

# Legally Speaking

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## Differentiated Accountability In a Nutshell

By James A. Robinson, General Counsel

The term Differentiated Accountability or "DA" has become part of the common lexicon among district administrators and instructional personnel. What is DA? How does it impact district schools? DA is a system of school improvement that categorizes schools based on a combination of FCAT performance and Adequate Yearly Progress (AYP) and provides support based on a system designed to target the lowest performing schools with the greatest levels of intervention. In March of this year, the State Board of Education adopted Rule 6A-1.099811, Florida Administrative Code, to implement the provisions of Section 1008.03, Florida Statutes, governing DA. However, that same month the Florida Education Association (FEA), on behalf of its statewide membership, filed a petition challenging the remedial portions of the rule, and a hearing is scheduled for June 17, 2010. The grounds for the FEA's challenge are that the rule is vague, arbitrary and capricious, fails to establish adequate standards for DOE determination and vests unbridled discretion in the DOE. The provisions the FEA challenges include those dealing with replacement of the principal, assistant principals and instructional coaches, and similar provisions regarding faculty and staff (see below under the discussion of the reconstitution options). The rule will not be effective until the rule challenge is resolved by final order of the administrative law judge.

The rule is intended to implement the provisions of Section 1008.33, Florida Statutes, which states in part that, "Pursuant to Article IX of the State Constitution ..., the State Board of Education shall equitably enforce the accountability requirements of the state school system and may impose state requirements on school districts in order to improve the academic performance of all districts, schools and students based upon the provisions of the Florida K-20 Education Code, chapters 1000-1013, and the federal Elementary and Secondary Education Act, 20 U.S.C. ss. 6301 et seq., and its implementing regulations."

Rule 6A-1.099811 sets forth the framework for categorizing schools based upon FCAT scores and how well schools are meeting AYP criteria. The rule also defines the level of assistance provided to schools, and identifies the support systems and strategies to be implemented by schools and districts.



### Mission Statement

The mission of the Office of General Counsel is to provide the highest quality legal services to the Pinellas County School Board, the superintendent and the district by ensuring timely and accurate legal advice and effective representation on all legal matters.

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**Differentiated Accountability**  
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**Categories** Every school is placed into one of six categories annually, beginning with the highest performing. The categories are entitled: 1) Schools Not Required to Participate in Differentiated Accountability Strategies, 2) Prevent I, 3) Correct I, 4) Prevent II, 5) Correct II and 6) Intervene. The criteria by which schools are

placed in these categories are set forth in the following table.

As used in the table, the term "AYP Count" means the value assigned to a school that did not achieve AYP for two consecutive years, starting from the 2002-03 school year. The school is assigned a value of one AYP Count if the school failed to make AYP for two consecutive years and increases by one for each year that the school fails to achieve AYP.

**Intervention and Support Strategies** The strategies and support interventions required of schools in need of improvement fall into seven areas: 1) school improvement planning, 2) leadership quality improvement, 3) educator quality improvement, 4) professional development, 5) curriculum alignment and pacing, 6) the Florida Continuous Improvement Model and 7) monitoring plans and processes. The action required for each school

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Category	The School ...
Schools Not Required to Participate in DA	1. Is graded "A", "B", "C", or is ungraded; and 2. Has not failed to make AYP for 2 consecutive years.
Prevent I school	1. Is graded "A", "B", "C", or is ungraded; and 2. Has an AYP Count between 1 and 3; and 3. Has met at least 80% of AYP criteria for at least 2 consecutive years.
Correct I school	1. Is graded "A", "B", "C", or is ungraded; and 2. Has an AYP Count of 4 or greater; and 3. Has met at least 80% of AYP criteria.
Prevent II school	1. Is a "D" school that failed to meet AYP criteria for fewer than 2 consecutive years; or 2. Is a "D" school that failed to meet AYP criteria for at least 2 consecutive years, with an AYP count between one and three 3; or 3. Is graded "A", "B", "C", or is ungraded; and a. Has an AYP Count between 1 and 3 and b. Has met less than 80% of AYP criteria and has not met AYP criteria for at least 2 consecutive years.
Correct II school	1. Is graded "F" regardless of AYP status; or 2. Is graded "D" and has an AYP Count of 4 or greater; or is graded "A", "B", "C" or is ungraded; and a. Has an AYP Count of 4 or greater; and b. Has met less than 80% of AYP criteria.
Intervene school	1. Is graded "F" and has earned at least 4 "F" grades in the last 6 school years; or 2. Is graded "D" and meets the criteria for a Correct II school or is graded "F" and meets the criteria for a Correct II school, and the school also meets at least 3 of the 4 following conditions: a. The percentage of non-proficient students in reading has increased when compared to the percentage attained 5 years earlier. b. The percentage of non-proficient students in mathematics has increased when compared to the percentage attained 5 years earlier. c. 65% or more of the school's students are not proficient in reading. d. 65% or more of the school's students are not proficient in mathematics. 3. Alternative schools are exempt from qualifying for the Intervene category.

