9)(D).

[153] *Id.* § 1401(26)(A).

[154] Cedar Rapids Cmty. Sch. Dist. v. Garret F. *ex rel.* Charlene F., 526 U.S. 66, 74–75 (1999).

[155] *See* 34 C.F.R. § 300.34(c)(13) (2008).

[156] *See* Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 895 (1984).

one-to-one physical support for a ventilator dependent student.[157] As a result, it seems unlikely that simply classifying aversive therapies as medical services will purge them from the purview of the IDEA. To the contrary, these therapies are among those costs that the local education agency is routinely mandated to bear.

Whatever the precise classification of the benefit, to the extent aversive therapies allow the child access to a free appropriate public education, the importance of collaboration with the local educational agency is plain. The use of the IDEA as an administrative process, though, must be altered in this limited context to protect the interests of the child.

The current language of the IDEA forbids personnel of the local education agency and the state education agency to order a child to receive prescription medications as a condition to attending school or to receiving an evaluation or services under the IDEA.[158] Even an impartial hearing officer cannot order a child to take his previously prescribed medications in order for him to receive an educational benefit. Conversely, the same hearing officer—or the child's IEP Team if all parties agree—could decide whether the child should receive aversive therapies even without the consent of a physician.

If local education agencies and impartial hearing officers are barred from insisting that a child follow a medical treatment prescribed by a physician in order to have minimal access to an education plan, they should not be given the power to insist that a child receive aversive therapies to achieve the same end. This is especially problematic in the case of aversives, as there is no requirement that there be any oversight from a medical expert, there is a possibility that the treatment will be misused for

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[157] *See Cedar Rapids Cmty. Sch. Dist.*, 526 U.S. at 69, 79. The one-to-one attendant would provide services such as manually ventilating the student when the ventilator needed maintenance, suctioning his tracheotomy tube, and assisting him with bladder catheterization. *Id.* at 69 n.3 (quoting Petition for Writ of Certiorari, *Cedar Rapids Cmty. Sch. Dist.*, 526 U.S. 66 (No. 20a)).

[158] 20 U.S.C. § 1412(a)(25)(A) (2000) ("The State educational agency shall prohibit State and local educational agency personnel from requiring a child to obtain a prescription for a substance covered by the Controlled Substances Act as a condition of attending school, . . . or receiving services under this chapter." (citation omitted)).

punitive reasons,[159] and the scope of judicial review is very narrow.[160]

B. *The IDEA Must Allow Direct Judicial Control of Proposed Aversive Therapies*

The ultimate determination that a child should or should not receive aversive therapies as part of his or her education program should not rest within the power of the IEP Team or of the impartial hearing officer. Where the therapy sought is in the form of seclusion, restraint, or electric shock, the courts must have direct involvement in order to assure that aversive therapies are properly administered to students that truly need them. There is simply too much at stake to allow the child's interests to go unrepresented and for judicial oversight to be tempered by the current framework set out by the IDEA.

1. Removal from the Administrative Process

In its current form, the IDEA grants jurisdiction to the courts if a party brings a civil action in a federal district court or in a state court of competent jurisdiction only after the administrative remedies have been exhausted.[161] In such a proceeding, the court must review the record of the administrative proceedings below and is empowered to hear new evidence.[162]

While the parties are entitled to a cause of action to enforce their rights under the IDEA, the decision of the impartial hearing officer is generally afforded considerable deference.[163] The Supreme Court has instructed that in civil actions brought under the IDEA, the court must first determine whether the "[s]tate complied with the procedures set forth in the Act."[164] Second, the court must determine whether the IEP developed

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[159] *See supra* note 45 and accompanying text.

[160] *See infra* notes 163–168 and accompanying text.

[161] *See* 20 U.S.C. § 1415(i)(2)(A). *See generally supra* notes 66–108 and accompanying text.

[162] *See* 20 U.S.C. § 1415(i)(2)(C).

[163] *See generally* Bd. of Educ. v. Rowley, 458 U.S. 176, 204–08 (1982) (detailing legislative history of IDEA's administrative process in relation to district court review).

