

# Elizabeth A. Estes

## Dannis Woliver Kelley

Elizabeth A. Estes has spent the past decade practicing in the areas of special education and student issues. Prior to joining the firm, she represented abused and neglected children for Los Angeles County Dependency Court and practiced general civil litigation. Elizabeth is an expert in all areas of special education and student issues, providing extensive representation and advice to clients throughout California. She has created and presents comprehensive trainings at state conferences throughout the year regarding special education and student issues. In addition, she has litigated numerous special education matters, student inter-district and expulsion appeals, and offers local inservices for clients in any area. She also has been integral in developing alternative dispute resolution processes for agencies seeking to preemptively address special education, student litigation and related costs.

### **Education**

University of California, Berkeley (B.A.)  
Loyola Law School (J.D.)

### **Practice Areas**

Special Education and Students  
Governing Boards

### **Admission**

California State Bar

### **Philanthropic Activities**

UC Berkeley Bearbackers, Board Member (Fundraising arm of the University's athletic department)

**REstraint AND SEclusion IN CALIFORNIA: A LEGAL UPDATE**

PENT CONFERENCE  
Elizabeth Estes, Esq.  
November 9, 2010

DEDICATION  
WISDOM  
KNOW-HOW

© 2010 Dannis Woliver Kelley www.DWKesq.com

---

---

---

---

---

---

---

---

**What To Expect**

- Summary of laws and cases regarding restraint and seclusion in the schools
- Best practices and legal tips based on expertise in the field and review of current legal authorities
- To have some fun

DEDICATION  
WISDOM  
KNOW-HOW

© 2010 Dannis Woliver Kelley www.DWKesq.com

---

---

---

---

---

---

---

---

**Who Am I Anyway**

DEDICATION  
WISDOM  
KNOW-HOW

© 2010 Dannis Woliver Kelley www.DWKesq.com

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients  
for tomorrow >>

# Who Are You

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dennis Woliver Kelley

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients  
for tomorrow >>

# Where Are We Now

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dennis Woliver Kelley

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients  
for tomorrow >>

# Issue in Forefront of Awareness Now

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dennis Woliver Kelley

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients  
for tomorrow >>

**US Government  
Accountability Office  
Study on Seclusion and  
Restraints**  
May 2009

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dennis Woliver Kelley

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients  
for tomorrow >>

**GAO Study**

- Studied cases of death and abuse at public and private schools and treatment centers across the U.S.
- Testified for House Committee on Education and Labor.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dennis Woliver Kelley

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients  
for tomorrow >>

**GAO Study**

- Asked to provide overview of seclusions and restraint laws applicable to children in all schools;
- To verify whether allegations of student death and abuse from such methods are widespread;
- To examine facts/circumstances surrounding cases where student died or suffered abuse.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dennis Woliver Kelley

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## GAO Study

Examined 10 restraint/seclusion cases where there was criminal conviction, finding of civil or administrative liability or large financial settlement.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dennis Woliver Kelley 10

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## GAO Study

- Restraint defined as any means that immobilizes or reduces the ability of an individual to move his or her arms, legs, body or head freely.
- Seclusion defined as involuntary confinement alone in a room or area from which they are prevented from leaving.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dennis Woliver Kelley 11

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## GAO Study

- Overall, found no federal laws restricting use of restraint/seclusion in public or private schools.
- State laws and regulations vary widely:
  - 19 states no laws related to use of seclusion or restraints in schools;
  - 7 place restrictions on restraints, but don't regulate seclusions;

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dennis Woliver Kelley 12

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

### GAO Study

- 17 states require training before restraint;
- 13 require parent consent prior to foreseeable physical restraints;

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 13

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

### GAO Study

- 19 require consent after restraint;
- 2 require annual reporting on use of restraint;
- 8 prohibit prone restraint or restraint that impedes ability to breathe.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 14

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

### GAO Study

- Could not determine whether allegations of abuse or death were widespread.
- However, did discover hundreds of allegations across the nation – almost all involving children with disabilities.
- Also discovered thousands of students are restrained or secluded each year.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 15

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## GAO Study

Case:

