

LEGAL ROUTES™

Your roadmap to pupil transportation law and compliance™

Volume 7, Number 3

May 2009

WHO'S IN THE DRIVER'S SEAT WHEN A STUDENT WITH A DISABILITY DOESN'T COME TO SCHOOL?

The opinion in a case decided recently by a Georgia administrative law judge (ALJ) allocates responsibility for a student's failure to come to school. *Richmond County School District*, Georgia State Educational Agency (March 10, 2009.)

THE FACTS

A 13-year old student has multiple disabilities, including autism and severe intellectual disability. He has limited communication skills, is very sensitive to noise, has difficulty making transitions, and prefers strict routines. In the fall of 2007, with a change in bus drivers compounded by a move to a new home and substitute teachers in his classroom, he began to resist getting on the school bus in the morning.

Problems persisted through the fall. Although the special education liaison interviewed transportation personnel, visited the boy in his classroom and observed his bus behavior and interactions in the afternoon, the district took no aggressive steps to end his morning resistance to the bus. His mother drove him to school until she stopped after a few months, frustrated with inaction by the school district.

THE ISSUE

The district tried to work with the boy's mother, but had some difficulties with calls and letters ("evidently the School District had not properly updated its records when [the mother] provided notification of her new address.") When the autism consultant finally made contact in January 2008, the mother refused assistance. She continued to keep her son home from school, even when, in February, the district outlined a comprehensive plan to transition him gradually to the bus. The boy did not return to school until the second week of September 2008. The Georgia Department of Education found that the district failed to provide a free, appropriate public education (FAPE) and ordered 30 hours of compensatory services (which the district exceeded.) At the time of the ALJ's opinion, the boy was attending school and making progress.

THE DECISION

The ALJ found that a portion of the boy's absences were due to the district's failure to provide FAPE. The district had reason to know that his disability prevented him from boarding the bus. For a period of time, his inability to access his education was caused by the fact that the district did not provide the necessary transportation and supportive services.

ABOUT OUR NEW LOOK

You will notice some subtle changes to the "look" of *Legal Routes*™ beginning with this month's issue. Headlines are more compact, subheads directing you to the Facts, the Issues, the Lessons are more evident to the eye, and "liftouts" have been added within the text to help emphasize a particularly important fact or point.

These changes, along with the squaring off of sidebars, offer a double advantage for our readers: there is room for more content in the report, and the information should be easier for readers to access.

We make every effort to avoid "legalese" and to provide clear, concise language. And we use a "story form" to help readers learn from significant cases. By nature, some of the cases we report on are lengthy, and we hope that the words, the format, and the cases we choose keep you engaged, involved and well informed. Your comments on how well we meet your expectations are always welcome.

Thanks for subscribing to *Legal Routes*™. We know you're committed to safe, compliant pupil transportation.

TABLE OF CONTENTS:

Head Off Legal Issues in Transporting Head Start Students	3
Lots of "Should-Have's" in TN Case	4
Medicaid Billing Still Available	5
Would You Have Been Convinced?	5
Far-Reaching Changes in ADA and Section 504 Now Effective	6
Dissent in Sexual Harassment Case	
Questions Immunity Decision.	7
Since You Asked	8
Bulletin Board.	8

Continued on page 2

LEGAL ROUTES™

is published 6 times per year by:
Legal Routes, LLC, P.O. Box 6053,
McLean VA, 22106
www.legalroutes.com
Email: myroadmap@legalroutes.com
Editor: Peggy A. Burns, Esq.
Phone: (303) 604-6142
Publisher: Roseann Schwaderer
Phone: (703) 288-4088, Fax: (703) 288-4089

Copyright © 2009 Legal Routes, LLC

Any reproduction in whole or in part without prior written authorization is prohibited.

This publication is designed to provide accurate and authoritative information in regard to the subject covered, as of the date of publication. It is sold with the understanding that the editor and publisher are not engaged as to this publication in rendering legal, accounting or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

The purpose of this publication is to educate pupil transportation officials and others interested in the area of school transportation. The editor and publisher shall have no liability to any person or entity with respect to any loss or damage alleged to be caused, directly or indirectly, by the information contained in the publication.

100% Satisfaction Guarantee

If your subscription does not deliver everything promised, *Legal Routes* guarantees a prompt and courteous refund.



