

**A CASE FOR IDEA PREEMPTION OF STATE COMMON-LAW TORT CLAIMS
BASED ON SPECIAL EDUCATION STUDENTS' INFLICTION OF
SERIOUS BODILY INJURY UPON ANOTHER AT SCHOOL**

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ABSTRACT

A thoughtful review of the Individuals with Disabilities Education Act's (IDEA)¹ purposes and language, its regulations, pertinent case law, commentators' statements, and public policy considerations shows that IDEA impliedly preempts state common-law tort claims filed against parents for their special education children's infliction of serious bodily injury upon another at school, as such claims present an obstacle to the accomplishment and execution of the full purposes and objectives of IDEA.

I. INTRODUCTION

It is well-established that IDEA's primary purpose is to ensure a free appropriate public education (FAPE) to all age-eligible disabled children.² Much less clear, however, is how courts should rule where disabled children's right to a FAPE is compromised due to state tort laws that conflict with IDEA's objectives.

¹ 20 U.S.C.S. §§ 1400, et seq. (LexisNexis 2006).

² *Ortega v. Bibb County Sch. Dist.*, 397 F.3d 1321, 1325 (11th Cir. 2005) (“[W]e agree with our sister circuits that the IDEA’s primary purpose is to ensure a free appropriate public education.”) (internal quotation marks omitted).

Specifically, there is a surprising lack of research³ concerning the effects on special education students' and their parents' guaranteed IDEA rights as a consequence of disciplinary measures taken against those students and state common-law tort claims filed against their parents for serious bodily injuries inflicted by those students upon another at school.⁴

A. Hypothetical

After lunchtime, General Education Teacher at Public High School takes her students back to the classroom. She begins writing on the blackboard.

³ One may argue that the lack of relevant research argues against preemption, but as this essay will show, the topic of this essay has been justiciable for several years. The author is confident that, were Congress to adopt a provision in IDEA expressly preempting all state common-law tort claims in such cases, or were a court to address this precise issue (the author's research shows that no court has), the result, fully consistent with IDEA's objectives and goals, would be that IDEA preempts such claims.

⁴ Although the author found no research directly on-point, others have conducted research involving somewhat relevant issues. See Kay Hennessy Seven & Perry A. Zirkel, *In the Matter of Arons: Construction of the IDEA's Lay Advocate Provision Too Narrow?*, 9 GEO. J. POVERTY LAW & POL'Y 193, 194 n.11 (2002) (stating, "Many courts have specifically noted that the IDEA preempts conflicting state law," and collecting several such cases: Hacienda La Puente Unified Sch. Dist. v. Honig, 976 F.2d 487, 496 (9th Cir. 1992) (failure to comply with state statute requiring notice of claim of attorney's fees may not bar claim for attorney's fees under IDEA); Antkowiak v. Ambach, 838 F.2d 635, 641 (2d Cir. 1988) (state statute permitting state review of unappealed decision of hearing officer violates finality provision of [the IDEA]); Gonzales ex rel. Doe v. Maher, 793 F.2d 1470, 1485-86 (9th Cir. 1986) (state statute allowing indefinite suspension or expulsion of disabled student during administrative proceedings violates [IDEA's] stay-put provision allowing child to remain in current placement); Converse County Sch. Dist. No. 2 v. Pratt, 993 F. Supp. 848, 860 (D. Wyo. 1997) (state rules and regulations prohibiting foster parents from acting as surrogate parents for IEP purposes violates IDEA's federal regulations); Bray by Bray v. Hobart City Sch. Corp., 818 F. Supp. 1226, 1230 (N.D. Ind. 1993) (state procedure governing residential placement applications, which allowed state to review hearing officer's decision even if no appeal taken, violates IDEA); Evans v. Evans, 818 F. Supp. 1215 (N.D. Ind. 1993) (state procedures requiring additional application and review process resulting in delay in obtaining residential placement violates IDEA); Amelia County Sch. Bd. v. Va. Bd. of Educ., 661 F. Supp. 889, 893-94 (E.D. Va. 1987) (state procedure for review of administrative proceedings that was substantially identical to procedure under [IDEA] does not violate the Act); Township High Sch. Dist. No. 211 v. Mrs. V., 1995 U.S. Dist. LEXIS 2601, at *6 (N.D. Ill. Mar. 2, 1995) (state statute providing two-tier state hearings does not offend IDEA); see also Mrs. C. v. Wheaton, 916 F.2d 69, 73 (2d Cir. 1990) (state standard of legal competency for purposes of waiving IDEA's procedural safeguards could not apply because it would be less exacting than federal provision) (citations modified to comply with Bluebook); see also Doolittle v. Meridian Joint

Special Education Student, who suffers from attention deficit/hyperactivity disorder (AD/HD) and oppositional defiant disorder, and who spends three days per week in her classroom pursuant to his Individualized Education Plan (IEP),⁵ suddenly begins fidgeting and making inappropriate noises in his seat.

Suddenly, he kicks General Education Student, who sits directly in front of him, in the back. General Education Student turns around and tells him to stop. Special Education Student does not stop. In fact, as soon as General Education Student faces forward again, Special Education Student takes a stapler out of his desk and whips it at the back of General Education Student's head. He then gets out of his seat and begins beating General Education Student in the face. General Education Student tries to defend himself, but Special Education Student overpowers him. When General Education Teacher breaks up the fight, she notices that General Education Student's nose is broken. She calls for an ambulance.

The next day, General Education Student's parents call a meeting with the school principal, where Special Education Student's single mother is also present. General Education Student's parents, whose medical insurance will not pay for the cost of the ambulance, demand that Special Education's mother pay for the cost. Special Education Student's mother explains that she cannot afford

Sch. Dist. No. 2, 919 P.2d 334 (Idaho 1996) (IDEA preempted the state constitution's prohibition against spending public money for non-public education).

⁵ See 20 U.S.C.S. § 1414(d).

it, as she works part-time and is already two months behind on rent due to her son's disability expenses.