- 14 year old student in Penn. residential facility.
- 2 trained staff pinned student facedown for 20 minutes after he tried to attack counselor. Died from brain injury due to lack of oxygen.
- Settlement for over 1 million. Penn. thereafter banned prone restraint in 2008.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dennis Woliver Kelley 14

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## GAO Study

Case:

- 13 year old autistic student in New York residential facility.
- Student died by suffocation after aide sat on top of him because he was being disruptive in van.
- Aide and driver stopped at game store while student was unconscious in backseat.
- Aide convicted of manslaughter.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dennis Woliver Kelley 17

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## GAO Study

Case:

- 15 year old autistic male in Mich. suffered seizure and lost control of extremities and later became uncooperative.
- Staff did not provide medical attention, but placed student in prone restraint for 1 hour, resulting in death.
- Death ruled an accident. No criminal charges.
- Civil suit with District settled for 1.3 million.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dennis Woliver Kelley 18

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## GAO Study

Case:

- 4 year old autistic girl in West Virginia with cerebral palsy restrained in chair using multiple leather straps when uncooperative at school.
- Suffered bruising and later diagnosed with PTSD.
- Teacher not liable, but school board liable for negligent supervision and training.
- Family awarded \$460,000.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 19

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## GAO Study

Case:

- 8 year old Illinois student with ADHD restrained in chair with masking tape on arms and mouth because would not remain seated.
- Found guilty of unlawful restraint and aggravated battery.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 20

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## GAO Study

Case:

- 7 year old California girl with Asperger's syndrome. Student weighed 43 pounds.
- Student was secluded in a walled off area because refused to do work sat on and repeatedly restrained when non-compliant.
- Teacher smeared burrito on student's face and hair after she refused to eat.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 21

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

### GAO Study

Case:

- Student reported to parents that teacher "hurt her all day."
- Teacher reported she restrained student because she was a danger.
- Principal reported teacher was trained once annually in restraint.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 22

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

### GAO Study

Case:

- Teacher and principal found liable for negligence and civil rights violations and family awarded \$700,000 in damages.
- However, to avoid protracted appeal, parties settled for \$260,000.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 23

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

### GAO Study

GAO found cases illustrate the following themes:

- Children with disabilities restrained and secluded at times when they did not appear to be physically aggressive;
- Facedown or other restraints that block air to lungs can be deadly;

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 24

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## GAO Study

GAO found cases illustrate the following themes:

- Teachers and staff were often not trained;
- Teachers and staff involved continue to be employed at schools.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWkesq.com

© 2010 Dannis Woliver Kelley 25

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Current California Law

DEDICATION  
WISDOM  
KNOW HOW  
www.DWkesq.com

© 2010 Dannis Woliver Kelley 26

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Ed. Code 56341.1

- For a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, strategies, including positive behavioral interventions and supports, to address that behavior.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWkesq.com

© 2010 Dannis Woliver Kelley 27

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## 5 C.C.R. 3001

- Behavioral interventions are defined as systemic implementation of procedures that result in lasting positive changes in student's behavior, including instructional and environmental modifications designed to provide greater access and ensure LRE.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 28

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## FAPE

- An IEP that does not appropriately address behavior that impedes a child's learning, denies a student a FAPE.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 29

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Hughes Bill

- In 1990, CA passed Ed Code section 56520, et seq. which is commonly referred to as the Hughes Bill.
- Addresses behavioral intervention for pupils with serious behavioral problems.
- Interestingly enough, does not exist in numerous other states according to recent GOA study.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 30

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Hughes Bill

- 5 C.C.R. 3052 implements the Hughes Bill.
- Requires an FAA, resulting in a BIP, when student develops a “serious behavior problem” and the instructional/behavioral approaches in IEP have been ineffective.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 11

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Hughes Bill

- “Serious Behavior Problem” means behaviors are self-injurious, assaultive, or cause serious property damage; or
- Other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches in the IEP are ineffective.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 12

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Hughes Bill

- BIP requirements:
  - Must be developed by IEP team and in IEP;
  - Must be implemented by, or under the supervision of, staff with appropriate training;
  - Must be based on an FAA and used in systemic manner;

