Notes

Eliminating the Use of Restraint and Seclusion Against Students with Disabilities

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I. INTRODUCTION

For the past two decades, throughout the United States, school children with disabilities have been subjected to the use of restraint and seclusion techniques by school personnel on a daily basis. In the early 2000s, reports of school children suffering serious bodily injury, or even death, led the United States Government Accountability Office (GAO) to address the House of Representatives Committee on Education and Labor regarding this issue.[1] The GAO found hundreds of cases alleging abuse and death related to the use of restraint and seclusion on school children.[2] Specifically, the GAO found that almost all of the restraint and seclusion allegations involved students with disabilities.[3] Furthermore, the use of these techniques was often in cases where the

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[1] Gregory D. Kutz, Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers, GAO-09-719T (2009).
[2] *Id.* at 5.
[3] *Id.*

child was not physically aggressive[4] and, more often than not, the teacher or staff member performing these techniques was untrained.[5] As a result, children with disabilities are at a higher risk of serious bodily injury or even death at the hands of those that should be protecting them: teachers, schools, and districts.

A. General Overview

In March of 2010, the House of Representatives passed House Bill 4247, the Keeping All Students Safe Act, but it remains under much criticism as it makes its way to the Senate.[6] The new bill will allow the Secretary of Education to "issue regulations regarding restraint and seclusion practices for students in public and private schools that receive federal funding."[7] Although the Keeping All Students Safe Act is a reasonable starting point in the battle against restraint and seclusion, it is not the solution. This Note will provide an overview of the problems with the use of restraint and seclusion and why it is necessary to eliminate the practice of using restraint and seclusion against children with disabilities, and not simply regulate its use. In order to protect these children, the use of restraint and seclusion needs to be eliminated in its entirety from all schools. If the new bill gets passed, the regulations and guidance issued by the Secretary of Education would not be enough to protect children with disabilities from suffering physical and emotional harm, or even death.

Part I of this Note provides an introduction to the United States Government Accountability Office's Seclusions and Restraints Report presented to the Committee on Education and Labor, and an overview of this note. Part II will provide a description of restraint and seclusion, the purpose of these techniques, and why they are ineffective. Part III will discuss the current situation across the country: a survey of state laws, how courts are dealing with allegations of restraint and seclusion, and why so many educators are protected and not punished. Part IV will provide an overview of the new Keeping All Students Safe Act, and explain why this regulation is not enough. Finally, Part V will explain why it is necessary to eliminate the use of restraint and seclusion from all schools and implement positive behavior interventions in order to ensure

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[4] *Id.* at 8.

[5] *Id.* at 9.

[6] Michelle Diamente, *Restraint and Seclusion Bill Hits Bumpy Road on Path to Senate*, Disability Scoop, Aug. 3, 2010, http://www.disabilityscoop.com/2010/08/03/restraint-senate-iep/9615/.

[7] Keeping All Students Safe Act, H.R. 4247, 111th Cong. (2009).

children with disabilities are protected.

II. USE OF RESTRAINT AND SECLUSION

A. General Definition of Restraint and Seclusion

The two types of restraint most commonly used in a school setting are mechanical and physical restraint.[8] Mechanical restraint "entails the use of any device or object . . . to limit an individual's body movement to prevent or manage out-of-control behavior."[9] The most common forms of mechanical restraint in law enforcement are handcuffs or straitjackets, but in a school setting, mechanical restraints usually include tape, straps, or tie-downs.[10] Mechanical restraints, however, must be distinguished from prescribed mechanical devices used to compensate for orthopedic weaknesses to protect a child or allow them to participate in school activities.[11] Prescribed mechanical devices are used to help a student participate in educational activities, or as a teaching strategy used to increase a student's opportunity to learn.[12] For example, many advocates for children with disabilities feel that a weighted blanket used to calm students with autism or attention deficit disorder is a form of restraint because it is not meant to be a teaching strategy.[13]

Similar to mechanical restraint, physical restraint is any method of "one or more persons restricting another person's freedom of movement, physical activity, or normal access to his/her body."[14] Physical restraint is usually intended to immobilize or reduce "the ability of an individual to move his or her arms, legs, body, or head freely."[15] Physical restraint is often used as a means of "controlling that [child]'s movement,

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[8] Kutz, *supra* note 1, at 1. Although there is a third form of restraint, chemical restraint, which is typically only used in hospitals or other medical facilities. Chemical restraint is the use of medication to control a child's behavior. The Council for Children with Behavior Disorders, CCBD's Position Summary on the Use of Physical Restraint Procedures in School Settings 3 (2009) [hereinafter CCBD Position Summary (Restraint)].

[9] CCBD Position Summary (Restraint), *supra* note 8, at 2. The definitions of mechanical and physical restraint are often combined into one definition. *See* Kutz, *supra* note 1, at 1.

[10] CCBD Position Summary (Restraint), *supra* note 8, at 2.

[11] *Id.*

[12] *See id.* If a device is prescribed by a physician, physical therapist or school nurse with "specific recommendations for lengths of time of use and other circumstances for their use," then these types of "assertive devices should not be considered mechanical restraint." *Id.*

[13] *See id.*

[14] CCBD Position Summary (Restraint), *supra* note 8, at 3. Physical restraint may also be known as "ambulatory restraint, manual restraint, physical intervention, or therapeutic holding." *Id.*

[15] Kutz, *supra* note 1, at 1.

reconstituting behavioral control, and establishing and maintaining safety for the out-of-control [child] . . ."[16] The use of physical restraint has been widespread in juvenile centers, hospitals, mental institutions, and education agency programs for a long time.[17] But for most schools, restraint is used as a method to prevent injury to a child with disabilities or other children nearby during a time of crisis or in an emergency.[18] Although school personnel claim that physical restraint is used only in emergency situations, there is evidence showing physical restraint is being used for a variety of other reasons including as a response to student noncompliance.[19]

Physical restraint is also used to forcibly move a student into a seclusion room.[20] Seclusion is defined as the "involuntary confinement of an individual alone in a room or area from which the individual is physically prevented from leaving."[21] Many advocacy organizations maintain that seclusion occurs when a child is confined in any room and is prevented from leaving regardless of the "intended purpose or the name applied to this procedure or the name of the place where the student is secluded."[22] In most situations, a child is placed in a room that is locked from the outside, or blocked so that the child is unable to leave.[23] Since seclusion often means a student is left alone in a small room, some may be inclined to believe that a student is less likely to suffer any harm. Although seclusion may cause less physical harm to a child, it subjects the student to greater emotional harm, which for some students has led to suicide.[24] On the other hand, it is important to recognize that seclusion does not include situations where a student makes a "free will" choice to go to a room to be alone and has the ability to leave at any time.[25] These rooms are often called cool-down rooms or

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[16] CCBD Position Summary (Restraint), *supra* note 8, at 4.

[17] *Id.* at 4.

[18] *Id.*

[19] Joseph B. Ryan & Reece L. Peterson, *Physical Restraint in School*, 29(2) J. Couns. for Child. Behav. Disorders 154, 158 (2004).