Driver's Seat, continued from page 1-----

But once the district proposed an appropriate plan, his mother's refusal to send him to school was unreasonable. As a result, the district had no obligation to provide compensatory services after it offered a reasonable course of action.

THE LESSONS

In another July 2005 case involving another non-attendance issue – *District of Columbia v. Ramirez* (reported in the September 2005 issue of *Legal Routes*) – a boy's disability required an aide to get him from his apartment to school. The district did not provide that support, and the student had not attended school for two years at the time of the decision.

In both Ramirez and Richmond County, the students' disabilities prevented them from getting to the bus. When that's the case, assistance to the bus is part of FAPE.

Here's what you need to know:

- If a student cannot get to the bus stop, the IEP team needs to be involved in decision-making. Next steps should not be decided unilaterally by the transportation director.
- The IEP team should examine options including:
 - Implementation of a travel training curriculum, with assignment of appropriate personnel, and assessment of potential for success throughout the training program.
 - Assignment of an attendant even where travel training is not appropriate for this child.
 - A different transportation route and/or vehicle.
 - Provision of IEP services at home, and/or compensatory education, as necessary, so that the child can progress towards IEP goals.
- Regardless of whether the inability is disability-related:

Continued on page 3

I WANT TO SUBSCRIBE OR RENEW my subscription to *Legal Routes*™.

One year at \$122 plus one FREE issue (seven issues of 8 to 10 pages mailed every other month and your Personal Access Key to online *Legal Routes* + PLUS)

Check enclosed Please bill me. My purchase order # is _____ (Purchase order number is required if we are billing you.)

Credit Card Visa MasterCard Card # _____ Exp. Date _____

Send my subscription to: _____ Signature _____

Name _____

Organization _____ Title _____

Address _____

City _____ State _____ Zip+4 _____

Phone _____ Fax _____ e-mail _____

Legal Routes LLC, Attn: Subscription Services, P.O. Box 6053, McLean VA 22106

If you would like this order form e-mailed to you, send your request to myroadmap@legalroutes.com

Driver's Seat, continued from page 2-----

- Initiate effective communication with the child's parent about his non-attendance.
- Participate in evaluating transportation concerns: For example, does he also have trouble transitioning to the bus at the end of the school day? Are there problems with other students who ride? Is the problem related to driver-student interaction?
- Be able to show that the district – and you – have behaved reasonably.

PH

HEAD OFF LEGAL ISSUES IN TRANSPORTING HEAD START STUDENTS

Head Start programs operate under detailed regulations and program performance standards. Compliance with the regulations is an essential part of legally-defensible decision making for youngsters enrolled in grantee agencies. But, rounding the corner from compliance concerns, what aspects of safe transportation of youngsters enrolled in the programs are most likely to produce legal dilemmas?

With good training by transportation coordinators of Head Start agencies, there should be few legal challenges from violations of safe driving practices and regulatory provisions. We'll highlight some of the concerns that "live" just beyond safe driving and statutory mandates.

BE AWARE OF INDUSTRY STANDARDS

While pronouncements of the National Highway Traffic Safety Administration (NHTSA) and the American Academy of Pediatrics may not have the force of law, a court will compare *your* practices to *best practices*. Know applicable Federal Motor Vehicle Safety Standards (FMVSS's) and applicable provisions of state and federal laws pertaining to students with disabilities. Transportation PathFinder is a valuable clearinghouse of information about program transportation for Head Start and Early Head Start agencies.

Note: The easiest way to access Transportation PathFinder is to Google the words Transportation PathFinder.

RELEASE TO UNAUTHORIZED INDIVIDUALS

Under 45 Code of Federal Regulations (CFR) 1310.10 "each agency must ensure that children are only released to a parent or legal guardian, or other individual identified in writing by the parent of legal guardian" This is an area in which you simply cannot be too careful. Here are tips for preventing unauthorized release, based on numerous lawsuits.

- **Enact, follow, and enforce** a policy and procedures for identifying those individuals who are authorized to receive the child. All members of your staff – including substitutes – must be trained in all aspects of this policy. There can be no discretion afforded personnel when it comes to ensuring that the person who appears to pick up a child is the individual identified *in writing* by the parent or legal guardian. Consider the following:

- Include a form for the *written direction* from parents and legal guardians. Seek accurate information by a given date (and updated as necessary) regarding name, address and telephone numbers of authorized individuals. It would be helpful to have a photograph of each such individual on file, or at least, descriptive information.
- Train all staff members in accordance with written procedures to follow when an unfamiliar individual comes to get a child. Such training should contemplate that the child may know an unauthorized person, and seem glad to see the individual. Even then, all staff members must strictly adhere to procedures.
- **Communicate** procedures and rationale to parents and legal guardians.