[164] *Id.* at 206.

was "reasonably calculated to enable the child to receive educational benefits."[165]

The impartial hearing officer's determinations are to be afforded "due weight" by the trial court.[166] Specifically, it may not substitute its judgment as to what is well-founded educational policy for the officer's.[167] The level of deference given to the impartial hearing officer is greater when the record indicates that his or her findings are " 'thorough and careful.' "[168]

Due to the severity of the consequences of receiving or being denied certain aversive therapies, the courts need greater supervisory control. While the limited role that the courts play within the administrative process enumerated by the IDEA may be appropriate for most situations, this is not the case where aversives are in issue. A new framework must balance the critical implications of severe aversive therapies with the judiciary's respect for the educational expertise of those involved in the administrative process. A bifurcated system where the question of aversives would be carved out of the administrative process and decided by the courts would not only respect this balance but would also allow for the remainder (and the bulk) of the child's education plan to be implemented while the issue of aversives is resolved.

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[165] *Id.* at 207. This Note argues that, in cases where aversives are in issue, this standard be elevated to consider the "best interests of the child."

[166] *Id.* at 206. Some courts apply a "modified de novo review" standard, making an independent evaluation of the record below but affording due weight to the administrative procedure below. *See, e.g.*, S.H. v. State-Operated Sch. Dist., 336 F.3d 260, 270 (3d Cir. 2003); Knable *ex rel.* Knable v. Bexley City Sch. Dist., 238 F.3d 755, 764 (6th Cir. 2001); Erickson v. Albuquerque Pub. Schs., 199 F.3d 1116, 1120 (10th Cir. 1999). At least one circuit applies a more strict standard for overturning the findings of an impartial hearing officer. *See* Dale M. *ex rel.* Alice M. v. Bd. of Educ., 237 F.3d 813, 815 (7th Cir. 2001) (holding that the district court judge "must be strongly convinced that the order is erroneous").

[167] *See Rowley*, 458 U.S. at 206 (cautioning that a district court's review "is by no means an invitation . . . to substitute [its] own notions of sound educational policy for those of the school authorities which [it] review[s]"); *see also* Briggs v. Bd. of Educ., 882 F.2d 688, 693 (2d Cir. 1989) ("Deference is owed to state and local agencies having expertise in the formulation of educational programs for the handicapped.").

[168] Doe v. Clark County Bd. of Educ., No. 02:03-CV-01500-LRH-RJJ, 2007 WL 2462615 at *2 (D. Nev. Aug. 28, 2007) (quoting Adams v. Oregon, 195 F.3d 1141, 1145 (9th Cir. 1999)); *see, e.g.*, Collins v. Bd. of Educ., 164 F. App'x 19, 21 (2d Cir. 2006).

The isolated issue of whether it is appropriate for a child to receive severe aversive therapies in the educational setting should fall solely within the purview of the courts. The question should be immediately removed to the court whenever the issue of aversives becomes ripe. The issue would ripen for judicial decision in one of two ways and, consequently, would immediately be submitted without delay to a federal district court or to a state court of competent jurisdiction.[169] One instance where a claim would be ripe is where all parties agree on the use of aversives. In such a case, the issue should be submitted when the IEP Team concludes that the student should receive aversives and seeks to add them to the child's IEP. On the other hand, where there is a disagreement, the issue would ripen and be submitted to the court when one party appeals on the issue of the appropriateness of the therapy. Given the rather small subset of the special education population for which these therapies are considered, combined with the narrow issue to be resolved, it is unlikely that the courts would become overburdened by such a process.

This removal procedure would allow the court to hear evidence presented on the issue and make a determination about the appropriateness of the plan for aversives without being hampered by a limited review process. Furthermore, the question could be resolved in a more time efficient manner, eliminating many steps in a multi-layered administrative appeals process. By removing the isolated question of aversive therapies, the IEP Team could continue to develop the child's education program and allow the child access to the educational system in accordance with the fundamental purpose of the IDEA. Additionally, a court order could provide for periodic review to ensure the continuing appropriateness of the treatment.

2. Providing a Voice for the Child

Once presented with the issue, the court must recognize that children have rights that inhere within the IDEA[170] and that these rights could potentially be adverse to those of their

[169] This would comport with the IDEA's current framework, allowing an aggrieved party to bring an action "in any State court of competent jurisdiction or in a district court of the United States." 20 U.S.C. § 1415(i)(2)(A) (2000).