Should Special Education Student's mother be liable? The Illinois Alliance of Administrators of Special Education posed this question to the Illinois State Board of Education in a position paper dated March 3, 2005,⁶ as a consequence of the enactment of the Individuals with Disabilities Education Improvement Act (IDEIA).⁷

II. SERIOUS BODILY INJURY, A GROWING CONCERN

Among the various changes IDEIA made to IDEA was the addition of a third category to the provision governing the unique circumstances by which school personnel may remove a student to an interim alternative educational setting (IAES).⁸ Prior to IDEIA, the provision permitted school personnel to remove a student to an IAES for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the student's disability, in cases where a child (i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency; or (ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

⁶ Illinois State Board of Education, IDEA Reauthorization Discussion Group: Discipline, at http://www.isbe.net/spec-ed/pdfs/discipline_notes.pdf (2005).

⁷ Pub. L. No. 108-446, 118 Stat. 2647 (codified in various sections throughout IDEA).

⁸ 20 U.S.C.S. § 1415(k)(1)(G).

The new provision⁹ extends to cases where a student “has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.”¹⁰ IDEA defines “serious bodily injury” as it is defined in the federal criminal code. “Bodily injury” is defined as “a cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary.”¹¹ “Serious bodily injury” is defined as bodily injury that involves “a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.”¹²

Although one commentator states, “One would hope that the occasions for invoking [the new serious-bodily-injury provision] will be few,”¹³ the Supreme Court of Wisconsin notes troubling social developments:

Across this state, increasing numbers of students have been identified as exhibiting emotional or behavioral problems which significantly interfere with their academic progress. Some of those students engage in disruptive or violent conduct. As a result, teachers, administrators, and staff now face problems and dangers in the classroom unheard of a generation ago.¹⁴

⁹ 20 U.S.C.S. § 1415(k)(1)(G)(iii).

¹⁰ *Id.*

¹¹ 18 U.S.C.S. § 1365(h)(4).

¹² 18 U.S.C.S. § 1365(h)(3).

¹³ Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 29 (1996).

¹⁴ *Nieuwendorp v. Am. Family Ins. Co.*, 529 N.W.2d 594, 596 (Wis. 1995). See also *Coolidge v. Riegler*, 2004 WL 170319 (Ohio App. 3 Dist. 2004), *appeals denied*, 811 N.E.2d 1150 (Ohio July 14, 2004) (special education student injuring general education teacher); *Marshall v. Cortland Enlarged City Sch. Dist.*, 697 N.Y.S.2d 395 (1999) (special education student killing another special education student on school grounds during lunch period); *LK v. Reed*, 631 So.

Indeed, the U.S. Department of Education's Office of Special Education and Rehabilitative Services reports that of the roughly 20,000 instances in 2002-2003 in which children with disabilities were suspended or expelled for longer than 10 days, approximately 1,200 involved serious bodily injury or removal by a hearing officer for likely injury.¹⁵ As the above commentator explains, courts have repeatedly entered injunctions keeping disabled students out of their current placements on the basis that the student's behavior constitutes an ongoing threat to him or herself or to others.¹⁶ Moreover, as an example, recent studies suggest that there has been an exponential increase in the number of children with autism,¹⁷ whose symptoms may include aggression and violence.¹⁸

III. STATE COMMON-LAW TORT CLAIMS

A. *RESTATEMENT (SECOND) OF TORTS § 316*

The present approach of persons injured by special education students is to file common-law negligence claims to seek damages. Two cases, with analyses that closely parallel *RESTATEMENT (SECOND) OF TORTS § 316 – Duty of*

2d 604 (1994) (13-year-old special education girl claiming 18-year-old special education boy forced her to have sex on school grounds during school hours).

¹⁵ 70 Fed. Reg. 35,782 (June 21, 2005). *But cf.* 145 CONG. REC. E. 581 (Mar. 25, 1999) (At least with respect to special education students who carry weapons to school, "Ninety-five percent of students in special education who are suspended or expelled for displaying violent or aggressive behavior are not disciplined.") (statement of Representative Bob Barr).

¹⁶ Weber, *supra* 32.

¹⁷ Sandra Blakeslee, *Increase in Autism Baffles Scientists*, N.Y. TIMES, Oct. 18, 2002, at A1.

¹⁸ Bernard Rimland, *Controlling Self-injurious and Assaultive Behavior in Autism*, Autism Research Review International (2001), available at <http://www.autismwebsite.com/ari/newsletter/sib.htm>.

Parent to Control Conduct of Child (1965), illustrate the current trend.¹⁹

RESTATEMENT (SECOND) OF TORTS § 316 states:

A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control.

B. *The Coolidge Case*

In Coolidge, an elementary school special education student, Adam, injured his teacher. Adam was diagnosed with autism and pervasive developmental disorder. Thus, Adam qualified for services under IDEA. As such, Adam had the right to be placed in the least restrictive environment possible.²⁰ Whereas Adam's parents heavily insisted that Adam be placed in a regular classroom on a full-time basis, the school district wanted to place Adam in a more restricted setting, designed specifically for disabled children. The IEP that resulted was that Adam was placed in a regular classroom five out of 10 days; on the other days, Adam was in a class with "multi-handicapped" children.

Adam had shown disruptive behavior on several occasions. One day, Adam was particularly disruptive in his "mainstream" classroom. Adam refused

¹⁹ Coolidge, 2004 WL 170319; Nieuwendorp, 529 N.W.2d 594.

²⁰ See 20 U.S.C.S. § 1412(a)(5)(A), which states:

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.

to take the test that the rest of the class was taking. Instead, he focused on a clock that was on his desk. When the teacher's aide unsuccessfully attempted to take away the clock, Adam's teacher (Coolidge) then tried. Adam refused to let go of the clock, and he began screaming at and striking Coolidge repeatedly on the chest, arms, and shins. Coolidge removed Adam from the classroom and placed him in the hallway. Coolidge told Adam that she would let him back into the classroom if he calmed down. After a while, when Adam appeared calm, Coolidge began to let him up, and Adam kicked her in the face and neck area.