[20] The Council for Children with Behavior Disorders, CCBD's Position Summary on the Use of Seclusion in School Settings 1 (2009) [hereinafter CCBD Position Summary (Seclusion)].

[21] Kutz, *supra* note 1, at 1. Time-out is a "behavior management technique that is part of an approved treatment program and may involve the separation of the individual from the group, in a non-locked setting, for the purpose of calming." 42 U.S.C. §§ 290ii(d)(4) and 290jj(d)(5). A time-out may be considered a form of seclusion if it is so restrictive the student is prevented from leaving. CCBD Position Summary (Seclusion), *supra* note 20, at 3.

[22] CCBD Position Summary (Seclusion), *supra* note 20, at 1.

[23] *Id.*

[24] *See* King v. Pioneer Reg'l Educ. Serv. Agency, 688 S.E.2d 7 (Ga. Ct. App. 2009). Jonathan King was a thirteen-year-old boy in Georgia. He had been placed in a seclusion room and checked on at fifteen-minute intervals. Even though Jonathan was suicidal and claustrophobic, he was still secluded. While in the room, Jonathan took the rope (given to him by the school because he was not wearing a belt) from his waist and hung himself. *Id.*

[25] CCBD Position Summary (Seclusion), *supra* note 20, at 2.

safe places and are not seclusion.[26]

B. Purpose of Restraint and Seclusion, and Why Teachers are Reluctant to Abandon These Techniques

In most circumstances, teachers and other staff members believe that it is necessary to restrain or seclude a child "in order to protect them from harming themselves or others."[27] Professionals insist that the purpose of physical restraint is to control student behavior in an emergency situation.[28] The use of restraint is also used to prevent damage to physical property.[29] And as more students with emotional or behavioral disorders are relocated into a general education classroom, rather than a special education classroom, the use of physical restraint is moving with them.[30] General education teachers are unfamiliar with students' disorders and behaviors and are reluctant to stop using restraint because they do not know of any other strategy to stop the possibility of harm.[31]

Seclusion is also used as a technique to change a student's behavior. In school settings, seclusion is most often used "as a consequence or punishment for inappropriate behavior for purposes of changing behavior."[32] For example, in a case reported on by the GAO, a seven-year-old female student, diagnosed with Asperger's Syndrome at a public school in California, was secluded in a walled-off area for not doing her school work.[33] There have also been a variety of other reasons that schools have opted to use the seclusion technique. Seclusion may be used to allow the student's emotions to cool down, remove the student from a reinforcing environment, or "provid[e] the teacher relief from managing the student's behavior or non-compliance with adult commands."[34] Although seclusion has come to be used most frequently to correct minor behavior, the majority of professionals believe seclusion should only be used when a student's behavior is out of control or so

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[26] *Id.*

[27] Kutz, *supra* note 1, at 1.

[28] CCBD Position Summary (Restraint), *supra* note 8, at 4.

[29] *Id.*

[30] *See* Ryan & Peterson, *supra* note 19, at 156.

[31] SpecialEdConnection.com, Green Bay, Wis., School Officials Go Beyond State Directive, http://www.specialedconnection.com/LrpSecStoryTool/index.jsp?contentId=6645349.

[32] CCBD Position Summary (Seclusion), *supra* note 20, at 2.

[33] Kutz, *supra* note 1, at 26. The young student was often placed in seclusion for up to 3three hours at a time for refusing to do her work. *Id.*

[34] CCBD Position Summary (Seclusion), *supra* note 20, at 2.

dangerous in the current situation that the student must be removed to protect himself from injury or injury to another student.[35]

These techniques have been used with children in the United States since the 1950s,[36] so schools are reluctant to eliminate the use of restraint and seclusion.[37] Although the Keeping Students Safe Act has passed the House of Representatives, it lacks support from educators and school administrators.[38] A number of education organizations, including the American Association of School Administrators, are lobbying to prevent its passage.[39] Many educators do not want limits placed on the use of restraint or seclusion techniques. Schools especially do not want regulations and requirements passed down by the federal government.[40]

C. How Effective are Techniques Like Restraint and Seclusion at Changing Behavior?

Even though educators insist on continuing to use restraint and seclusion on students with disabilities, little is known about their efficacy.[41] Almost no research has been conducted to confirm any possible advantages of using these techniques.[42] Most professionals support the use of restraint and seclusion in emergency situations to protect the student, or to calm them down, but "[f]ew of the proponents of physical restraint have claimed that the procedure has any therapeutic value in and of itself."[43]

With regard to seclusion, there is also a lack of information regarding the environment of seclusion rooms and whether or not they meet any of the commonly accepted safety standards.[44] There is also a lack of data concerning the amount of time a student spends in a seclusion room.[45] However, the anecdotal evidence available seems to suggest that students spend "longer periods of time in seclusion than

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[35] *Id.*

[36] Ryan & Peterson, *supra* note 19, at 155.

[37] John Kline, House Committee on Education and Labor, Factsheet, http://republicans.edlabor.house.gov/UploadedFiles/factsheet.pdf (2010).

[38] *Id.*

[39] *Id.*

[40] Republican Study Committee, Legislative Bulletin: H.R. 4247, http://rsc.jordan.house.gov/UploadedFiles/LB_030110_H_R_4247.pdf (2010).

[41] Ryan & Peterson, *supra* note 19, at 159.

[42] CCBD Position Summary (Restraint), *supra* note 8, at 7.

[43] Ryan & Peterson, *supra* note 19, at 159.

[44] CCBD Position Summary (Restraint), *supra* note 8, at 6.

[45] *Id.*

would be necessary to meet the stated goal."[46]

Regardless of the lack of research and data, most educational textbooks dealing with the behavior of students with emotional or behavioral disorders suggest that these types of techniques may be "warranted . . . despite the lack of empirical research supporting such claims."[47] On the other hand, there is research that supports the use of proactive positive behavioral plans, rather than the reactive use of restraint and seclusion.[48] According to a study conducted by the Council of Parent Attorneys and Advocates, Inc., seventy-one percent of the 185 cases studied did not use any form of positive behavioral supports as an intervention.[49] Instead, most educators agree that "sometimes teachers need to seclude or restrain children who are at risk."[50]

III. PROBLEMS WITH USING RESTRAINT AND SECLUSION IN A SCHOOL SETTING

The National Disabilities Rights Network documented incidents from all fifty states indicating that students with disabilities were being "abusively pinned to the floor for hours at a time, handcuffed, locked in closets, and subjected to other traumatizing acts of violence."[51] In Atlanta, Georgia, thirteen-year-old Jonathan King hanged himself with a rope in a seclusion room after being locked in the room for several hours.[52] This came only weeks after he threatened to commit suicide.[53] In Wisconsin, a seven-year-old girl died after being held for hours face-down, in a prone restraint, by multiple staff members.[54] Staff members did not realize she stopped breathing until they rolled her over and discovered she had begun to turn blue.[55] In West Virginia, a four-year-old girl was strapped into a chair with "multiple leather straps that

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[46] *Id.*

[47] Ryan & Peterson, *supra* note 19, at 159.