[170] *See* discussion *supra* Part II.B.

parents.[171] To that end, the court must appoint a guardian ad litem to ensure that the child's separate interests are protected. While common thought may suggest that parents in almost all cases are acting with the best interests of their children in mind, this is unfortunately not the case. Parents, sadly, "do not always live up to society's ideals,"[172] and often "are simply too emotionally deprived themselves to love their children generously."[173] In the case of aversives, however, parents may indeed be well-intentioned but nonetheless fall short of acting in their child's best interests. Many parents are faced with highly emotional decisions while forming an education plan for their child that includes aversives. This, coupled with research that suggests that some parents later regret the use of the very aversive therapies that they approved as part of their children's education plan, enforces the need for a court-appointed guardian.[174]

Federal courts may appoint guardians ad litem under Rule 17(c) of the Federal Rules of Civil Procedure.[175] A judge may appoint a guardian "as it deems proper for the protection of [an] infant."[176] A guardian ad litem acts as a representative to the

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[171] *See* discussion *supra* Part II.B.

[172] Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571, 1584 (1996).

[173] *Id.*

[174] *See* Amos, *supra* note 3; *see also* Smith, *supra* note 9 (reporting that a family filed suit against facility that employed electrical shock therapy after giving permission for her son to receive the therapy). At the time of this writing, no court documents are readily available that outline any complaint or resolution of this suit.

[175] FED. R. CIV. P. 17(c). "The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action." *Id.* 17(c)(2). The terms "guardian ad litem" and "next friend" are often used interchangeably as their duties and powers as a minor's representative are identical. Dacanay v. Mendoza, 573 F.2d 1075, 1077 n.1 (9th Cir. 1978). "In precise legal parlance," however, "a minor plaintiff sues by a 'next friend,' while a minor defendant defends by a 'guardian ad litem.' " *Id.* (citing BLACK'S LAW DICTIONARY 834 (rev. 4th ed. 1968)). Rule 17(c) was amended on December 1, 2007, consistent with other changes made throughout the Rules as part of the 2007 amendments. *See* FED. R. CIV. P. 17 advisory committee's note. The amendment is intended to be stylistic only and "part of the general restyling" of the Rules "to make them more easily understood." *Id.*

[176] Roberts v. Ohio Cas. Ins. Co., 256 F.2d 35, 39 (5th Cir. 1958) (citing FED. R. CIV. P. 17(c)). In *Roberts*, the court stated that a court should usually appoint a guardian ad litem "as a matter of proper procedure." *Id.* The court noted, however, that the court may weigh all of the circumstances and issue an order that will protect the interests of the minor in lieu of appointing a guardian ad litem or,

court "to act for the minor in the cause, with authority to engage counsel, file suit and to prosecute, control and direct the litigation."[177] The courts have consistently recognized the importance of appointing a guardian ad litem when there is an apparent conflict between the interests of the minor's general representative and the interest of the minor herself.[178] The decision to appoint a guardian "rests with the sound discretion of the district court and will not be disturbed unless there has been an abuse of its authority."[179]

A guardian ad litem is not necessarily an attorney and his or her role is distinguishable from that of a person acting as an attorney.[180] The major distinguishing characteristic between a guardian ad litem and an attorney appointed for the child is that the guardian ad litem advocates for the child's best interests irrespective of the child's wishes while an attorney zealously promotes the child's expressed interests.[181] Where the child, due to infancy or—as here—legal incompetence, cannot express

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alternatively, determine that the interests of the minor are protected without a guardian. *Id.*

[177] Fong Sik Leung v. Dulles, 226 F.2d 74, 82 (9th Cir. 1955). A parent may not claim, as a matter of right, to be the guardian ad litem of a minor. *Id.*

[178] Hoffert v. Gen. Motors Corp., 656 F.2d 161, 164 (5th Cir. 1981); *see also* M.S. v. Wermers, 557 F.2d 170, 176 (8th Cir. 1977) (noting inappropriateness of appointing parents as guardians ad litem where their interests in the litigation were in direct conflict with their daughter's interests); Geddes v. Cessna Aircraft Co., 881 F. Supp. 94, 100 (E.D.N.Y. 1995) (appointing guardian ad litem where the proposed tort settlement showed a clear conflict of interest between the children and their mother); *cf. In re* Chicago, Rock Island & Pac. R.R. Co., 788 F.2d 1280, 1282 (7th Cir. 1986) (holding that guardian ad litem need not be appointed for future litigants), *rev'd sub nom. on other grounds* Maytag Corp. v. Navistar Int'l Transp. Corp., 219 F.3d 587 (7th Cir. 2000); Croce v. Bromley Corp., 623 F.2d 1084, 1093 (5th Cir. 1980) (holding that appointment of guardian ad litem was not necessary when mother was a party to the lawsuit, there was no conflict between the parties' interests, and she "vigorously pressed her child's claims").