Coolidge filed suit, alleging negligence against Adam's parents. Both Coolidge and Adam's parents moved for summary judgment, and the trial court granted both parties' motions. Coolidge appealed, arguing that the trial court erred in granting summary judgment to Adam's parents, because a material issue of fact remained regarding Adam's parents' prior knowledge of Adam's violent propensities and likelihood to harm people. More specifically, Coolidge alleged that Adam's parents knew or reasonably should have known that Adam suffered from conditions that would result in fits of rage and physical violence toward others. Thus, Coolidge argued, Adam's parents were negligent because they so heavily insisted that Adam be placed in a regular classroom, which led to Coolidge's injuries.

Applying common-law negligence, the appellate court first considered whether Adam's parents could be held liable for Coolidge's injuries. First, the court noted that the trial court "found no conflict between the federal preference

for educating disabled children in a regular classroom and a parent's obligation to ensure that their disabled child does not cause harm to others."²¹ Next, the court found that, based on Adam's actions prior to his injuring Coolidge, his parents indeed knew or should have known that injury to another was foreseeable. Last, the court found that, as Coolidge argued, material issues of fact did remain regarding proximate cause. The court reasoned:

The purposes and procedures of IDEA complicate the circumstances of the case herein. Because the express terms of IDEA entitle Adam to be educated, to the maximum extent appropriate, with children who do not have disabilities, merely advocating that their son be placed in a normal educational setting pursuant to Adam's right under IDEA cannot, without more, make [his parents'] conduct liable.²²

Because material issues of fact remained, the court held that the trial court erred in granting summary judgment to Adam's parents.

C. *The Nieuwendorp Case*

In Nieuwendorp, the Supreme Court of Wisconsin found that the parents of Jason, a special education elementary school student who injured his special education teacher (Nieuwendorp), were negligent under traditional tort law principles. The student was diagnosed with AD/HD, for which his doctors prescribed medication. Jason's parents bought and administered the medication for part of the school year. They were initially pleased with the medication's effects on Jason's behavior.

²¹ Coolidge, 2004 WL 170319, at *4.

²² Id., at *5.

Toward the end of the school year, however, Jason's parents began to worry about the medication's potential side effects, so they unilaterally chose to stop giving Jason the medication. They did not inform themselves about the potential consequences of such action, nor did they inform the school that, as a result, Jason's behavioral problems (including kicking, biting, using vulgar language, fidgeting, and making inappropriate noises) might recur, so that school officials could work with Jason's parents to develop a behavioral management plan for him.

Jason's disruptive behavior indeed resumed. One day, Jason's behavior was particularly disruptive. Nieuwendorp asked Jason to leave the classroom, but he refused. Nieuwendorp then physically attempted to remove Jason from the class to take him downstairs, where the "time out" room was located. Jason struggled to break free, grabbing Nieuwendorp's hair with such force that she fell to the floor. As a result, Nieuwendorp suffered a herniated disc in her neck that required surgery, and virtually all of her activities outside of work were curtailed.

Nieuwendorp sued, alleging that Jason himself was negligent in not controlling his behavior and that his parents were negligent, both in failing to exercise reasonable care and in failing to control Jason. The jury ultimately found Jason 14% causally negligent, his parents 55% causally negligent, and Nieuwendorp 31% causally negligent. On appeal, although Jason's parents did not explicitly argue that IDEA preempted Nieuwendorp's claim, they did argue that while they acknowledged their parental duty to control Jason, public policy

considerations did not require them to medicate Jason against their will.

Nieuwendorp argued to the contrary.

The appellate court reversed, concluding that the jury could only speculate as to whether Jason's further treatment or his parents' warning to the school would have prevented Nieuwendorp's injuries. Guided by the RESTATEMENT (SECOND) OF TORTS § 316, the Supreme Court of Wisconsin reversed the appellate court and affirmed the jury's conclusion that Jason's parents' actions and omissions constituted negligence in failing to control Jason. The court, relying on expert testimony elicited at trial, further affirmed the jury's conclusion that Jason's parents' failure to control Jason was a substantial factor in causing Nieuwendorp's injuries.

More importantly, the court held that that Jason's parents' argument that there were specific policy reasons for not imposing liability did not apply in this case. The court listed several potential policy reasons that could preclude liability despite a finding of negligence as a substantial factor in producing the injury in question. Some of those included: (1) the injury is too remote from the negligence; (2) the injury is wholly out of proportion to the culpability of the negligent tortfeasor; (3) allowing recovery in such cases places too unreasonable a burden on the tortfeasor; (4) allowing recovery enters a field that has no sensible or just stopping point; (5) in retrospect, it appears highly extraordinary that the negligence should have brought about the harm; or (6) because allowance of recovery is too likely to open the way for fraudulent claims.

Jason's parents argued that examples (1), (3), and (4) applied in this case. The court disagreed. First, the court reiterated its finding concerning the likelihood that taking Jason off of the medication might have resulted in danger to others. Second, and most importantly, the court stated:

Imposing liability in this case would not place too unreasonable a burden on persons such as Jason and his parents. On the contrary, it is reasonable to conclude that [Jason's parents] should have considered the ramifications of their actions...This case does not stand for the proposition that parents must forcibly medicate their hyperactive children in order for the children to attend public school. Rather, it is a natural extension of the principle that recognizes parents' responsibility to exercise reasonable control over their children so as to prevent harm to others.²³

Last, the court held that Jason's parents' no-just-stopping-point argument failed because "the case at hand is very fact-specific and cannot be read to force parents to medicate their children against their will."²⁴

IV. PREEMPTION ANALYSIS

A. Overview

The Supremacy Clause of the U.S. Constitution makes federal law "the Supreme Law of the Land."²⁵ Consequently, federal statutes and regulations can preempt conflicting state laws.²⁶ Federal law preempts state law under three circumstances: (1) where Congress has clearly expressed an intention to do so (express preemption); (2) where Congress has legislated comprehensively to

²³ Nieuwendorp, 529 N.W.2d at 601.

²⁴ Id.

²⁵ U.S. CONST. art. VI, cl. 2.