[48] Jessica Butler, The Council of Parent Attorneys and Advocates, Inc., Unsafe in the Schoolhouse: Abuse of Children with Disabilities 3 (2009), *available at* http://www.copaa.org/wp-content/uploads/2010/10/UnsafeCOPAAMay_27_2009.pdf.

[49] *Id.*

[50] Joseph Shapiro, *Report: Discipline Measures Endanger Disabled Kids*, The Two-Way: NPR's News Blog, May, 19, 2009, http://www.npr.org/templates/story/story.php?storyId=104277070.

[51] Kutz, *supra* note 1, at 2. *See generally* National Disabilities Rights Network, School is Not Supposed to Hurt: Investigative Report on Abusive Restraint and Seclusion 13–26, http://www.ndrn.org/images/Documents/Resources/Publications/Reports/SR-Report2009.pdf (2009) [hereinafter School Is Not Supposed to Hurt].

[52] Kutz, *supra* note 1, at 5.

[53] *Id.*

[54] *Id.* at 6.

[55] *Id.*

resembled a 'miniature electric chair.'"[56] She was later diagnosed with post-traumatic stress disorder after the restraint led to bedwetting and frequent temper tantrums.[57] In Oregon, a police officer shot a sixty-five-pound boy with a 50,000-volt Taser gun after the boy locked himself in a classroom during a behavioral outburst.[58] These are only a few examples of what may result from the use of restraint and seclusion.

While conducting its research, the GAO discovered hundreds of allegations of abuse in public and private schools, and as the report was being published, the GAO continued to receive new allegations from parents and advocacy groups.[59] Even though the report "stopped short of calling the incidence of abuse and death widespread,"[60] the GAO obtained data indicating that thousands of public and private school children were restrained and secluded during the previous school year.[61]

The GAO, along with the Council for Children with Behavioral Disorders and many other organizations, has found that there are four main issues raised by the use of restraint and seclusion. First, restraint and seclusion can cause physical and emotional harm, and death.[62] Second, the majority of deaths are caused by the use of prone restraint.[63] Third, children with disabilities are often restrained or secluded even when they do not appear to be physically aggressive or in danger of hurting anyone.[64] Fourth, the majority of teachers and staff members implementing these procedures are not properly trained.[65]

A. Restraint and Seclusion Can Cause Emotional and Physical Harm, and Death

Even children who manage to walk away without any physical harm may remain severely traumatized by the experience.[66] Psychological and psychiatric organizations have come to realize that restraint and seclusion are harmful to children.[67] While some

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[56] *Id.*

[57] Kutz, *supra* note 1, at 11.

[58] School Is Not Supposed to Hurt, *supra* note 51, at 25.

[59] Kutz, *supra* note 1, at 5.

[60] Craig Goodmark, *A Tragic Void: Georgia's Failure to Regulate Restraint & Seclusion in Schools*, 3 J. MARSHALL L.J. 249, 260 (2010).

[61] Kutz, *supra* note 1, at 7.

[62] School Is Not Supposed to Hurt, *supra* note 51, at 13–26.

[63] Kutz, *supra* note 1, at 7.

[64] *Id.*

[65] *Id.*

[66] *Id.* at 1.

[67] *See generally* Wanda K. Mohr et al., *Adverse Effects Associated with Physical Restraint*, Can. J.

psychological effects may be short-term, such as fear and adrenaline rush, constant physical confrontation may lead to long-term effects such as post-traumatic stress disorder.[68] Although there is only anecdotal evidence for these types of psychological effects caused by restraint and seclusion in a school setting, there is no question that these effects have been connected with similar forms of restraint in medical emergencies and physical assaults.[69] Children who have been restrained in mental institutions have reported:

> nightmares, intrusive thoughts, and avoidance responses resulting from their restrained experiences, as well as marked startle responses associated from being held in benign or nonthreatening positions. They also reported painful memories seeing or hearing others being restrained . . . . Five years later they continued to experience intrusive thoughts, recurrent nightmares, avoidance behaviors, startle responses, and mistrust.[70]

In addition, studies show that physical restraint can cause increased psychological harm to children who have experienced prior abuse by other adults.[71]

Students who are forced into seclusion may suffer more psychological harm than those who are restrained. As a result of being secluded, students express a variety of emotional states: "feelings of anger, anxiety, boredom, confusion, embarrassment, depression, humiliation, abandonment, loneliness and sadness, loss of dignity, powerlessness, helplessness, despair and delusion."[72] A study asking students to draw pictures of their seclusion indicated that they saw it as a form of punishment.[73] The pictures showed students crying and calling for help.[74] For some students, the feeling is so unbearable that they have become fearful of small spaces; others have threatened or committed suicide as a result of seclusion.[75]

Restraint and seclusion may also result in physical injury. Children have suffered bruises, scratches, bleeding, and even broken bones.[76] All fifty states use some form of restraint or seclusion in schools. In

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Psychiatry, 48(5) (2003).

[68] CCBD Position Summary (Restraint), *supra* note 8, at 5; *see also* Kutz, *supra* note 1, at 11.

[69] *See* CCBD Position Summary (Restraint), *supra* note 8, at 5.

[70] Mohr et al., *supra* note 67, at 334.

[71] CCBD Position Summary (Restraint), *supra* note 8, at 5.

[72] School Is Not Supposed to Hurt, *supra* note 51, at 15.

[73] *Id.*

[74] *Id.*

[75] King v. Pioneer Reg'l Educ. Serv. Agency, 688 S.E.2d 7 (2009).

[76] School Is Not Supposed to Hurt, *supra* note 51, at 13–26.

Wisconsin, a high-school student's elbow was broken after a teacher placed the student in an "arm-bar," a move he learned in the Marines.[77] An eleven-year-old boy diagnosed with Asperger's Syndrome in South Carolina was frequently subjected to physical restraint against the floor, which in one incident split open his chin.[78] According to one of the allegations reviewed by the GAO, an eight-year-old autistic boy suffered from scratches, bruises, and a broken nose after teachers and staff members used a prone restraint hold on him.[79] In Florida, a boy suffered a spiral fracture to his upper right arm.[80] Students in seclusion have been hurt by electrocution and self-injury due to cutting, pounding on walls and doors, and head-banging.[81] Students have also been denied food, water, and access to toilets while in seclusion.[82]

Unfortunately, for a number of families, the use of restraint and seclusion has even led to death. There has also been one confirmed case of suicide in seclusion, as well as other reports of students attempting suicide while in seclusion.[83] The GAO identified at least twenty cases in which the use of restraint resulted in death.[84] The Child Welfare League of America has estimated that "between 8 and 10 children in the U.S. die each year due to restraint procedures."[85]

B. Prone Restraint is the Most Dangerous Form of Restraint

The GAO report found that restraints in which a child is held face-down can be deadly.[86] Physical restraint is a dangerous technique that involves "physical struggling, pressure on the chest, or other interruptions in breathing," and has led to the suffocation of some young children.[87] In addition, all national disability organizations have identified prone restraint[88] as the most dangerous form of restraint that