PREVENTING FORESEEABLE RISKS

There's so much you know about your young charges that can tip you off to the inherent dangers of getting them from one place to another: their size, their immaturity, their dependence on adult support, their impulsivity, and, overall, their general vulnerability to harm. And you know the components of the transportation process. Put these knowledge sets together and you get the umbrella category of "foreseeable risks" that you are legally responsible to minimize, or eliminate to the greatest extent possible:

- The risk: *Children left on the bus*
 - Don't! That's not a typo; we absolutely intended this emphatic direction. Although the Head Start Regulations tuck a prohibition against leaving students behind on a vehicle into 45 CFR 1310.10, there's nothing subtle or hidden about the seriousness of violations in this arena.
 - When a staff member leaves a student behind, the situation can have numerous legal repercussions – whether or not the student is harmed, physically or otherwise. Such repercussions can include criminal proceedings for reckless child endangerment or neglect, civil lawsuits for money damages, and employment consequences.
 - Cavalier reliance on systems that "ensure" drivers do not leave students at the end of the route is foolhardy. Whatever system or practice is in place, drivers and/or attendants must engage in actively searching the vehicle at the end of each trip to be sure no one has been left.
- The risk: *Emergency situations*
 - Equip vehicles adequately with functional communication systems, safety equipment, first aid necessities, and other safety supplies;
 - Train drivers in emergency preparedness, including evacuation procedures and use of seat belt cutters;

Continued on page 4

Head Off, continued from page 3-----

- Conduct safety training and bus evacuation drills that are developmentally appropriate for all your riders;
- Be sure accurate and timely information about the needs of each student with a disability is provided to drivers, attendants, and relief personnel.
- The risk: *Behavior issues, including student-to-student harassment*
 - Even though they may not know what “harassment” or “sex” is, they can still do it. Be sure your personnel understand that.
 - Train drivers and attendants in intervention techniques: Some action is always better than no action. Help them make reasonable choices among available responses.
- The risk: *Loading and unloading*
 - We call it the “danger zone” because it’s fraught with risk for all students getting on and off the bus. For young children the concern is especially pronounced. Avoid expanding the dangers of the zone by prohibiting unauthorized stops and unnecessary variations in schedule, and train staff to use effective communication techniques that recognize the student’s listening and understanding skills. Encourage immediate reporting of any problems with stops and procedures.
 - Loading problems can travel with students who resist getting on the school bus or alternative vehicle in the morning. Be alert to these concerns and work with parents and staff to help alleviate them.
- The risk: *Inappropriate selection and use of child safety restraint systems (CSRS)*
 - The safety of a child being transported can depend upon the correct choice of child safety seats and restraints appropriate to the needs of the child. Check out the *Point of Law*TM page at the Education Compliance Group website at www.educationcompliancegroup.com for factors to consider.
 - Don’t let haste to begin program participation compromise selection, acquisition, personnel assignment or training considerations.
- The risk: *Absent staff members*
 - Illness happens. Have back up plans. There’s a not-so-strange correlation between absent attendants and aggressive behavior from children with sexual or violent tendencies. A similar correlation can be noted with emergencies in the making (such as students struggling with health conditions) when there is no one on board to notice. 

LOTS OF “SHOULD-HAVE’S” IN TENNESSEE DRIVER CASE

In the last issue of *Legal Routes*, we previewed the critical question in *Wilson v. Metropolitan Government of Nashville and Davidson County*, 2009 WL 196033: When is a school bus driver expected to take action to prevent student injury?

THE FACTS

Here’s a quick review of what happened. Driver Maddox allegedly failed to prevent one student from brutally attacking another on the school bus. When the school district appealed the decision against it, the issue for the court was whether the driver should have foreseen that an altercation initiated by two boys against another student would escalate.

THE EVIDENCE

The school district (Metro) had a handbook that provided that students were not to stand while the bus was moving, and that if a driver saw them doing so, he should ask the student to be seated.