²⁶ College Loan Corp. v. SLM Corp., 396 F.3d 588, 595 (4th Cir. 2005).

occupy an entire field of regulation (field preemption); and (3) where state law conflicts with federal law (conflict preemption).²⁷

Because IDEA itself contains no preemption provision, express preemption is inapplicable to the present topic. Moreover, although field preemption may be applicable to the relationship between IDEA and state common-law tort claims, the more logical approach is to consider the issue as one involving conflict preemption. As the U.S. Supreme Court has explained, “The categories of preemption are not rigidly distinct....[F]ield pre-emption may be understood as a species of conflict pre-emption[,as f]ield preemption may fall into any of the categories of express, implied, or conflict preemption.”²⁸

When the Supreme Court speaks of conflict preemption, it examines whether the state law under the circumstances of the particular case stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress – whether that “obstacle” be identified with such terms as “conflicting,” “contrary to,” “inconsistent,” “curtailment,” “interference,” and so on.²⁹ A state law may pose an obstacle to federal purposes by interfering with the accomplishment of Congress’s actual objectives or by interfering with the methods Congress uses for meeting those objectives.³⁰

²⁷ *Id.*, at 595-96.

²⁸ Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 373 (2000) (internal quotation marks and citations omitted.)

²⁹ Geier v. Am. Honda Motor Co., 529 U.S. 861, 873 (2000) (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

³⁰ College Loan Corp., 396 F.3d at 596 (citing Gade v. Nat’l Solid Wastes Mgmt. Ass’n, 505 U.S. 88, 103 (1992)).

In conflict preemption cases, the Court assumes that Congress would not want the conflict at issue.³¹ Moreover, “our starting presumption is that Congress does not intend to supplant state law.”³² Also, “the Court has observed repeatedly that pre-emption is ordinarily not to be implied absent an actual conflict.”³³ Still, although the Court looks for a specific statement of preemptive intent in field preemption cases, “the Court has never before required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists.”³⁴

The Court’s primary function in such cases is to determine congressional intent.³⁵ The Court traditionally distinguishes between “express” and “implied” preemptive intent, treating “conflict pre-emption as an instance of the latter.”³⁶

B. Foundational Case

As no case has dealt with the precise issue of IDEA preemption of state common-law tort claims,³⁷ one must turn to cases where courts have considered preemption of such claims concerning other federal statutes.

³¹ Geier, 529 U.S. at 873.

³² College Loan Corp., 396 F.3d at 597 (internal quotation marks omitted).

³³ Id. at 598 (citing English v. Gen. Elec. Co., 496 U.S. 72, 90 (1990)) (internal quotation marks omitted).

³⁴ Geier, 529 U.S. at 884.

³⁵ Id. See also Gade, 505 U.S. at 96 (“The purpose of Congress is the ultimate touchstone...To discern Congress’ intent we examine the explicit statutory language and the structure and purpose of the statute.”) (internal quotation marks and citations omitted); Keams v. Tempe Technical Inst., Inc., 39 F.3d 222, 225 (9th Cir. 1994) (“Our sole task is to ascertain the intent of Congress.”) (quoting California Fed Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 280 (1987)).

³⁶ Geier, 529 U.S. at 884.

³⁷ See *supra* note 3 and accompanying text. Cf. M.Q. v. Baltimore County Pub. Schs., 2005 U.S. Dist. LEXIS 16690, at *8 (D. Md. Aug. 3, 2005) (in the “well-pleaded complaint” doctrine context, IDEA is sufficiently pervasive to justify removal of a special education case where the complaint cites state law only); *but see* Evergreen Sch. Dist. v. N.F., 393 F. Supp. 2d 1070, 1075

In Geier, the basic question was whether plaintiffs' state common-law "no airbag" tort claim was impliedly preempted by Federal Motor Vehicle Safety Standard 208 (federal standard), promulgated under the authority of the National Traffic and Motor Vehicle Safety Act (federal statute).³⁸ The basic facts of the case were that the plaintiff car driver (Geier) crashed into a tree and was seriously injured. His car had manual shoulder and lap belts, which Geier had buckled at the time. His car did not have airbags. Geier sued the car manufacturer under state tort law, alleging that it designed the car negligently and defectively because it lacked a driver's side airbag, which state law required.

It is worth noting that the federal statute in Geier contained an express preemption provision stating that any state safety standard that was not identical to the federal standard applicable to the same aspect of performance would be preempted. While the existence of this provision may make Geier seem less relevant for the purpose of this essay (again, IDEA has no express preemption provision), that is not the case, as the Court went on to hold that the express preemption provision was effectively nullified by a corresponding "saving clause," which stated that compliance with a federal safety standard did not exempt any person from liability under common law. The Court then found that the saving

(W.D. Wa. 2005) (although in the well-pleaded complaint context, there is "a presumption against state legislation being found to conflict with an Act of Congress, such as the IDEA[,] in this case, "IDEA does not preempt the state statute, and Plaintiff's well-plead complaint does not arise under federal law."); John B. by Helga B. v. Bd. of Educ., 1995 U.S. Dist. LEXIS 3651, at *3 (N.D. Ill. Mar. 22, 1995) (in the well-pleaded complaint context, IDEA does not completely preempt state law; it only preempts state law that is below the federally required procedural standards or otherwise in conflict with federal law.).

³⁸ Id., at 874.

clause did *not* bar the operation of ordinary preemption principles “insofar as those principles instruct us to read statutes as pre-empting state laws (including common-law rules) that ‘actually conflict’ with the statute or federal standards.”³⁹

Thus, the issue became: Does the state common-law “no airbag” claim actually conflict with the federal standard at issue? Applying ordinary preemption principles, the Court answered this question affirmatively. In its primary function of determining congressional intent, the Court first reviewed the federal standard’s legislative history. The Court found that the federal standard reflected several significant considerations that supported the Department of Transportation’s objective of deliberately seeking a “mix of several different passive restraint systems” – not solely airbags – based on safety, public opinion, and cost-effectiveness concerns.⁴⁰ Furthermore, the federal standard sought a gradual phase-in of passive restraints – as opposed to suddenly requiring any one type of passive restraint (e.g., airbags) on all cars of all manufacturers.⁴¹

Also, the Court noted the importance of uniformity when applied to federal preemption of state tort law. The Court, examining the federal standard’s legislative history, stated, “This [uniformity] policy by itself favors pre-emption of state tort suits, for the rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict, say, when

³⁹ *Id.*, at 869.