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[77] *School Is Not Supposed to Hurt*,[77] *Id.* at 16.
[78] *School Is Not Supposed to Hurt*, *Id.* at 25.
[79] Kutz, *supra* note 1, at 6.
[80] School Is Not Supposed to Hurt, *supra* note 51, at 20.
[81] CCBD Position Summary (Seclusion), *supra* note 20, at 4.
[82] *Id.*
[83] *Id.*
[84] Kutz, *supra* note 1, at 8.
[85] The Child Welfare League of America, Fact Sheet: Behavioral Management and Children in Residential Care, http://cwla.org/advocacy/secresfactsheet.htm (1998).
[86] Kutz, *supra* note 1.
[87] *Id.* at 1.
[88] Prone restraint is when a person is pinned down face-down; supine restraint is when a person is held down face-up. In both situations, the "maneuver . . . places pressure or weight on the chest, lungs, sternum, diaphragm, back, neck, or throat." CCBD Position Summary (Restraint), *supra* note 8, at 13.

can be used on a child.[89] Children are more vulnerable than adults and are at a greater risk of injury.[90] According to the Hartford Courant Investigation, forty percent of all deaths caused by physical restraint are a result of asphyxiation.[91] The investigation found 142 deaths caused by physical restraint in mental institutions,[92] which have strict restraint regulations and trained medical staff.[93]

Of the ten closed cases examined by the GAO, three of them resulted in death caused by the use of prone restraint in a school setting.[94] In the first case, a fourteen-year-old boy with a history of disruptive behavior was pinned down to the ground by two staff members.[95] After twenty minutes, the boy lost consciousness and CPR was administered.[96] The boy was later pronounced dead as a "result of a brain injury sustained as a result of lack of oxygen due to the compression of the student's chest."[97]

The second case also involved a fourteen-year-old male from Texas. The child feared not being able to eat and often hoarded food as a result of prior abuse by his biological parents.[98] The day he died, he was denied lunch, and around 2:30 in the afternoon he became agitated.[99] The 129-pound boy was pinned to the ground by a 230-pound teacher.[100] Medical examiners determined that the boy's cause of death was "mechanical compression of the trunk."[101]

The third case involved a fifteen-year-old boy on the first day of school.[102] He suffered a seizure while in class, but the school's assistant

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[89] Goodmark, *supra* note 60, at 255.

[90] Kutz, *supra* note 1, at 1.

[91] Mohr et al., *supra* note 67, at 331 (2003).

[92] *Id.*

[93] CCBD Position Summary (Restraint), *supra* note 8, at 5–6.

[94] Kutz, *supra* note 1, at 8. There were actually four cases that resulted in death from the use of physical restraint that restricted the child's breathing. Case 3 in the GAO report involved an eleven-year-old who was committed to a state operated facility in New York for children with developmental disabilities, not in a school setting. While on a field trip, the boy got out of his seat and began grabbing another student. An aide, trying to control the boy sat on him causing the boy to lose consciousness and to stop breathing. *Id.* at 17.

[95] *Id.* at 15.13. The boy weighed 125 pounds and the two men weighed 195 pounds and 155 pounds. *Id.*

[96] *Id.* at 13–14.

[97] *Id.*

[98] *Id.* at 15. The young boy was removed from his family at the age of nine after reports of being neglected and emotionally and physically abused. He suffered from post-traumatic stress disorder, conduct disorder, oppositional defiance disorder, attention deficit hyperactivity disorder, and narcissistic personality disorder. As a child he would try to find food by digging it out of the trash. *Id.*

[99] Kutz, *supra* note 1, at 16.

[100] *Id.*

[101] *Id.*

[102] *Id.* at 19.

principal decided that medical attention was not necessary.[103] Approximately ten minutes later, the child started flailing his arms and screaming,[104] and two aides held him in a full restraint face-down on the floor for approximately one hour.[105] After over thirty minutes of CPR, the boy was transported to the hospital, where he was pronounced dead.[106] The official cause of death was listed as "prolonged physical restraint in prone position associated with extreme mental and motor agitation."[107]

In most cases, educators claim prone restraint is used to protect children who are physically aggressive or are in danger of hurting themselves or others. There is an increased risk of respiratory compromise while trying to subdue or restrain an uncooperative person.[108] While the teachers were properly trained in some of these cases, the result was still the same. Prone restraint is inappropriate and dangerous, especially since the majority of those in the education profession are not trained to properly administer any form of restraint. Regardless of the possible dangers, educators continue to restrain defenseless children who are not physically aggressive.[109]

C. Restraint is Disproportionately Used against Young Children and Usually When the Child is not Physically Aggressive

Most people inaccurately believe that restraint and seclusion are used against older kids in high school, who can be more physical and aggressive. However, only fourteen percent of all restraint and seclusion incidents involve people over the age of fourteen.[110] Fifty-three percent of all incidents are against children between the ages of six and ten.[111] In fact, the younger the child, the more frequent the use of restraint.[112] Of the 185 reports of restraint and seclusion collected over a short two-

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[103] *Id.* at 20.
[104] Kutz, *supra* note 1, at 20.
[105] *Id.*
[106] *Id.*
[107] *Id.* at 21.
[108] Protection & Advocacy, Inc., The Lethal Hazard of Prone Restraint: Positional Asphyxiation, http://www.disabilityrightsca.org/pubs/701801.pdf (2002).
[109] In Wisconsin a 7 year-old girl was placed in a prone restraint position for "blowing bubbles in her milk." School Is Not Supposed to Hurt, *supra* note 51, at 14.
[110] Butler, *supra* note 48, at 4.
[111] *Id.*
[112] Abigail Donovan et al., *Two-Year Trends in the Use of Seclusion and Restraint Among Psychiatrically Hospitalized Youths*, 54 Psychiatric Services 987, 990 (2003).

month period, 68% of the children had autism or Asperger's Syndrome.[113] Furthermore, 27% of those diagnosed with attention deficit hyperactivity disorder (ADHD) were being restrained or secluded.[114]

Nine out of ten cases considered by one study involved children with disabilities or a history of troubled behavior.[115] Restraint and seclusion are not meant to be exclusively used on those with disabilities, but "children with disabilities are being victimized"[116] at a much higher rate than any other group of children in the nation's public and private schools.[117]

Students with autism or ADHD are the most likely to be restrained and secluded, even when they are not physically aggressive.[118] For example, a nine-year-old boy was secluded in a small room seventy-five times over the course of six months for "whistling, slouching, and hand waving."[119]

D. Teachers and Staff Members Lack the Necessary Training Needed to Implement Physical Restraint and Seclusion Procedures

The use of restraint and seclusion are heavily regulated in other professional fields. Medical, psychiatric, and law enforcement agencies have strict guidelines that govern the use of physical restraint.[120] Unfortunately, education is the only field that does not currently require any form of regulation or guideline when it comes to implementing restraint and seclusion.[121] Unlike other professional agencies using restraint or seclusion, there are no accreditation requirements or any other form of federal legislation regulating restraint or seclusion implementation for public or most private schools.[122]

In the GAO report, it was discovered that teachers and other staff

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[113] Butler, *supra* note 48, at 5.