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 13

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Hughes Bill

- BIP requirements:
  - Must identify targeted behavior and replacement positive behaviors;
  - Must identify goals specific to BIP;

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 14

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Hughes Bill

- BIP requirements:
  - Include detailed description of behavioral interventions and circumstances for their use;
  - Specific schedules for recording use of interventions and targeted and replacement behaviors, including criteria for discontinuing use of the intervention or replacing it;

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 15

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Hughes Bill

- BIP requirements:
  - Include criteria for fading or phasing-out intervention;
  - Include interventions which will be used in the home, residential facility, worksite or other non-educational settings; and
  - Specific dates for review by IEP team.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 16

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Hughes Bill

- BIP requirements:
  - Positive response options shall include, but are not limited to ignoring behavior, verbally or verbally and physically redirecting the student, providing feedback, acknowledging the behavior, or providing a brief, physical prompt to interrupt or prevent aggression, self-abuse, or property destruction.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 17

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Hughes Bill

- Emergency Interventions SHALL not be a substitute for a BIP;
- Behavioral Interventions CANNOT cause pain or trauma.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 18

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Hughes Bill

- Behavioral Emergency is a serious behavior problem that has not been seen before and for which BIP has not been developed, or for which BIP is not effective.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 19

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Hughes Bill

- Emergency Intervention may only be used to control unpredictable, spontaneous behavior which poses danger of serious physical harm and cannot be prevented by a less restrictive response.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 40

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Hughes Bill

- No emergency intervention shall be used for longer than is necessary to contain the behavior;
- Any situation requiring prolonged use shall require staff to seek assistance of an administrative or law enforcement as applicable;

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 41

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Hughes Bill

To PREVENT emergency interventions, parent and residential care provider, if appropriate, shall be notified within 1 school day whenever emergency intervention is used or serious property damage occurs.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 42

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Hughes Bill

Behavior Emergency Report (BER) must be completed, including:

- Name and setting;
- Name of those involved;
- Description of incident;
- Whether Student has BIP;
- Details of injuries.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 43

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Hughes Bill

Anytime a BER is written for a student who does not have a BIP, an administrator shall, within 2 days, schedule an IEP meeting to review the BER and determine the necessity for a FAA and Interim BIP.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 44

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Hughes Bill

Anytime a BER is written for a student who has a BIP, any incident involving an unseen serious behavior or where previous designed interventions is not effective should be referred to the IEP team to determine if BIP needs modification.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 45

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Hughes Bill

- School Districts and NPAs cannot use aversive interventions to modify a student's behavior.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWkesq.com

© 2010 Dennis Woliver Kelley 46

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Hughes Bill

- Aversive interventions include:
  - Intervention likely to cause physical pain;
  - Releasing unpleasant odors or substances in proximity to face;
  - Denying adequate sleep, food, water, shelter, bedding, physical comfort or access to bathrooms;

DEDICATION  
WISDOM  
KNOW HOW  
www.DWkesq.com

© 2010 Dennis Woliver Kelley 47

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Hughes Bill

- Aversive interventions include:
  - Restrictive interventions which use device or object that immobilized all four extremities, including prone containment, except prone containment may be used by trained personnel as a limited emergency intervention;

DEDICATION  
WISDOM  
KNOW HOW  
www.DWkesq.com

© 2010 Dennis Woliver Kelley 48

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Hughes Bill

- Aversive interventions include:
  - Intervention designed to, likely to, or which does subject individual to verbal abuse, ridicule or humiliation, or which is expected to cause excessive emotional trauma;

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 49

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Hughes Bill

- Aversive interventions include:
  - Locked seclusion;
  - Any intervention precluding adequate supervision;
  - Any intervention which deprives the individual of one or more of his or her senses.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 50

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Hughes Bill

- SELPA Plan must include procedures governing the use of behavioral interventions and emergency interventions.
- These procedures shall be available to all staff and parents whenever a BIP is proposed.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 51