⁴⁰ *Id.*, at 878.

⁴¹ *Id.*, at 879.

different juries in different States reach different decisions on similar facts.”⁴²

The Court concluded:

[T]he language of [the federal standard] is clear enough...[The federal standard] sought a gradually developing mix of alternative passive restraint devices for safety-related reasons. The rule of state tort law for which petitioners argue would stand as an obstacle to the accomplishment of that objective. And the statute foresees the application of ordinary principles of pre-emption in cases of actual conflict. Hence, the tort action is pre-empted.⁴³

C. Preemption Principles Applied to IDEA

1. IDEA’s Stated Purposes

IDEA expressly lists its several purposes. Some of these purposes include ensuring that all children with disabilities have available to them a “free appropriate public education” that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; ensuring that the rights of children with disabilities *and parents* of such children are protected; and assisting States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities.⁴⁴

IDEA defines the term “free appropriate public education,” in relevant part, as special education and related services that have been “*provided at public expense*,” under public supervision and direction, “*and without charge*.”⁴⁵

⁴² *Geier*, 529 U.S. at 871.

⁴³ *Id.*, at 886.

⁴⁴ 20 U.S.C.S. § 1400(d)(1)(A)-(C) (emphasis added).

⁴⁵ 20 U.S.C.S. § 1401(9)(A) (emphasis added).

IDEA defines the term “special education,” in relevant part, as “specially designed instruction, *at no cost to parents*, to meet the unique needs of a child with a disability.”⁴⁶ “*At no cost* means that all specially-designed instruction is provided without charge, but does not preclude incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program.”⁴⁷

2. Right to a FAPE

As the Supreme Court in Geier found preemption based, in part, on the federal government’s concern for cost-effectiveness, so, too, is cost an important factor warranting IDEA preemption of state common-law tort claims against parents for their special education children’s infliction of serious bodily injury upon another at school. It is well-established that a FAPE is to be provided to all age-eligible disabled children.⁴⁸

For example, the federal court in Parks held that Illinois’ statutory scheme, which required parents to pay for their severely disabled children’s placement in

⁴⁶ 20 U.S.C.S. § 1401(29) (emphasis added).

⁴⁷ 70 Fed. Reg. 35,782 (June 21, 2005) (emphasis in original).

⁴⁸ See *infra* Part I. See also Parks v. Pavkovic, 557 F. Supp. 1280 (N.D. Ill. 1983), *aff’d in part and rev’d in part*, 753 F.2d 1397 (7th Cir. 1985); Doolittle, 919 P.2d 334 (IDEA preempted the state constitution’s prohibition against spending public money for non-public education); Evans, 818 F. Supp. 1215 (N.D. Ind. 1993) (state’s residential service procedures preempted by IDEA because the former stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress); Miener v. Missouri, 800 F.2d 749, 753 (8th Cir. 1986) (“We are confident that Congress did not intend the child’s entitlement to a *free* education to turn upon her parent’s ability to ‘front’ its costs.”) (emphasis in original); Parks v. Dept. of Mental Health and Developmental Disabilities, 110 Ill. App. 3d 184, 187 (1 Dist. 1982) (state’s assessment against parents of “responsible relative liability charges” was preempted by the Education for All Handicapped Children Act, as “all expenditures of every kind for the education and welfare of the child are to be borne not by the parents but by the educational authorities of the State.”).

a residential facility and assessed parents a “responsible relative liability” based on annual income, conflicted with the Education for All Handicapped Children Act (now IDEA) and thus was preempted. The court stated that IDEA “unambiguously requires Illinois to provide an appropriate public education *at no cost* to the parents of handicapped children.”⁴⁹ Finding that Illinois “clearly violated” IDEA’s FAPE requirement, the court next addressed the issue of which of the several defendant agencies should pay for the money owed plaintiffs.⁵⁰

Furthermore, after determining that each defendant agency was liable for its role in Illinois’ invalid statutory scheme, the court concluded that “where there is a right, there is a remedy. Plaintiffs’ civil rights cannot be permitted to slip between the cracks simply because the state of Illinois has apportioned liability in a way that does not focus blame on a single agency.”⁵¹ The court hinted, though it did not expressly find, that the Illinois State Board of Education (ISBE) should foot the bill: “ISBE, as the state educational agency, is clearly responsible for Illinois’ failure to comply with federal law. Under [IDEA], *it* is responsible for ensuring compliance with [IDEA]. The ultimate responsibility is placed on ISBE precisely to avoid an abdication of responsibility by other state agencies such as has occurred here.”⁵²

⁴⁹ *Id.*, at 1283-84 (emphasis added) (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 189 (1982) (IDEA’s provision of a FAPE requires that “instruction and services be provided *at public expense*”) (emphasis added)).

⁵⁰ *Id.*, at 1287.

⁵¹ *Id.*, at 1288.

⁵² *Id.* (emphasis added).

At the end, however, the court declined to apportion liability among the several defendant agencies. Instead, the court explained, “All defendants are liable and will be bound by our final decree. We will dictate no specific mode of compliance to them, but merely order ISBE to assume ultimate responsibility for developing a plan that complies [IDEA].”⁵³

3. Application to Present Topic

IDEA’s express language⁵⁴ shows that Congress intended that parents should not have to worry about any costs relating to the education of their disabled children. Also, the FAPE notion is well-supported by case law.⁵⁵

a. Uniformity

Another significant reason supporting preemption is uniformity.⁵⁶ Applying the same uniformity analysis as the Supreme Court did in Geier, it is clear that state common-law tort claims against the parents for their special education children’s infliction of serious bodily injury upon another at school inhibit IDEA from being applied uniformly, due to the vast tort-law differences among the states.

One commentator, noting that “current jurisprudence regarding a school district’s responsibility for related services varies from state to state,” argues that “[c]ourts should strive to establish a uniform application of the related services

⁵³ Id.

⁵⁴ See *infra* Part I; Part IV.C.1.

⁵⁵ See *infra* Part IV.C.2.