[114] *Id.*

[115] Kutz, *supra* note 1, at 8.

[116] Shapiro, *supra* note 50.

[117] *See* Kutz, *supra* note 1, at 5 ("Almost all of the allegations we identified involved children with disabilities.").

[118] Kutz, *supra* note 1, at 8.

[119] *Id.*

[120] Ryan & Peterson, *supra* note 19, at 155.

[121] *Id.*

[122] Joseph B. Ryan et al., Reducing the Use of Seclusion and Restraint in a Day School Program 204, http://66.147.244.209/~tashorg/wp-content/uploads/2011/01/Reducing-RS-in-Day-School-Program-Ryan__et-al.pdf (2007).

members involved in restraint and seclusion incidents were often untrained.[123] In one of the incidents evaluated, staff members admitted they were inadequately trained.[124] In another incident, a substitute teacher never even received a copy of the school's policy on restraint and seclusion.[125] However, even when staff members received training, it was not enough to prevent the death of a child with a disruptive history.[126]

As more and more students with behavioral disorders and disabilities move out of special day programs and into general education classrooms, their teachers are no longer receiving special training to effectively handle these children; instead, teachers are receiving generic special education training.[127] Furthermore, not only are students with disabilities moving into general education classrooms, but restraint and seclusion techniques are following them.[128] As a result, teachers have "limited to no training or experience with severe behavior disorders or the issues involved in employing physical restraint procedures."[129] Training in such intervention techniques is critical in preventing a student's behavior from escalating to dangerous levels.[130] In addition, since school personnel are not properly trained, staff members usually choose physical restraint or seclusion as their first response to verbal threats, threatening gestures, or intimidating behaviors.[131] Instead of using restraint, school staff members should be trained in "effective behavior interventions that are necessary for the prevention of emotional outbursts typically associated with students who have severe behavior problems."[132]

Unfortunately, states do not require school personnel to be trained in the use of effective behavior intervention or the appropriate use of restraint and seclusion techniques.[133] Of the fifty states, only seventeen require selected staff members administering restraint and seclusion to receive some training, and only one of these seventeen requires training after restraint has already been used.[134] Only five states require staff

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[123] *See* Kutz, *supra* note 1, at 9.
[124] *Id.*
[125] *Id.*
[126] *Id.* at 10.
[127] CCBD Position Summary (Restraint), *supra* note 8, at 7.
[128] Ryan & Peterson, *supra* note 19, at 154.
[129] CCBD Position Summary (Restraint), *supra* note 8, at 7.
[130] Ryan & Peterson, *supra* note 19, at 204.
[131] CCBD Position Summary (Restraint), *supra* note 8, at 7.
[132] *Id.* at 5.
[133] *See* Kutz, *supra* note 1, at 33–58.
[134] *See id.* Out of these seventeen states, the majority of them do not provide much guidance for how much training is necessary, or when training needs to be renewed. Under Texas law, it is acceptable for a staff member to be trained within thirty days after restraint was already administered. *See id.*

members to be trained in de-escalation or other behavior intervention techniques.[135]

In its *Summary of Seclusion and Restraint Statutes, Regulations, Polices, and Guidance, By State and Territory*, the Department of Education collected information regarding each state's current laws regulating the use of restraint and seclusion. In Alaska, although there is no legal regulation for teacher training, statistical data from 2007 to 2009 shows that less than fifty percent of school staff received more than two hours of training, and the other fifty percent received between zero to two hours of training from 2007 and 2009.[136]

The lack of requirements and guidelines in the educational field are a direct cause of the increased susceptibility of misunderstanding, improper implementation of these techniques, and abuse.[137] Without the necessary regulations and guidelines, restraint and seclusion become even more harmful and dangerous. On the other hand, when staff members are appropriately trained in effective behavior interventions, de-escalation, and the implementation of restraint and seclusion, the overall use and danger of restraint and seclusion can be reduced dramatically.[138]

Although Michigan does not have a law regulating training, the Michigan Department of Education drafted and implemented standards for the use of emergency restraint. *See* Mich. Dep't of Educ., Office of Special Educ. and Early Intervention Servs., Supporting Student Behavior: Standards for the Emergency Use of Seclusion and Restraint 4 (2006).

[135] *See* Kutz, *supra* note 1, at 33–58. Connecticut, Iowa, Massachusetts, Nevada, Oregon, Rhode Island, and Texas require teachers to receive training in other forms of intervention and training including: de-escalation, prevention techniques, methods of evaluating the risk of harm in individual situations, the simulated experience of administering and receiving, restraint, alternatives to restraint, crisis prevention techniques, safety, effectiveness of restraint and seclusion, types of restraint, differences between life-threatening restraints and other types of differences between permissible restraints and pain compliance techniques. *See id.*

[136] United States Dep't of Educ., Summary of Seclusion and Restraint Statutes, Regulations, Policies and Guidance, By State and Territory 14 (2010) [hereinafter Summary of Seclusion and Restraint Statutes], *available at* http://www2.ed.gov/policy/seclusion/summary-by-state.pdf.

[137] CCBD Position Summary (Seclusion), *supra* note 20, at 5.

[138] *See generally* Ryan et al., *supra* note 123.

IV. UNREGULATED USE OF RESTRAINT AND SECLUSION IN THE UNITED STATES

A. Inadequate State Laws

Without federal legislation, states are left to deal with the issue of regulating restraint, seclusion, and teacher training on their own. As a result, the laws regarding the use of restraint and seclusion are widely divergent from state to state.[139] There are nineteen states that have no regulation or guidelines for either restraint or seclusion.[140] Some of these nineteen states do have guidelines provided by the state's department or board of education, but many of these guidelines are limited to simple definitions or physical requirements of a seclusion room, or they lack enforcement or some sort of monitoring element.[141] The remaining thirty-one states have laws regulating the use of restraint and seclusion, but these laws also vary widely.[142] Approximately seven states have some restrictions only on the use of restraint, but do not regulate the use of seclusion.[143] Only eight states ban prone restraint (or any other form of restraint that may impede a child's ability to breathe), even though prone restraint has been determined by the GAO to be the most deadly form.[144] With regard to parent notification, only thirteen states require a school to get any form of consent from a parent before using these techniques, and only nineteen states require schools to notify parents after restraint or seclusion has been used.[145] After the publication of the GAO report and the introduction of the Keeping All Students Safe Act in Congress, many states have taken steps to create guidelines for schools to follow.[146]

Texas and California are the two states with the most stringent laws regulating the use of restraint and seclusion, and they both require

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[139] Kutz, *supra* note 1, at 3.

[140] *Id.* at 4.

[141] *See generally* Summary of Seclusion and Restraint Statutes, *supra* note 137.

[142] *See* Kutz, *supra* note 1, at 4.

[143] *Id.* at 4 n.5; *see id.* at 33–58.