# Student Restraint and Secured Seclusion – Federal and State Update

By David Koperski, Associate Counsel

The practice of using restraint and secured seclusion with students, whether exceptional education students or general education students, has been the subject of much public debate over the last couple of years. This has been due primarily to high profile national cases where students with disabilities have been restrained in an inappropriate manner. This article will provide a short summary of the initiatives at the federal and state legislative and executive levels that may affect the use of restraint and secured seclusion in Florida public schools. This article will also discuss a recent court case involving a challenge to a student's restraint.

Two branches of the federal government have entered the debate. On the legislative side, congressional bills have been proposed in the U.S. House of Representatives and the U.S. Senate to create a new federal law entitled, "The Preventing Harmful Restraint and Seclusion in Schools Act." See a copy of the House bill, H.R. 4247, and related materials at <http://edlabor.house.gov/blog/2009/12/preventing-harmful-restraint-a.shtml>. This bill has been passed by the U.S. House of Representatives. It is now being considered by the U.S. Senate as Senate Bill 2860 and was recently referred to the Senate Committee on Health, Education, Labor and Pensions. It may or may not reach a full vote in the Senate or, if passed, be signed by the President. The two bills generally require the states to adopt standards for the use of restraint and seclusion that conform to standards contained in the bills.

On the executive side of the federal government, the U.S. Department of Education has recently stated that it would support legislation addressing this issue so long as certain principles are included, such as 1) the flexibility to use restraint and seclusion

when it is necessary to protect the student or others from imminent danger, 2) the inability to use these methods as punishment or discipline and 3) a requirement that staff be trained and parents notified of the district's practices. This statement by the federal DOE serves to communicate to Congress what provisions the President would be looking for if/when he is handed a bill to sign or veto.

In Florida, the state Department of Education ("FLDOE") issued a Technical Assistance Paper on June 3, 2008, entitled, "Guidelines for the Use of Manual Physical Restraint in Special Education Programs." In addition, FLDOE has been engaged in drafting a more formal document – a regulation – regarding the use of restraint and seclusion, but has not completed that process. Relatedly, the FLDOE is also currently drafting its proposed regulation regarding the use of "reasonable force" in public schools. Section 1006.11, Florida Statutes, allows school districts to use reasonable force on students in accordance with the standards adopted by the FLDOE.

On the judicial side, a recent court case addressed the question whether a teacher's restraint of a disruptive ESE student violated the student's substantive due process rights to bodily integrity or his procedural due process rights to notice and a hearing before being deprived of his liberty and bodily integrity. These due process rights are guaranteed under the Fifth and 14<sup>th</sup> Amendments to the U.S. Constitution. In this case, the pre-K student was diagnosed with various emotional and behavioral disorders. After numerous incidents of disruption, including kicking other students, the teacher attempted various strategies to address the behavior, including redirection, changes in environment and stimulus and other non-physical

interventions. After the attempted interventions failed, the teacher asked the student if he would sit and be restrained in a Rifton chair, a chair designed for reasonable restraint using a lap belt and foot straps. The young student agreed.

In ruling in favor of the teacher and school district, the federal district court in Alabama stated that the restraint was not unreasonable and denied the due process claims of the parent. Regarding the substantive due process claim, the court applied the general test in this area, which requires conduct that was arbitrary or "conscience-shocking." The court ruled that the teacher's actions were not excessive and were a reasonable response to the student's behavior.