---

---

---

---

---

---

---

---



## Office of Administrative Hearings Cases

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dennis Woliver Kelley 12

---

---

---

---

---

---

---

---



### *Student v Patterson Unified,* (ALJ Castillo, May 2010)

- Due to change in medication, special education eligible Student identified as potentially having behavioral outbursts requiring intervention.
- District appropriately drafted a BSP.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dennis Woliver Kelley 13

---

---

---

---

---

---

---

---



### *Student v Patterson Unified,* (ALJ Castillo, May 2010)

- In December 2008 and January 2009 Student's behaviors increased and he was physically restrained on multiple occasions as BSP procedures did not deescalate Student.
- Staff testified they did not complete a BER or hold an IEP team meeting because Student had a BSP.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dennis Woliver Kelley 14

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

**Student v Patterson Unified,  
(ALJ Castillo, May 2010)**

- ALJ held District did not use physical restraint as form of aversive punishment, but only as last resort when Student presented serious threat.
- However, District failed to complete required BERs, regardless of whether Student had an existing BSP.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 55

---

---

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

**Student v Patterson Unified,  
(ALJ Castillo, May 2010)**

- Because Student did not have a BIP, District failed to schedule the necessary emergency IEP meeting within 2 days of incident.
- This prevented Parents from meaningful participation and denied Student a FAPE.
- District required to provide compensatory education and develop a policy to implement the Hughes Bill.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 56

---

---

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

**Student v Bellflower Unified,  
(ALJ Castillo, January 2010)**

- 5 year old autistic student enrolled in SDC program.
- Continually lied down in and out of class and minimally participated in group activities.
- Required hand-over-hand prompting to complete fine motor tasks.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 57

---

---

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

**Student v Bellflower Unified,  
(ALJ Castillo, January 2010)**

- Required repeated instruction and physical prompting to follow requests.
- Substitute teacher restrained Student in chair with soft ties due to aggressive behaviors on the playground during recess. Then returned to playground.
- Mother came and released Student and refused to return her to school.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWkesq.com

© 2010 Dannis Woliver Kelley

---

---

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

**Student v Bellflower Unified,  
(ALJ Castillo, January 2010)**

- District contended restraint was only brief and did not harm Student.
- Chair was used for postural support, but District did not train staff in use of chair. Aide did not know she could not use chair to discipline Student.
- ALJ held because Student had been removed from playground, there was no need to restrain.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWkesq.com

© 2010 Dannis Woliver Kelley

---

---

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

**Student v Bellflower Unified,  
(ALJ Castillo, January 2010)**

- District failure to offer BSP to address Student conduct and failure to train staff was a denial of FAPE, including using an aversive intervention.
- Harm was minimal as Student was only restrained for 5 minutes and then left. Also, there was no evidence Student was negatively impacted upon return to school.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWkesq.com

© 2010 Dannis Woliver Kelley

---

---

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

**Student v Los Altos Elementary,  
(ALJ Castillo, December 2006)**

- 12 year old Student with autism received partial in-home program.
- During in-home program mother would give child a cold bath after toileting accident. Also, put hot sauce on Student's hand to stop thumb sucking.
- NPA providing in-home services informed mother these were aversive and they could not implement them.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley

---

---

---

---

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

**Student v Los Altos Elementary,  
(ALJ Castillo, December 2006)**

- However, when Student had a toileting accident, NPA staff would bring child to mother to give Student a cold bath. Staff also recorded cold baths and use of hot sauce in data collection binder.
- NPA did not inform District of aversive interventions being used.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley

---

---

---

---

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

**Student v Los Altos Elementary,  
(ALJ Castillo, December 2006)**

- ALJ held that even if NPA did not approve of mother giving Student cold baths, mother's actions became part of the ABA program through acquiescence.
- Also, District failed to appropriately monitor home program by failing to seek written status reports or reviewing Student's data binder.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley

---

---

---

---

---

---

---

---

---

---

---

---



## Potential Federal and State Claims

DEDICATION  
 WISDOM  
 KNOW HOW  
[www.DWKesq.com](http://www.DWKesq.com)

© 2010 Dennis Woliver Kelley 44

---

---

---

---

---

---

---

---



## Potential Federal and State Claims

- As a result of alleged inappropriate restraint or seclusion, numerous state and federal court claims may also be pursued.
- The merits of each case depends upon the specific facts of the case and claims pursued.
- In most cases in California, the cases have settled due to costs of litigation.