[144] *Id.* at 4 n.10. Since the GAO report was published, many disability organizations have successfully lobbied to change their respective state laws, but this is a long process. Very few states have successfully changed their laws, but for those that have been successful in any change it has been the elimination of prone restraint.

[145] *Id.* at 4 n.7–8.

[146] *See generally* Summary of Seclusion and Restraint Statutes, *supra* note 137.

schools and districts to report every incident of restraint or seclusion.[147] Over one-fifth of the nation's children live in these two states,[148] and during the 2007–2008 academic year, Texas and California reported a combined total of 33,095 instances of restraint and seclusion.[149]

The Texas Education Code now explicitly bans the use of seclusion by any school district employee,[150] and allows the use of restraint only in an emergency.[151] Under the Texas Administrative Code, emergency is defined as a situation that poses an "(A) imminent, serious physical harm to the student or others; or (B) imminent, serious property destruction."[152] In addition to limiting restraint to only emergency situations, Texas also places specific restrictions on the techniques and procedures that must be followed if restraint is to be used:

> (1) Restraint shall be limited to the use of such reasonable force as is necessary to address the emergency.
>
> (2) Restraint shall be discontinued at the point at which the emergency no longer exists.
>
> (3) Restraint shall be implemented in such a way as to protect the health and safety of the student and others.
>
> (4) Restraint shall not deprive the student of basic human necessities.[153]

However, even with these stringent laws and regulations, the state of Texas averages over 18,000 incidents of restraint each year.[154] Approximately 45% of these incidents involve students with emotional disorders even though these students only make up 0.3% of the population. Additionally, 25% are students identified with autism, even

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[147] Kutz, *supra* note 1, at 4, 7. California, Connecticut and Texas are required to keep reports on the total number of restraint and seclusion incidents in their respective states. *Id.* at 7. However, other states including Kansas, Pennsylvania, and Rhode Island also collect some type of information. *Id.*

[148] *See generally* Children's Defense Fund, Children in the States Factsheet, *available at* http://www.childrensdefense.org/child-research-data-publications/data/state-data-repository/children-in-the-states-factsheets.html (2009) [hereinafter Children in the States Factsheet].

[149] Kutz, *supra* note 1, at 7.

[150] Tex. Educ. Code Ann. § 37.0021(c) (Vernon 2006).

[151] *Id.* § 37.0021(f).

[152] 19 Tex. Admin. Code § 89.1053 (2007).

[153] *Id.* § 89.1053(c)(1)–(4).

[154] During the 2007–2008 academic year, there were 18,741, in 2008–2009 there were 18,133, and the most recent data for the 2009–2010 school year shows there were 18,542 incidents of restraint in the state of Texas. Data collected by Advocacy Inc., Austin, TX and provided by Senior Attorney Steve Elliot.

though they make up only 8.8% of the population.[155] The most recent data shows that in some school districts, the highest rate of restraint is twenty-four times per child in a single academic year.[156]

The California State Education Code explicitly bans locked seclusion and any "device or material or object [that] simultaneously immobilizes all four extremities."[157] But like Texas, California does allow the use of emergency intervention against students with disabilities if, and only if, "it is used to control unpredictable, spontaneous behavior which poses a clear and present danger of serious physical harm to the individuals or others."[158] In order to use restraint to control unpredictable and spontaneous behavior, it must be a situation that "cannot be immediately prevented by a response less restrictive than the temporary application of a technique used to contain the behavior" of the student.[159] Furthermore, the use of force cannot "exceed that which is reasonable and necessary under the circumstances."[160] In a recent notification sent to all school districts, charter schools, and special education schools, the director of the Special Education Division of California added additional guidelines, including a ban on "any intervention designed to, or likely to, cause physical pain." However, this same policy update maintained the use of prone restraint in an emergency situation by a trained staff member.[161]

Even though California still allows prone restraint, its regulations and restrictions are more stringent than most states with regard to restraint and seclusion. Yet, these restrictions have not eliminated or reduced the use of restraint in California. During the 2007–2008 academic year, California reported 14,354 instances of students being restrained, secluded, or otherwise subjected to "emergency interventions."[162] According to the most recent numbers, during the 2009–2010 academic school year, California reported over 21,000 incidents of restraint and seclusion.[163] The stringent regulations in California have not decreased the number of incidents of restraint or

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[155] *Id.*

[156] *Id.*

[157] 5 Cal. Code Regs. § 3052(i)(4)(B) (2011).

[158] *Id.* § 3052(i).

[159] *Id.*

[160] *Id.* § 3052(i)(4)(C).

[161] California Department of Education, Special Education Division Memorandum, Official Message from State Director of Special Education, November 8, 2007.[161] California Department of Education, Procedures for Serious Behavior Problems, *available at* http://www.cde.ca.gov/sp/se/lr/om110707.asp (2007).

[162] Kutz, *supra* note 1, at 7.

[163] Colleen Shaddox, *Use Of Student Restraints, Seclusions Tops 18,000*, Connecticut Health I-Team, Dec. 6, 2010, *available at* http://newhavenindependent.org/index.php/health/entry/restraints_story.

seclusion (even though seclusion in a locked room is banned); California has been slow to make any adjustments or changes to its current law even after the publication of the GAO report.[164]

In both Texas and California, the stringent laws have not been able to protect children from the harms and dangers of restraint and seclusion. In Northern Texas, a first grader with severe emotional behavior issues stemming from a history of sexual abuse was restrained by her teacher.[165] During the multiple incidents of restraint, the teacher sat on the student, wrapped her in a sheet, and duct-taped her. The principal taped the child's mouth with gauze, and eventually the child was wrapped in a blanket and taped to a cot in the office.[166]

According to the investigative report by Disabilities Rights California,[167] schools in California not only have a large number of reported restraints and seclusions, there are incidents in which schools have clearly broken the law. In a special day classroom, an eight-year-old boy with ADHD and mild retardation was placed in a locked seclusion room whenever he became "noncompliant, aggressive, or disruptive."[168] This intervention violated California state law and was inconsistent with the standards of using locked seclusion.[169] In addition to the numerous reports of seclusion and restraint, Disabilities Rights California has learned of over thirty-nine incidents of death due to seclusion or behavioral restraint in the past decade.[170]

Connecticut requires reporting the use of restraint and seclusion, but its laws are not nearly as stringent as those in Texas or California. Connecticut bans the use of prone restraint or any restraint that may restrict the flow of air into a person's lungs.[171] Connecticut allows restraint and seclusion to be used as an emergency intervention designed to prevent immediate or imminent injury to the person at risk or others.[172] Restraint and seclusion cannot be used as disciplinary measures, for the convenience of the staff member, or in circumstances where there is a less-restrictive alternative.[173] Additionally, all providers and assistant providers must be trained in the use of physical restraint, de-escalation techniques, and other prevention strategies.[174]