⁵⁶ See Gade, 505 U.S. at 106 (“In assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature’s professed purpose and have looked as well to the effects of the law.”).

provision and promote compliance with IDEA's mandate to educate all disabled children."⁵⁷

Another commentator, arguing for home-schooled students' integration into IDEA, states that "the purposes undergirding the IDEA, plus the need for more uniformity in its application, dictate that Congress should integrate home-educated students into the Act."⁵⁸ The commentator adds, "Although federalism concerns are important..., [IDEA] already defines many uniform issues of scope...So why should it not go a little further and unify the states' application of the law to home-educated students?"⁵⁹

Yet another commentator, addressing the courts' varied interpretations of IDEA's least restrictive environment (LRE) mandate, poignantly declares, "Until the courts become consistent, either by action from the United States Supreme Court or by the evolution of the law at the appellate court level, IDEA will continue to guarantee different rights for children in different parts of the country."⁶⁰

The commentators' statements are not inconsistent with case law holding that IDEA "does not presume to impose nationally a uniform approach to the education of children within [*sic*] any given disability; it requires only that a free

⁵⁷ Haekyoung Suh, *The Need for Consistency in Interpreting the Related Services Provision Under the Individuals with Disabilities Education Act*, 48 RUTGERS L. REV. 1321, 1356 (1996).

⁵⁸ Lisa R. Knickerbocker, *The Education of All Children with Disabilities: Integrating Home-Schooled Children into the Individuals with Disabilities Education Act*, 62 OHIO ST. L.J. 1515, 1542 (2001).

⁵⁹ *Id.* at 1543.

appropriate education, in conformity with the state’s educational standards, be provided to each disabled child.”⁶¹

The court in Evans held that IDEA preempts the state’s standards fall below the federal minimum standards, but not if the state standards if they meet the federal minimum.⁶² As the state’s standards in that case fell below the federal minimum and thus directly conflicted with IDEA’s purposes and objectives, IDEA preempted the state’s standards.

The holding in Evans, i.e., that IDEA does not impose nationally a uniform approach to the education of children with any given disability, does not undercut this essay’s argument for IDEA preemption based partly on uniformity considerations. The Evans court relied on the U.S. Supreme Court’s application of the “cooperative federalism” concept, as stated in Burlington.⁶³ In the following sentence, the Court in Burlington stated, “Cooperative federalism *in this context*, then, allows *some substantive* differentiation among the states in the

⁶⁰ Rebecca Weber Goldman, Comment, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken By the Individuals with Disabilities Education Act*, 20 DAYTON L. REV. 243, 275 (1994).

⁶¹ Evans, 818 F. Supp. at 1223 (internal quotation marks and citations omitted) (quoting Burlington, 736 F.2d at 784, *aff’d sub nom. Burlington Sch. Comm. v. Dep’t of Educ.*, 471 U.S. 359 (1985)). *But see* College Loan Corp., 396 F.3d at 597 (“We are unable to confirm that the creation of ‘uniformity,’ a goal relied on by the district court...was actually an important goal of the [Higher Education Act.]”); Pinney v. Nokia, 402 F.3d 430, 457 (4th Cir. 2005) (reversing the district court’s finding of congressional intent of achieving national uniformity in wireless telecommunications services, because there existed “no evidence of such an objective.”).

⁶² Evans, 818 F. Supp. at 1223.

⁶³ Burlington, 736 F.2d at 784.

determination of which *educational theories, practices, and approaches* will be utilized for educating disabled children with a *given impairment*.”⁶⁴

Thus, because the federalism implications that Burlington discussed were in the context of a state’s *substantive* educational theories, practices, and approaches, the statement in Evans that IDEA does not impose nationally a uniform approach to the education of children with any given disability is simply inapplicable to the argument that IDEA impliedly preempts the states’ tort laws that undercut special education students’ central right to a FAPE.

b. “Chilling Effect” On Right to a FAPE

Directly related to the issue of a lack of uniformity caused by state common-law tort claims against parents under these circumstances is the likely “chilling effect” such claims have on parents’ exercise of their statutory rights to not only enroll their children in school but also to mainstream them into general education classes. Although there is no case directly on-point, a Ninth Circuit case offers some guidance.⁶⁵

The plaintiffs in Keams brought state common-law tort claims against the defendant alleging negligence and a violation of the Higher Education Act. With respect to plaintiffs’ negligence theory, the appellate court quoted the trial court’s chilling-effect analysis:

⁶⁴ Id. (emphasis added) (citing Rowley, 458 U.S. at 207 (“The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child’s needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.”))

⁶⁵ Keams, 39 F.3d 222.

Negligence tort law varies from state to state. Allowing state negligence claims could result in numerous and unpredictable standards for performance. Such confusion and lack of direction regarding compliance could well discourage participation by accrediting agencies in the program.⁶⁶

Although the appellate court noted that the trial court “adopted a plausible policy argument that state standards might be diverse, and might discourage accreditor participation in the federal program,” it ultimately disagreed with the trial court’s analysis.⁶⁷ The appellate court provided two reasons for its disagreement: First, “[A]n equally plausible policy argument could be made to the contrary, that diversity in accrediting standards might facilitate adaptation of this federal program to local conditions,” and second, “Congress could have avoided diversity by express preemption, had it wished to do so.”⁶⁸

When applied to the topic of this essay, the court’s reasoning is unpersuasive. As to its first conclusion, the court merely restated the trial court’s reasoning in reverse terms and with no further reasoning of its own. Also, even though the appellate court’s conclusion may have a place in the context of the Higher Education Act, it clearly has no place when applied to disabled students’ guaranteed right to a FAPE. As to its second conclusion, the court simply ignored well-established principles of implied preemption.⁶⁹ Thus, the lack of

⁶⁶ *Id.* at 226.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See *Crosby*, 530 U.S. at 370 (“A failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply, and in any event, the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict.”) (citing *Hines*, 312 U.S. at 67)).

uniformity caused by state common-law tort claims against parents for their special education children's infliction of serious bodily injury upon another at school in turn causes a chilling effect on parents' exercise of the rights IDEA guarantees them.

c. Priority to Low-Income Families

This chilling-effect concern is especially important considering that the families of many special education children are poor. The predictable result of allowing state common-law tort claims to be filed against parents is that not only will students' right to a FAPE be adversely effected, but also parents, especially poorer parents, many of whom presumably have no insurance, will be forced to pay damages on their own, at the expense of their children's education, which IDEA strives to make as "appropriate" as possible.