Regarding the procedural due process claim, the court analogized this case to those involving the use of corporal punishment. Since other cases involving corporal punishment state that traditional procedural due process does not apply to corporal punishment (reasoning that other remedies protect against abuses of corporal punishment), this case also ruled that the traditional concepts of procedural due process, such as notice and an opportunity to be heard prior to the action, did not apply to this restraint.

Student restraint and secured seclusion will continue to be debated at both the federal and state levels, as well as litigated in the courts. We hope to have additional regulatory guidance in the near future. In the meantime, the district will continue its practice of only implementing those measures necessary for the safety of the student or others, such as the use of the de-escalation techniques taught under the Crisis Prevention Intervention, or CPI, program currently used in the district. ■

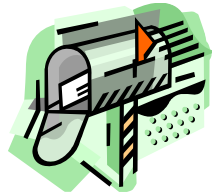
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Strategies when it meets AYP criteria for two consecutive years. In order to exit the Intervene category a school must make significant progress after one year. Significant progress is defined as:

1. The school's letter grade improves to a "C" or better, and
2. The school's AYP performance improves so that at least one subgroup in reading and at least one subgroup in mathematics that previously did not make AYP has made AYP.

As noted above, the remedial provisions of the rule are under challenge. One such provision would require the district and DOE to provide assistance with the selection and implementation of one of four "reconstitution options" in the event a school in the Intervene category fails to make significant progress within one year and exit the Intervene category. The reconstitution options are: 1) reassign students to another school and monitor the students' progress; 2) convert the school to a district-managed turnaround school (which would involve replacement of the principal, assistant principals and instructional coaches unless assigned to the school for less than one year and the school's failure to improve cannot be attributed, in whole or in part, to the individual); 3) close the school and reopen the school as a charter school or multiple charter schools; and 4) contract with an outside entity to operate the school.

***Differentiated Accountability***

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category is set forth in the form entitled, DA2 – Strategies and Support for Differentiated Accountability. For charter schools and alternative schools the action required for each school category is set forth in the forms entitled DA-3, 2009-2010 Strategies and Support for Differentiated Accountability – Alternative Schools and DA-4, 2009-2010 Strategies and Support for Differentiated Accountability – Charter Schools. The forms can be obtained through the Department of Education (DOE) website [www.flbsi.org/DA/index.htm](http://www.flbsi.org/DA/index.htm) or by contacting the Bureau of School Improvement in the DOE. Should the implementation of any of the strategies imposed by the rule require collective bargaining, the rule requires that the district promptly submit the issue for bargaining.

Except for a school in the highest performing category, a school's improvement plan must include the strategies and support activities found in the Department's Form DA2 – Strategies and Support for Differentiated Accountability.

**Progression and exiting from categories other than Intervene** A Prevent I, Correct I, Prevent II, or Correct II school may progress to a School Not Required to Participate in Differentiated Accountability

In the next issue of *Legally Speaking* we will report on the results of the rule challenge and its impact on DA, including reconstitution of Intervene schools. We will also address the relationship between DA and Race to the Top (RTTT), and requirements of the revised RTTT Memorandum of Understanding (MOU) just released to districts throughout the state. The RTTT MOU, must be returned to DOE with the signatures of the School Board chairman, Superintendent and Association president/executive director by May 25, 2010, if the district is to participate in Phase 2 of the RTTT grant. The MOU would require the district to select and implement one of four "school intervention models" in all "persistently lowest-achieving schools" located in the district. In Pinellas those schools identified in the MOU are: Boca Ciega, Dixie M. Hollins, Lakewood and Gibbs High Schools. Persistently lowest-achieving schools are identified based upon the school categories devised for DA as described above. These school intervention models are substantially similar to the "reconstitution options" under the DA rule. They are: 1) turnaround model (includes replacing principal and screening of existing staff and rehiring of no more than 50 percent of existing staff); 2) restart model (convert or close and reopen as a charter or an entity known as a charter management or education management organization); 3) school closure (just what it says) and 4) transformation model (involves replacement of the principal and a host of school improvement and professional development measures). ■