[179] Developmental Disabilities Advocacy Ctr., Inc. v. Melton, 689 F.2d 281, 285 (1st Cir. 1982).

[180] *See* Noe v. True, 507 F.2d 9, 12 (6th Cir. 1974). In *Noe*, the court noted that a minor child seeking an abortion had legal interests adverse to her parents. *Id.* Though she was represented by counsel, the Sixth Circuit found the district court to be in error for not considering appointment of a guardian ad litem. *Id.*; *see also* McCaslin *ex rel.* McCaslin v. Radcliff, 168 F.R.D. 249, 256 (D. Neb. 1996), *aff'd sub nom.* McCaslin v. County of York, 141 F.3d 1169 (8th Cir. 1998). *See generally* Ross, *supra* note 172, at 1614–17 (detailing differences between guardians ad litem and attorneys that represent the child's interests).

[181] *See* Ross, *supra* note 172, at 1615–16.

opinions that effect the outcome of the litigation, a guardian ad litem is a more appropriate representative.[182]

The necessity of appointing a guardian ad litem for children who may receive severe aversive therapies is especially crucial in light of *Winkelman v. Parma City School District*.[183] While the Court in *Winkelman* held that parents have enforceable rights under the IDEA,[184] it did not explicitly parse these rights from the rights of the child.[185] In fact, the Court's analysis leaves the rights of the child helplessly commingled with those of the parent.[186]

The Supreme Court did not specifically address the question of whether parents could proceed with their child's claim under the IDEA pro se,[187] but *Winkelman*'s holding effectively forecloses any other conclusion. Following *Winkelman*, the lower courts have allowed parents to proceed pro se to enforce their own rights under the IDEA.[188] Some explicitly forbid the parent from pursuing their child's claim pro se;[189] however, the distinction is merely academic.[190] If the parent is pursuing a claim that her child is not receiving an "appropriate" education, the child's rights will clearly be affected by the outcome of the litigation. When the parents—well-intentioned as they may be—proceed pro se on such a claim involving aversive therapy, the necessity of a guardian ad litem is glaring.

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[182] *See* Zaro v. Strauss, 167 F.2d 218, 220 (5th Cir. 1948) (rejecting the view that Rule 17(c) did not apply to an incompetent party that was "otherwise represented" and finding error in district court's failure to appoint a guardian ad litem).

[183] 550 U.S. 516 (2007); *see* discussion *supra* Part II.B.

[184] *Winkelman*, 550 U.S. at 535.

[185] *Id.* at 530–31.

[186] *Id.*

[187] *Id.* at 535.

[188] *See, e.g.*, Grieco v. N.J. Dep't of Educ., No. 06-cv-4077(PGS), 2007 WL 1876498, at *10 (D.N.J. June 27, 2007).

[189] *See, e.g.*, L.J. *ex rel.* N.N.J. v. Broward County Sch. Bd., No. 06-61282-CIV, 2007 WL 1695333, at *2 (S.D. Fla. June 8, 2007).

[190] *See, e.g.*, *id.* (dismissing without prejudice child's claim that he was not receiving an appropriate education but allowing a pro se mother to litigate claims "for violations of her parental rights, including the right that her child receive a meaningful education"); *see also* Alexandra R. *ex rel.* Burke v. Brookline Sch. Dist., No. 06-cv-215-SM, 2007 WL 2669717 at *1 (D.N.H. Sept. 6, 2007) ("[E]ven if [the child's] parents cannot, strictly speaking, represent her in pursuing *her* IDEA claims against the School District, they may pursue their own identical claims, in their own right.").

The importance of judicial oversight and child representation has not gone unnoticed by the Judge Rotenberg Center, a Massachusetts school that provides aversive therapies for some of its students.[191] When a child is to receive electric shock therapy as an aversive behavior control therapy at that school, a multi-layered review process is employed.[192] After parental consent, the education plan is peer-reviewed and then sent to an in-house human rights committee.[193] Following in-house approval, each student's plan is approved by a Massachusetts probate court with the child's interests represented by his own appointed attorney.[194] Legislatures should take notice that schools that use aversive therapies as an educational tool have already developed safeguards to protect the children that they serve. While these efforts are commendable, they are isolated; an amendment to the IDEA would grant similar, uniform protection to all of the Nation's children who may need aversive therapies.[195]

3. The Courts Must Consider the "Best Interests of the Child"

The relevant legal standard for a judge to consider when severe aversive therapies are at issue should be more stringent than "reasonably calculated to enable the child to receive educational benefits." [196] This standard is extremely deferential to education agencies and IEP Teams and is appropriate in virtually all contexts within the IDEA. The courts should defer to the professional opinions of teachers and school personnel where the issue presented is one of placement in a particular educational setting. Similarly, psychologists and teachers are likely to be in the best position to make determinations regarding curriculum. In these typical situations, the courts deference and application of the "reasonably calculated" standard is appropriate.