Part D of IDEA (entitled "National Activities to Improve Education of Children with Disabilities") expressly finds that "there is an urgent and substantial need to enhance the capacity of State and local agencies and service providers to identify, evaluate, and meet the needs of all children, particularly minority, *low-income*, inner city, and rural children, and infants and toddlers in foster care."⁷⁰ Also, IDEA expressly gives priority to "projects that address the needs of children from *low-income families*,"⁷¹ among other projects. IDEA similarly reflects this

⁷⁰ 20 U.S.C.S. § 1431(a)(5) (emphasis added).

⁷¹ 20 U.S.C.S. § 1481(d)(3)(C) (emphasis added).

policy in several of its provisions.⁷² This policy is also reflected in the regulations⁷³ and in case law.⁷⁴

d. Public Policy Considerations

Last, public policy warrants preemption in such cases for two principal reasons. As the court in Nieuwendorp discussed,⁷⁵ there are several potentially applicable policy reasons for precluding civil liability against parents for their special education children's infliction of serious bodily injury to another at school. The two most relevant considerations for the purpose of this essay are: (1) where

⁷² See, e.g., 20 U.S.C.S. § 1412(a)(10)(B)(i) ("Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, *at no cost to their parents*, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency.") (emphasis added); 20 U.S.C.S. § 1415(e)(2)(D) ("The *State* shall bear the cost of the mediation process.") (emphasis added); 20 U.S.C.S. § 1415(i)(3)(B)(i) ("In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs--(l) to a prevailing party who is the parent of a child with a disability."). See also Jeff Lerner, Comment, *Encouraging Litigation At the Expense of Our Children: The Inapplicability of Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health and Human Serv. to the Individuals with Disabilities Education Act*, 76 TEMP. L. REV. 381, 408-09 (2003) ("The text of the IDEA and its legislative history strongly suggest that Congress intended parties obtaining relief through private settlement agreements to be awarded attorneys' fees, and the act's policies of encouraging early dispute resolution and assisting *low-income families* would be thwarted by a rule requiring a judgment or court-sanctioned consent decree for prevailing party status.") (emphasis added).

⁷³ 34 C.F.R. § 300.345(f) ("The public agency shall give the parent a copy of the child's IEP *at no cost to the parent*.") (emphasis added); 34 C.F.R. § 300.507(a)(3) ("The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area if - (i) The parent requests the information; or (ii) The parent or the agency initiates a hearing under this section."); 34 C.F.R. § 300.509(c)(2) ("The record of the hearing and the findings of fact and decisions described in paragraphs (a)(4) and (a)(5) of this section must be provided *at no cost to parents*.") (emphasis added).

⁷⁴ See, e.g., Knable v Bexley City Sch. Dist., 238 F.3d 755 (6th Cir. 2001) (IEP that stated school district would assume costs of private school beyond what parents' insurance would cover did not offer a FAPE, since it would have required parents to exhaust their own insurance coverage before school would pay, and since parents had limits for psychiatric care under their insurance policy, proposed IEP would have resulted in costs to parents); Seals v Loftis, 614 F. Supp. 302 (E.D. Tenn. 1985) (court has authority to order reimbursement of parent's insurance carrier for services of physician and psychologist, since parents of handicapped child cannot be required to use their private medical insurance benefits where utilization of benefits would cause them to incur financial costs).

⁷⁵ See *infra* Part III.C.

the students' actions are a manifestation of their disability, the injury is wholly out of proportion to the culpability of students who inflict the injury; and (2) allowing recovery in such cases would place too unreasonable a burden on students' parents, especially poorer parents.

IDEA's legislative history shows that Congress wanted to assure that "a child with a disability should not be subject to discipline in the same manner as a non-disabled child."⁷⁶ A corollary of this principle is that Congress likewise intended to bar state common-law tort claims against parents for their special education children's serious bodily injury to others while at school, particularly where the students' actions are a manifestation of their disability. The IDEIA legislators stated, "It is the intention of the Conferees that the conduct in question was caused by, or has a direct and substantial relationship to, the child's disability."⁷⁷ During the Senate floor debate over IDEIA's new serious-bodily-injury provision, Senator Kennedy confirmed the distinction between discipline for disabled and non-disabled students: "[I]t is a basic premise of disability civil rights law that someone should not be punished for disability-related conduct. Nowhere is this more true than in the educational setting. That is why we have placed an emphasis on functional behavioral assessments and positive behavioral supports."⁷⁸

e. Other Considerations

⁷⁶ See H.R. CONF. REP. NO. 108-779, at note 245 (2004).

⁷⁷ *Id.*

⁷⁸ 150 CONG. REC. S11,547 (2004).

Moreover, it is worth noting that the RESTATEMENT (SECOND) OF TORTS § 316, which the current trend of claims parallels, was published in 1965 – a decade prior to the enactment of IDEA’s predecessor, the Education for All Handicapped Children Act, and four decades prior to IDEA’s new serious-bodily-injury provision. Thus, using RESTATEMENT (SECOND) OF TORTS § 316 as a basis for liability against the parents for special education children’s infliction of serious bodily injury to others at school is outdated and thus presents an obstacle to the accomplishment and execution of the full purposes and objectives of IDEA.

Lastly, the new “serious-bodily-injury” provision⁷⁹ is over-inclusive and vague, in that it states no requirement of intent on the tortious student’s part and does not even attempt to address inevitable parental liability implications. This is problematic because, while IDEA, through its “manifestation review” process,⁸⁰ contemplates that a student’s actions may have resulted from his or her disability, state common-law tort claims against their parents do not.