DEDICATION  
 WISDOM  
 KNOW HOW  
[www.DWKesq.com](http://www.DWKesq.com)

© 2010 Dennis Woliver Kelley 45

---

---

---

---

---

---

---

---



## Potential Federal and State Claims

- Common claims are:
  - Assault;
  - Battery;
  - Intentional or Negligent Infliction of Emotional Distress;
  - Negligent Supervision;
  - False Imprisonment;

DEDICATION  
 WISDOM  
 KNOW HOW  
[www.DWKesq.com](http://www.DWKesq.com)

© 2010 Dennis Woliver Kelley 46

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Potential Federal and State Claims

- Common claims are:
  - Violation of Section 504 of the Rehabilitation Act of 1973;
  - 4<sup>th</sup> Amendment Unlawful Seizure;
  - 14<sup>th</sup> Amendment Deprivation of Life, Liberty or Property.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 47

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Proposed Federal Legislation

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 48

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Proposed Federal Legislation

- SB 3895 (Sen. Chris Dodd):
  - Keeping All Students Safe Act
  - Rewritten from SB 2860, original version proposed in Dec 2008.
  - Permits restraint and seclusion to be included in IEP for students with history of dangerous behavior and if FBA has been conducted and BIP is in place.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 49

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Proposed Federal Legislation

- SB 3895 (Sen. Chris Dodd):
  - Prohibition on mechanical, chemical, physical restricting breathing, and any other “aversive intervention that compromises health and safety.”
  - US Dept. of Education would have 1 year to issue regulations. States would then have 2 years to implement.
  - Would cover private schools receiving funds to serve students under the IDEA.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWkesq.com

© 2010 Dennis Woliver Kelley 70

---

---

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Lessons Learned

DEDICATION  
WISDOM  
KNOW HOW  
www.DWkesq.com

© 2010 Dennis Woliver Kelley 71

---

---

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Lessons Learned

- Train staff on Section 504 and IDEA mandate to address the behavioral needs of eligible students.
- Train staff regarding how to address student behavior, including:
  - when to conduct functional behavioral assessments and develop behavior support plans,
  - when to conduct functional analysis assessments and develop behavior intervention plans.

DEDICATION  
WISDOM  
KNOW HOW  
www.DWkesq.com

© 2010 Dennis Woliver Kelley 72

---

---

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Lessons Learned

- Make sure staff restraining students are properly trained in restraint techniques.
- Make sure staff placing students in seclusion are properly trained.
- Closely monitor cases for students who are being restrained or secluded.
- Listen to staff and parents.

DEDICATION  
WISDOM  
KNOW-HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 73

---

---

---

---

---

---

---

---

**DWK**  
DANNIS WOLIVER KELLEY  
Preparing clients for tomorrow >>

## Additional Questions



DEDICATION  
WISDOM  
KNOW-HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 74

---

---

---

---

---

---

---

---

**DWK** Preparing clients for tomorrow >>  
DANNIS WOLIVER KELLEY

**SAN FRANCISCO**  
71 Stevenson Street, 19th Floor  
San Francisco, CA 94105  
TEL 415.543.4111  
FAX 415.543.4384

**LONG BEACH**  
301 East Ocean Boulevard, Suite 1750  
Long Beach, CA 90802  
TEL 562.366.8500  
FAX 562.366.8505

**SAN DIEGO**  
750 B Street, Suite 2310  
San Diego, CA 92101  
TEL 619.595.0202  
FAX 619.702.6202

Thank you!

Elizabeth Estes, Esq.  
Dannis Woliver Kelley  
71 Stevenson Street, 19<sup>th</sup>  
Floor  
San Francisco, CA 94105

DEDICATION  
WISDOM  
KNOW-HOW  
www.DWKesq.com

© 2010 Dannis Woliver Kelley 75

---

---

---

---

---

---

---

---