Maddox’ supervisor testified that “drivers were trained to glance at all their mirrors in a constant rotation,” in part to check on the students in their rearview mirror. Specific evidence offered by the supervisor suggested that Maddox’ failure to respond on the day in question was unacceptable:

- Maddox should have been able to see Wilson, the victim, on the day in question.
- He should have seen McKnight, the main aggressor, stand and move toward the back of the bus and begin picking on Wilson, and should have asked the boy to be seated. If McKnight did not comply, Maddox should have stopped the bus to address the situation.
- The bus video showed that there were few students on the bus on that day, and that Maddox should have seen the events unfold and realized that Wilson might be in danger. Moreover, Maddox should have seen that McKnight was a considerably larger boy than Wilson, and had teamed up with a friend.
- The tape revealed that a girl sitting right behind the driver said, “Ooh, they’re going to go bust his head.”

The supervisor’s conclusion was that “Maddox could have been more proactive, and should have taken action to try and prevent what happened.”

Maddox was a veteran driver who testified that it was not uncommon for the students to move around on the moving bus, and that sometimes he said nothing. Moreover, he claimed that when he did tell them to sit down, they didn’t always obey. He saw the physical bullying but did not “think it was that big of a problem,” and didn’t say anything. While he heard a girl sitting behind him saying something in a raised voice, he didn’t hear the words. There was no prior history of trouble on the bus, or violent behavior between these boys.

Continued on page 5

THE DECISION

In Tennessee, a plaintiff seeking compensation for injury must show that the defendant had reason to believe an injury of the particular type actually suffered was likely to occur. In other states, the burden of proof is less – the plaintiff would simply have to show that the students involved had a tendency to fight, and the defendant should have realized some sort of injury would occur.


The conclusion: “A reasonably prudent person could have easily appreciated the danger of the situation and taken action to prevent it.”

KEY FACTS

Even under Tennessee's stricter approach, the appellate court upheld the trial court's decision and award of damages based on these factors:

- There was an immediate threat.
- There was an interval where preventive measures could have been taken before the act of aggression followed.
- There was a larger student seen to be threatening and assaulting a smaller, weaker student.
- This behavior went on for at least three minutes, without any warning, or words of any type, from the driver.
- Two students were involved, with one “backing the other up” at all times.
- The tape showed that the boys spent almost a minute standing in the aisle before the attack.


THE LESSONS

Wilson's experience on the school bus that day was terrible, and the only purpose it can serve is to be the core of a “teachable lesson” for your drivers. Brainstorm with them about what a “threat” looks like and sounds like. Discuss the preventive measures that Maddox could have taken, and use their contributions about the hypothetical and real threats that come to mind to talk about approaches they could use to prevent each. There are, we know, many situations in which a driver has to balance competing interests. When there's time to act, reason to act, and appropriate actions to take, there are no interests that compete with preventing harm to a student. 

MEDICAID BILLING STILL AVAILABLE

The U. S. Department of Health and Human Resources Centers for Medicare and Medicaid Services (better known as CMS) recently proposed rulemaking to rescind a December 28, 2007 final rule that would impact the ability of school districts to bill Medicaid-eligible students for the related service transportation after June 30, 2009.

Currently, Medicaid-eligible students that receive transportation as a related service to access approved health services during the school day can bill for transportation for those days students access these services. This ability was to terminate on June 30, 2009.

The proposed rule demonstrates that CMS has become more knowledgeable about the potential impact of this moratorium on school systems. Districts across the nation have utilized this funding source to supplement transportation costs for students requiring specialized services and equipment. Dr. Linda F. Bluth, President-Elect of NAPT, notes that it is encouraging that the disabilities advocacy community has been influential in getting CMS to note the importance and efficacy of this funding for school districts already faced with significant transportation costs for special needs students. 

IF YOU WERE “JUDGE PEGGY,” WOULD YOU BE CONVINCED?

In *Los Angeles U.S.D. Personnel Commission v. Brynjolfsson*, 2008 WL 4277464 (Cal.App. Dist.), an unpublished decision, a 25-year veteran mechanic appealed his termination from his job. He had installed the wrong size brake chamber on the left rear wheel of a school bus. As a result, the bus failed an inspection by the California Highway Patrol before being returned to service.

THE FACTS

The mechanic testified that he had presented the repair order for the bus to the parts storekeeper, and had been given the brake chamber at issue. He noticed that it was a different color, shape and size than others on the bus, but was assured by the parts storekeeper that it was the correct part. The parts storekeeper denied in court that he had given any such assurances.