V. CONCLUSION

In sum, Congress and the courts must closely examine the practical and significant effects that the current trend has on special education children (academically) and their parents (financially). IDEA’s purposes and language, its regulations, pertinent case law, commentators’ statements, and public policy considerations make it is clear that state common-law tort claims filed against parents for their special education children’s infliction of serious bodily injury

⁷⁹ See *infra* Part II.

upon another at school present an obstacle to the accomplishment and execution of the full purposes and objectives of and therefore are impliedly preempted by IDEA.

It is no answer that the “States, local educational agencies, and educational service agencies are primarily responsible for providing an education for all children with disabilities[,]” because “it is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law.”⁸¹ As the U.S. Supreme Court has stated, “We recognize that the States have a compelling interest...to protect the public health, safety, and other valid interests...[b]ut under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however, clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.”⁸²

VI. RECOMMENDATIONS

To save the limited resources of special education children, their parents, school districts, and the courts, it may be preferable for Congress to add a provision in IDEA expressly preempting state common-law tort claims against parents for their special education children’s infliction of serious bodily harm upon another at school. This, however, begs the question of who will be liable for

⁸⁰ See 20 U.S.C.S. § 1415(k)(1)(E).

⁸¹ 20 U.S.C.S. § 1400(c)(6).

⁸² Gade, 505 U.S. at 108 (internal quotation marks and citations omitted).

damages in such circumstances, and whether any principles akin to tort law's concept of comparative negligence will play a part.

Of course someone must be liable in order to make the injured party whole. The natural inclination is to analyze this problem under traditional negligence analysis, including comparative negligence principles. However, this essay has shown the various problems associated with this approach.

A. Alternative #1

One alternative is to add a provision in IDEA that is modeled after any given state's tort-law scheme. Administrative hearing officers would adjudicate claims arising thereunder. This would help to eliminate the lack of uniformity produced by the current approach of filing claims according to the 50 states' distinct tort-law schemes. If the hearing officer finds that the parents were in any way responsible for their special education child's violent acts (as in Nieuwendorp), or if the child's acts were not a manifestation of his or her disability, then the parents would be responsible for a pre-determined percentage of the damages due (say, half of what they would otherwise be responsible for paying under common-law negligence theories), according to their percentage of fault.⁸³ Thus, if the parents are found to have been 50% causally negligent, then they would be responsible for paying 25% of the damages, and the school district would pay the remainder. If the parents are found to not have been negligent in

⁸³ See 145 CONG. REC. E. 581 (Mar. 25, 1999) (With respect to special education students who carry weapons to school, "If it is determined [that] a student's disability was not a contributing factor, that students should be held accountable for his or her actions.") (statement of Representative Bob Barr).

any way (e.g., if the student's act resulted from the school's failure to properly implement the child's IEP, or if the student's acts were a manifestation of his or her disability), then the school district would pay all of the damages. This approach would be consistent with IDEA's demonstrated policy of not shifting costs to parents.⁸⁴

B. Alternative #2

Another alternative is for Congress to draft a preemption provision including language to the effect that negligence principles are simply inapplicable. The rationale would be that, because IDEA completely preempts

⁸⁴ See 20 U.S.C.S. § 1412(a)(10)(C)(i) ("Subject to subparagraph (A), this part [20 USCS §§ 1411 et seq.] does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility."); 20 U.S.C.S. § 1412(a)(10)(C)(iii) ("The cost of reimbursement described in clause (ii) may be reduced or denied--(I) if--(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or (bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa); (II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 615(b)(3) [20 USCS § 1415(b)(3)], of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or (III) upon a judicial finding of unreasonableness with respect to actions taken by the parents."); 20 U.S.C.S. § 1415(i)(3)(B)(i) ("In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs--(II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or (III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.")

such claims, there is simply no need for negligence analysis on any level.⁸⁵ This alternative would be much more pragmatic, from the viewpoints of all involved, than the first alternative, even though it is admittedly somewhat counterintuitive, in that it almost too easily dispenses with general notions of fairness and justice, from the viewpoints of the school districts and taxpayers, generally. In other words, under this approach, parents of special education students would have no incentive, other than desiring the best education possible for their children, to control their children's violent propensities (as was the case in Nieuwendorp), which of course always remains a valid concern.

C. *Alternative #3*

Yet another alternative is for individual state legislatures to bar liability in such cases. One court, addressing whether the interests of the plaintiffs in that case would be more effectively vindicated by private tort suits in state court rather than by preemption of such suits, has stated, "We do not make this policy decision. It is for the state governments to decide upon the desirability of the tort, unless Congress chooses to preempt their lawmaking power."⁸⁶

D. *Final Thoughts*

Regardless of which approach one favors, looking at the problem as realistically as possible, Congress most likely would not add a preemption provision. Perhaps the best alternative at this time, then, is to maintain the status

⁸⁵ It should be noted that the author does not at all advocate the idea that IDEA preemption of state common-law tort claims in these cases in any way also stands for the proposition that criminal liability is likewise preempted.

⁸⁶ Keams, 39 F.3d at 227.

quo and not add a preemption provision to IDEA. Perhaps the courts are better suited to adjudicate these claims. However, courts generally refuse to read IDEA as a catalyst for monetary damages.⁸⁷

One can only hope that when courts review such claims, they realize that such claims present an obstacle to the accomplishment and execution of the full purposes and objectives of, particularly disabled students' right to a FAPE, and therefore are impliedly preempted by IDEA.

⁸⁷ “[IDEA is] not to serve as a tort-like mechanism for compensating personal injury.” Ortega, 397 F.3d at 1325. See also Witte v. Clark County Sch. Dist., 197 F.3d 1271, 1275 (9th Cir. 1999) (monetary damages are not available under IDEA); Charlie F. by Neil F. v. Bd. of Educ., 98 F.3d 989, 991 (7th Cir. 1996) (“We conclude that damages are not relief that is available under the IDEA. This is the norm for social-welfare programs that specify benefits in kind at public expense, whether medical care or housing or, under the IDEA, education”) (internal quotation marks omitted); College Loan Corp., 396 F.3d at 597 (“[T]he presumption against preemption is even stronger again preemption of state remedies, like tort recoveries, when no federal remedy exists.”) (quoting Abbot v. Am. Cyanamid Co. 844 F.2d 1108, 1112 (4th Cir. 1988) (citing Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984))).