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[164] *See* Summary of Seclusion and Restraint Statutes, *supra* note 137, at 23–24.
[165] Doe v. S&S Consol. I.S.D, 149 F. Supp. 2d 274, 279–81 (E.D. Tex. 2001).
[166] *Id.* at 279–80.
[167] Disabilities Rights California was formerly known as California Protection & Advocacy, Inc.
[168] Protection & Advocacy, Inc., Restraint and Seclusion in California Schools: A Failing Grade (2007) [hereinafter Restraint and Seclusion in California Schools].
[169] *Id.*
[170] *Id.*
[171] Conn. Gen. Stat. § 46a-151 (1999).
[172] *Id.* § 46a-152.
[173] *Id.*
[174] *Id.*

Although Connecticut law seems to focus more on preventive measures, it does not provide specific regulations regarding the use of these techniques.[175] Though much smaller than Texas, Connecticut has reported over 18,000 incidents of restraint and seclusion against school children.[176] Connecticut law only requires schools to report emergency interventions, not planned interventions available for special education students as part of their behavior plans.[177]

The use of restraint and seclusion remains staggeringly widespread, but without data from states that lack legal regulation, it is difficult to come to any clear conclusions. However, if states like Texas, California, and Connecticut are still experiencing high restraint rates, it is not hard to believe that there would be even higher rates of restraint and seclusion in states where no regulation exists. It is also important to recognize that all of the data collected is only that which gets reported by the staff members using restraint and seclusion interventions.

B. Judicial Decisions: Protection for School Districts, Schools, and Educators

The lack of state laws and the inconsistency from state to state have given additional protections to school districts, schools, educators, and other school personnel from being held responsible for the harm, serious injury, or death of a child while at school. As the number of incidents involving restraint and seclusion remains high, parents and attorneys are trying to find new ways to attack the problem. Over the past two decades, there have been hundreds of cases brought by parents or guardians against school districts or teachers who have used restraint against a child and caused some type of harm. Advocacy organizations have taken on cases against these school districts and educators under various laws including the Individuals with Disabilities Education Act (IDEA), section 504 of the Americans with Disabilities Act (ADA), the Fourteenth Amendment, and the Fourth Amendment's protection from unreasonable searches and seizures. Many of these arguments have turned out to be fruitless in the judicial branch. School districts, schools, and educators are not only being protected from liability, but in some cases the child has been held liable for harming a public servant who uses a restraint intervention.[178]

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[175] *See generally id.*

[176] Shaddox, *supra* note 164.

[177] *Id.*

[178] In *In re P.N.*, a fourth grader was diagnosed with severe emotional disorder. While being

1. *Individuals with Disabilities Education Act*

One of the most common claims made against school districts by families who have children with disabilities is that the school district or school personnel violated IDEA. IDEA ensures that all disabled children receive a free appropriate public education ("FAPE") that is designed to meet the needs of each individual child.[179] States have the "primary responsibility for developing and executing education programs" for children with disabilities, but IDEA "imposes significant requirements to be followed in the discharge of that responsibility."[180] As part of IDEA, Congress also provided procedural safeguards, which are intended to permit parental involvement in their child's education.[181] In addition, if a parent is unsatisfied with a child's Individual Education Plan ("IEP")[182] or the services being provided, then IDEA allows "parents to obtain administrative and judicial review."[183] The party unsatisfied with the outcome of the hearing process may then file a law suit in state or federal court.[184]

If a party chooses to file under IDEA, there are several procedures and requirements that must be met in order to have a successful claim. First, the party may only file suit against the school district in which they are currently enrolled.[185] The party must exhaust all administrative remedies, unless the party can show that exhausting these remedies would be futile.[186] Finally, the party must show the school district failed

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restrained due to his behavior, P.N. struggled to get away and kicked Dunlap, the person trying to restrain him. The State filed a petition against P.N. alleging that he had engaged in delinquent conduct by committing the offenses of assault on a public servant. The Texas Penal Code provides that "a person commits an offense if the person . . . intentionally, knowingly, or recklessly causes bodily injury to another," which constitutes "a felony of the third degree if the offense is committed against . . . a person the actor knows is a public servant while the public servant is lawfully discharging an official duty." Tex. Penal Code § 22.01 (Vernon 2009). The court held that since P.N. was trying to get away from Dunlap, he had knowledge that his kick would cause Dunlap to fall over. Dunlap was a public servant; and the use of a "bear hug" restraint by Dunlap was a lawful discharge of his official duties. *In re P.N.*, 2006 WL 2190577 (Tex. App.—Austin 2006).

[179] 20 U.S.C. § 1400(d)(1)(A) (2010).

[180] Schaffer v. Weast, 546 U.S. 49, 52 (2005) (quoting Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 183 (1982)).

[181] C.N. *ex rel.* J.N. v. Willmar Pub. Schs, Indep. Sch. Dist. No. 347, 591 F.3d 624, 630 (8th Cir. 2010).

[182] An Individual Education Plan is a detailed written statement approved by a multidisciplinary team including general and special education teachers, service providers, parents and the child. The document summarizes the student's abilities, outlines the goals for the child's education and specifies the services that the child will receive. *See* Vicky M. v. N.E. Educ. Intermediate Unit 19, 486 F. Supp. 2d 437, 452 (M.D. Penn. 2007).

[183] *C.N.*, 591 F.3d at 630.

[184] *Id*; *see also* 20 U.S.C. § 1415(b)(6), (f), (i)(2)(A).

[185] *See, e.g.*, Thompson v. Bd. of the Special Sch. Dist. No. 1, 144 F.3d 574, 578–79 (8th Cir. 1998).

[186] *See, e.g.*, McCormick v. Waukegan Sch. Dist. No. 60, 374 F.3d 564 (7th Cir. 2004).

to comply with IDEA and the child was denied a FAPE, depriving the child of educational benefits.[187] Unfortunately, these procedural safeguards and requirements have become more like procedural obstacles that provide additional protections for school districts and their teachers.

Parents who wish to bring a lawsuit against a school district will have a difficult time winning under IDEA. According to the Eighth Circuit, a request for a due process hearing is not only meant to be a safeguard for the parents, but it also provides notice to the school district of the perceived problem.[188] Therefore, the school district will have the opportunity to address any alleged problems.[189] In *C.N. v. Willmar Public School District*, the child, C.N., was moved to a new school district before her parents requested a due process hearing.[190] Even though there was evidence of C.N. being restrained, placed in seclusion, denied use of the bathroom, and being verbally abused by her teacher while attending school in Willmar Public School District, her IDEA claims were dismissed by the district court for failure to request a hearing prior to moving school districts.[191] Due to further obstacles created by individual states, a district court held that C.N. was required to request the due process hearing while in the Willmar Public School District because the hearing must be held in the "district responsible for ensuring that a free appropriate public education is provided."[192] If a person does not request a due process hearing to challenge educational services, then the party's right to challenge will not be preserved and becomes moot since a new school district is responsible for providing a due process hearing.[193]

It is nearly impossible to get around these additional requirements placed on parties by various states. On appeal, C.N. tried to argue, notwithstanding the failure to request a hearing before leaving the district, that the claim should not be dismissed because C.N. needed to be immediately transferred to protect her physical and psychological safety.[194] However, the court refused to extend any sort of protection to the families. Based on precedent, the court chose to dismiss the case.[195]