THE EVIDENCE

Make no mistake about it – I wouldn't know a brake chamber from a steering wheel. Nevertheless, the testimony would have convinced me that an experienced mechanic should have been held accountable for this kind of mistake. I'm guessing you're thinking that a red flag should have been raised once the mechanic received a part that was different in color, shape and size.

The commissioner who had originally heard the evidence prior to the court appeal in the *Brynjolfsson* case was skeptical about the school district's argument in support of termination of the mechanic. He stated that he had “a serious problem with the claim that no one else within the department including the parts department has any responsibility to make sure that a mechanic is furnished with the proper parts...I think everybody in the department has a responsibility to make sure things are done right....[W]hether they are given the tools to do that is another issue; there appeared to be some problems with the procedures in place for getting parts.”

Continued on page 6

THE DECISION

The commissioner concluded by saying that he had difficulty upholding the district's decision to terminate in light of the district's deficiencies in supervising both the mechanics and the parts department.


THE LESSONS

As transportation professionals, you may have a sense of exactly what should have happened here, and how the problem could have been prevented. But lay hearing officers and judges don't know that. So you have to be prepared to "take them by the hand" and lead them where you want them to go if litigation results. It helps to have a policy or procedures that mechanics and parts people can follow – perhaps a checklist – that would, at least, impress the decision-maker that you've done your part. It may still come down to a "he said, she said" debate, but I'd urge you to think about how you would put your best foot forward.

And, experts tell me that this is an example of the importance of on-going, well-documented, training for both technicians and parts people. In addition, I now know that although there is a "typical school bus" that uses a "typical" spring brake chamber, each bus manufacturer may use different brake chambers for every application.

One more point learned from the experts: Technicians should be trained to recognize that what's already on the bus may not be correct.

You can't assume the person before you has installed the right part. The experienced mechanic in this California case should have had this kind of knowledge.

And, what could have happened here in lieu of termination where, though a serious mistake occurred, no injury resulted? If implementation of supervision and discipline has been lax, a director might have to begin progressive discipline rather than jump to termination of a veteran employee with acceptable past performance. In addition, such a director would want to engage in a thorough audit of the training program and parts delivery processes to ensure this sort of situation did not reoccur. 

FAR-REACHING CHANGES IN ADA AND SECTION 504 NOW EFFECTIVE

We forecast it last July, and now it's here. The ADA Amendments Act of 2008 has all but wiped out 10 years of court decisions under the Americans with Disabilities Act. Not to be outdone by Congress, the Office for Civil Rights issued revised "Frequently Asked Questions About Section 504 and the Education of Children with Disabilities" on March 27, 2009, confirming that Section 504 echoes the changes in the ADA, effective on January 1, 2009.

REVIEW OF ADA CHANGES

The intent of the ADA legislation is to move courts quickly past consideration of whether the employee even qualifies as "disabled," and force judges to take a more direct route to a decision about whether the employee has been the victim of discrimination. A "disability" is still:

- A physical or mental impairment that substantially limits one or more major life activities;
- A record of such an impairment; or
- Being regarded as having such an impairment.

But it will take less to be "substantially limited" by an impairment. Generally speaking, the thrust of the revised ADA is broader coverage for more employees. Perhaps most significant is the fact that employers may no longer take into consideration "mitigating measures" – improvements brought about by medication, coping behaviors, and the like. And, for the first time, a substantial impairment in the activity of "working" is, by itself, enough to require the "interactive process," (See box below.)

The list of major life activities – although never all-inclusive – has been expanded to specify eating, sleeping, standing, lifting, bending, reading, concentrating, thinking and communicating. A "major life activity" now includes the operation of a major bodily function: digestive, bowel, bladder, circulatory, reproductive, and others.

FOCUS ON PERFORMANCE AND CONDUCT

Employee lawsuits asserting an ADA violation arise most often in the context of discipline or loss of job. More than ever, you should focus on real data and documentation that reflect performance or conduct problems, and apply your district or company's policies in a uniform manner.

And, the 2008 Amendments have not changed the fact that the employee must still be "qualified" to do the job, with or without a reasonable accommodation. Here's an example. Even though "communicating" has now been expressly listed as a major life activity, if a driver's inability to communicate understandably prevents performance of an essential function

THE INTERACTIVE PROCESS

This isn't new, but you'll need to know about it more often. Why? Because your obligation to begin the conversation known as the "interactive process" starts with your awareness of the employee's disability and limitations, either through observation or notification.