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[191] *See supra* note 9 (discussing the education program at this school and the controversy surrounding it).

[192] *See* Judge Rotenberg Center, Frequently Asked Questions, http://www.judgerc.org/faqs.html (last visited Mar. 24, 2009).

[193] *Id.*

[194] *Id.*

[195] In addition to providing a layer of protection to children in the initial determination, a court could retain jurisdiction over the matter and periodically ensure the child's program.

[196] Bd. of Educ. v. Rowley, 458 U.S. 176, 177 (1982).

When the question before the court involves the application for severe aversive therapies, the courts should look outside the realm of the IDEA and related jurisprudence and instead apply the "best interest of the child" standard, which is often used in custody hearings.[197] Such a test would require a court to afford the child's interests due weight by balancing his needs against the rights of his parents. The fundamental nature of the adverse interests between parent and child created by the prospect of severe aversive therapies demand that the child's interests be afforded this level of consideration.

The very purpose of removing the issue of whether a student may receive these therapies would be undercut if the court could approve or deny a plan that met the low threshold of "reasonably calculated to give the child an educational benefit." After removal from the IDEA's administrative framework and appointment of a guardian ad litem to advocate for the child's rights, the court should naturally make a decision that is in the "best interest of the child."

CONCLUSION

The IDEA's administrative process allows some children to be denied life-saving aversive therapies while others are subjected to the therapies without warrant. These decisions are permitted to be made by a committee of teachers, the parents of the child, and school officials without any input or oversight by the courts. An error by a committee can have a dramatic, long-term impact on a child's physical and mental health.

The IDEA must be amended in order to minimize the possibility of error and protect the well-being of these particularly fragile children. A bifurcated process that removes the limited question of aversives from the current administrative process and grants it instead to the courts would add a crucial layer of protection without complicating the remainder of the

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[197] *See* 24A AM. JUR. 2D *Divorce and Separation* § 931 (2008); *see also* Elizabeth P. Miller, Note, Deboer v. Schmidt *and* Twigg v. Mays: *Does the "Best Interests of the Child" Standard Protect the Best Interests of Children?*, 20 J. CONTEMP. L. 497, 504 (1994). While the "best interests" standard is used in almost all jurisdictions, *see* AM. JUR. 2D *Divorce and Separation* § 931, its application is not uniform, *see* Miller, *supra*, at 509–10. Jurisdictions balance the best interests of the child against the rights of their parents in varying degrees, *id.* at 504; however, "[a]ll courts agree that the best interests of the child is a paramount consideration," *id.* at 519.

child's education plan. The existing administrative process could develop the bulk of the program while the court oversees the aversive therapy component.

Once the question is removed to the court, the IDEA must provide that it appoint a guardian ad litem to speak for the child. Even the most well-intentioned parent's judgment can be clouded by his or her sheer emotional involvement in the decision. Additionally, the administration of aversives very often places the parent and the child in a posture that is hostile to each other. A guardian ad litem would speak exclusively on behalf of the child and give the court a perspective divorced from the school district's financial interests and the parents' understandably tempestuous involvement in the decision.

Finally, the courts must consider the decision to administer or withhold aversive therapies in light of the "best interest of the child" standard. The current standard, to wit, "reasonably calculated to give the child educational benefits," is simply too deferential as applied to the narrow question of aversives. The bifurcated system and the appointment of a guardian ad litem would be undercut by such a standard of review. The far-reaching consequences of the determination of whether to include aversive therapies demand a more thorough analysis by the court.

The scholarly debate among educational psychologists about the risks and benefits of aversive therapies remains contentious; the legal system is not in any position to resolve it. What the courts and the legislatures must do while the debate wages on, is seal the cracks in the IDEA that many children are falling through. By enacting these procedural safeguards, legislators can ensure that students who need access to aversive therapies can receive them after an informed and calculated judicial determination.