- The exact shape of the dialogue varies from situation to situation.
- It's triggered by the employee's telling of a disability and resulting limitations.
- It must be characterized by good-faith communication.
- And demonstrate a good-faith effort toward the goal of identifying reasonable accommodations.

Far-Reaching Changes, continued from page 6-----

of the job, this failure – even though his limitation is disability-related – will disqualify him, unless a “reasonable accommodation” is available. And if the only accommodation he suggests or you can imagine is assignment of another person to do his communicating for him, your proven budget constraints can make that an unreasonable accommodation that you just don’t have to provide.

BE SURE SECTION 504 CHANGES ARE ON YOUR RADAR SCREEN

OCR’s “Frequently Asked Questions About Section 504” is a very useful document in its entirety. (You can jump to it directly from the Students with Disabilities section of the Resources page of Education Compliance Group, Inc.’s website – www.educationcompliancegroup.com.) The March 27, 2009 revision to the FAQ document confirms that school districts will have to evaluate students for eligibility under Section 504 on the basis of a different set of standards than before.

Specifically, in determining whether a student has a physical or mental impairment that substantially limits that student in a major life activity, school districts may not take into consideration any improvements in condition brought about by medication, coping behaviors, or a host of other means to determine if a student comes within the protections of Section 504. For school transportation professionals, this is likely to mean that more students will be entitled to more transportation services.

Many transportation issues reside in Section 504 (some of them include choice transportation, transportation to after school programs, special circumstances of disabled parents, transportation for field trips).

Most important, as a child changes education level from elementary to middle school, and so on, the location of his or her school could alter the transportation responsibilities for a child with a disability to create the necessary access to education under Section 504. For more information, check these back issues of *Legal Routes*: July 2005, pp. 4-5; May 2006, pp. 6-7.

SECTION 504 IS NOT AUTOMATIC

While it may seem that you’d better just give up and give in, OCR is emphatic that:

- There is no impairment that, in and of itself is a disability.

The impairment must substantially limit one or more major life activities in order to be considered a disability under Section 504. Temporary impairments must be evaluated on a case-by-case basis, considering both duration and extent of impact, to be a Section 504 disability.

- A medical diagnosis does not suffice as an evaluation for Section 504 eligibility.


A medical diagnosis is one source that may be considered in the evaluation process. Section 504 regulations require school

districts to draw upon a variety of sources in interpreting evaluation data and making decisions about services.

- A medical diagnosis of an illness doesn’t automatically mean a child receives transportation or any other service
The illness must cause a substantial limitation on the student’s ability to learn or, in the case of transportation, to access education.

But, remember: If a student does have an impairment that substantially limits his or her ability to access education, the school district must make an individualized determination of the child’s need for transportation, appropriate for that child, at no cost to the parent.

PREVENTIVE MAINTENANCE

Because the focus of both the twin laws of the ADA and Section 504 will shift away from the definition of disability and toward whether school districts have complied with their obligations, documentation of actions and decisions can be very important if an employee or student alleges discrimination. Your best strategy is to keep accurate records, and train those who report to you about the new rules. 

PRECIOUS CARGO? DISSENT IN SEXUAL HARASSMENT CASE QUESTIONS IMMUNITY DECISION

The Ohio Supreme Court’s March 31 decision in *Doe v. Marlinton Local School Dist. Bd. of Edn.* may be the final rung in the legal ladder for a young girl sexually molested on a school bus four years ago by another student.

THE FACTS

As we reported in the September 2007 issue of *Legal Routes* following the appellate court’s decision, a school bus driver had seen students moving around on the floor of the bus before learning of “Billy’s” long-term sexual assault of “Holly Doe,” but had assumed the children were “playing tag.” Holly’s parents sued the school district, but were detoured by statutory governmental immunity against lawsuits based on a school employee’s negligent supervision of students. Though the Does argued that, in the context of a school bus, “operation of any motor vehicle” – for which there is no immunity – means all of the essential functions that the bus driver is trained or required to do by law, the appellate court disagreed. The Ohio Supreme Court upheld that decision in the district’s favor.

THE COURT’S RATIONALE

In its decision the court acknowledged: “This is not to say that supervision of students may not be a part of a school bus driver’s duties. As the Does point out, the Ohio school-bus-driver training requirements include instruction in pupil management. . . However, it does not follow that every duty required of a school bus driver, or for which the driver is trained, constitutes operation of the school bus within the meaning of [state law.]”

Continued on page 8

Precious Cargo, continued from page 7 -----

So, “While the facts alleged in this case are distressing,” this court finds, as other states’ highest courts have held, that courts are not authorized to rewrite statute – even where the law denies compensation to an injured victim.

DISSENT PREDICTS PARENTS WILL BE ASTONISHED

Some legal scholars have expressed the opinion that state governmental immunity statutes interfere with ethical action in government. Others have just applauded the tendency toward limiting immunity favored by some state courts. It’s said that, “The law abhors a wrong without a remedy.”

The dissenting opinion in the *Marlington* case may never become the prevailing attitude – and I hope it does not. But its piercing criticism of the result in this case bears note: “Ohio parents will be startled to learn that school bus drivers in this state have but one responsibility: don’t crash the bus. A school bus can become “Lord of the Flies” on wheels, but apparently as long as the driver maintains an assured clear distance from other drivers, a school board faces no liability for what happens inside. It turns out that the school bus driver’s cargo is no more precious than that of the garbage truck driver. Just don’t crash the bus!”

THE LESSONS

The good news, of course, is that we’d all prefer that our mistakes, and those of our employees, not saddle us with big money judgments, and that’s how the *Marlington* case worked out. The bad news is that, unlike the garbage truck driver, your precious cargo is, indeed, highly vulnerable to injury of different types, from a variety of sources. While you should reassure your drivers that they won’t be liable for every error in judgment, you must not fall prey to the “I don’t want to scare my drivers” syndrome. I know you are far more concerned about student injury than courtroom victories or losses.

Continued vigilance and accountability are essential. 

SINCE YOU ASKED


A driver asks, “What legal recourse is available to a driver who gets hit by a special needs student? And, can the student be suspended from the bus, or is this regarded as a matter for parents and school to address?”

Questions from drivers provide insight into what’s actually going on inside the bus on a daily basis.

There are, typically, state statutes (specific to each state) that impact the nature of the employee’s rights. Basically... it depends on a number of factors. From a legal standpoint, suspension from the bus is certainly an option (but review and download “Where Does It Say That,” on the *Resources* page of www.educationcompliancegroup.com) for limitations on that ability). Also consider a functional behavioral assessment that explores triggers for the behavior, as well as positive behavior strategies to change it.

A number of factors seem to drive decisions around prevention of injury to employees in the first place, and liability in the second place. Districts and companies, take notice:

- Did the district or company have reason – because of prior history in this or other school districts, information from medical professionals, information from parents or educators, etc. – to know that it was likely that a particular student could hurt others?
- Did the entity increase the risk of harm, either through an inadequate adult-student ratio on the bus; or inadequate procedures for handling a disruptive child; or provision of insufficient information to transportation staff to allow them to make wise decisions about their own clothing, jewelry, accessories and the like; or deficient training about practical aspects of transporting this particular student?
- If some form of child safety restraint was indicated, did the local education agency (LEA) take necessary steps to explore this option through the IEP process?
- Did drivers or aides expose themselves to unnecessary harm when there were reasonable means available to avoid getting hurt?

While these factors are important in considering responsible and necessary action, a case-by-case consideration of the issues presented by given students, and the training implications created by any tendency toward impulsive, violent behavior, is essential. Look too, to the “Tips for preventing, addressing injuries, on page 3 of the July 2005 issue of *Legal Routes* for more. 

Publisher’s Note: To have your question considered for *Since You Asked*, e-mail your question to myroadmap@legalroutes.com or send it to *Legal Routes*, PO Box 6053, McLean, VA 22106.

BULLETIN BOARD

Order your video training programs now for pre-service and in-service training. Peggy Burns’ 4 video training programs for drivers are industry essentials for focusing staff on key safety practices beyond just driving. Order *The Road to Compliance for Special Needs Drivers*, *Putting the Brakes on Harassment*, *Steering Clear of Liability*, and *Confidential Records* from www.educationcompliancegroup.com, or call toll free (888) 604-6141.

Plan and budget now to attend the **19th National Conference & Exhibition on Transporting Students with Disabilities & Preschoolers**, March 5-10, 2010 in Orlando, and the 13th National Special Needs Team Safety Rodeo. For photos of the 2009 event, and for information on the 2010 meeting, go to www.eduprogroup.com or call 703 288-4088. If you can choose just one meeting to attend in 2010, choose the one that’s “special” – the only national conference on special needs transportation.