Before switching school districts, C.N.'s parents tried to discuss

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[187] L v. N. Haven Bd. of Educ., 624 F. Supp. 2d 163, 178 (D. Conn. 2009); *see also* 20 U.S.C. § 1415(f)(3)(E)(ii)(I)–(II) (2005).
[188] *C.N.*, 591 F.3d at 631.
[189] *Id.*
[190] *Id.*
[191] C.N. *ex rel.* J.N. v. Willmar Pub. Schs., I.S.D. No. 347, 2008 WL 3896205, at *3–4 (D. Minn. Aug. 19, 2008).
[192] *Id.*
[193] *Id.*
[194] *C.N.*, 591 F.3d at 631.
[195] *Id.* at 632.

the possibility of C.N.'s teacher returning and C.N. remaining with Willmar Public School.[196] Plaintiffs relied on a previous Eighth Circuit case, in which a student was verbally harassed and physically assaulted.[197] The parents tried to engage in informal discussion to solve the problem.[198] During these informal discussions the child was still subjected to the "intolerable situation," and the court held that because the parents waited to request a due process hearing until after switching schools, their case must be dismissed.[199] Based on both of these cases, it seems that courts will not allow a plaintiff to bring a claim after taking the child out of the school unless she was in such immediate danger that the parent could not solve the problem. If there is such a severe problem, the parent must request a due process hearing as soon as possible. Otherwise, the delay caused by switching of districts is enough to prevent a party from bringing an IDEA claim against the school district.

To further complicate matters for families in need of protection against school districts abusing restraint and seclusion interventions, the IDEA requires a party disputing an IEP to exhaust all administrative remedies before filing in state or federal court.[200] In every district in the United States, IDEA claims continue to be dismissed for failure to exhaust administrative remedies, regardless of the claim's validity. If a party makes a claim that could possibly be "redressed to any degree by the IDEA's administrative procedures and remedies," then the aggrieved party must exhaust administrative remedies.[201] A party must exhaust administrative remedies unless the court determines that the administrative process would be futile.[202] Once again, the courts have not made this an easy process for parents. A parent will have to show there is no possible remedy that can be provided by the school district to ameliorate the alleged problem. In a Seventh Circuit case, Eron, a student with a disability, was able to show that exhaustion of administrative remedies would be futile for damages sought for the permanent physical injuries he suffered during his physical education class.[203] Eron's complaint asserted that he "suffered permanent physical injuries that [would] reduce the quality of his life—and perhaps even

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[196] *See id.* at 629.

[197] *Id.* at 632; *see also* M.P. v. Indep. Sch. Dist. No. 721, 326 F.3d 975, 977 (8th Cir. 2003).

[198] *C.N.*, 591 F.3d at 632.

[199] *Id.*

[200] *See* 20 U.S.C. § 1415(a), (f) (2005).

[201] McCormick v. Waukegan Sch. Dist. No. 60, 374 F.3d 564, 568 (7th Cir. 2004).

[202] *Id.*

[203] *Id.* Eron was diagnosed with muscular dystrophy in 1992. According to his IEP, Eron was permitted to participate in physical education but could stop if he became winded or felt muscle pain. One of the physical education instructors forced Eron to run laps and perform push-ups. Despite Eron's pleas and informing the teacher of his IEP, the teacher threatened to fail Eron if he did not complete the tasks. *Id.* at 566.

shorten it."[204] Since his claims were not education-related, and no change in his IEP could remedy the problem, the court held that it would be futile for Eron to exhaust the administrative process.[205]

Although Eron was able to show that exhaustion of administrative remedies would be futile, this is not the norm. Most cases will be dismissed for failure to exhaust remedies, or will be dismissed for failure to show that the school or district violated IDEA and failed to provide a free appropriate public education.

Once a party has made it to an administrative hearing or to state or federal court, the parent must be able to show the child was denied a free appropriate public education in the least restrictive environment and was deprived of the educational benefit.[206] This is usually where the majority of restraint and seclusion cases lose in federal court because the courts determine that the child was not denied a free appropriate public education.

In order to show a child was denied a free appropriate public education, the court first determines if the child's IEP was "reasonably calculated to enable the child to receive educational benefits."[207] Unfortunately, in many states where restraint and seclusion techniques are allowed to be included in a child's IEP, parents have a difficult time proving their child was denied a free appropriate public education. When parents consent, these types of emergency interventions become part of the reasonably calculated IEP to bring about educational benefit. Furthermore, an IEP does not have to maximize educational benefit.[208] In order to meet the requirements of IDEA, an appropriate public education is one that is likely to produce progress.[209] Therefore, if the use of restraint or seclusion is offered as a technique to keep the student on task and intended to increase the student's educational benefit, then it is not a violation of IDEA, even if the IEP does not actually produce progress.

Furthermore, teachers have continued to claim that restraint and seclusion, or other similar interventions are required because the child's own behavior is what is impeding their educational benefit. In *L. v. North Haven Board of Education*, L. was a twelve-year-old at the time of the hearing and had Down syndrome.[210] During the 2006–2007 school year, L.'s parents refused to allow the implementation of an IEP which

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[204] *Id.* at 569.
[205] *Id.*
[206] L. v. N. Haven Bd. of Educ., 624 F. Supp. 2d 163, 178, 180 (D. Conn. 2009); *see also* 20 U.S.C. § 1415(f)(3)(E)(ii)(I)–(II) (2006).
[207] *L.*, 624 F. Supp. 2d at 180.
[208] *Id.*
[209] *Id.*
[210] *Id.* at 186.

allowed the school to use a seclusion room when L.'s behavior became out of control.[211] However, the court did not determine that the school had failed to implement a reasonably calculated IEP which provided L. with a free appropriate public education in the least restrictive environment.[212] Instead, the court held that the IEP, with its incomplete behavior plan, could not be implemented because L.'s own behavior significantly impeded her ability to participate in the regular education setting.[213]

In many of the cases brought to court regarding IDEA violations, the use of restraint and seclusion is unlikely to be seen as a violation because, for many schools, it is an intervention justified as a technique aimed at helping the child in the classroom. Unfortunately for many parents and families, IDEA does not create strong enough safeguards to protect children from the use of restraint or seclusion. Or at least it does not provide any safeguards against these techniques as long as they are seen as being likely to increase educational progress.

2. *Americans with Disabilities Act Section 504 Complaints*

Complaints filed under section 504 are very similar to those filed under IDEA. In fact, if a case fails to meet the requirements of IDEA it will also fail to meet the requirements of a section 504 complaint. The courts have determined that a valid IDEA claim is necessary for a section 504 complaint, however, it is not determinative.[214]

There are three requirements of an ADA claim: (1) the party must be disabled; (2) the party was excluded from or denied benefits of a public service, program, or activity; and (3) the party was excluded from, or denied benefits from, the public entity because of his disability.[215] The party must also be able to show that the educational decisions relating to the student were inappropriate and constituted either "bad faith" or "gross misjudgment" to make a successful special education claim under section 504.[216] Furthermore, if a plaintiff is seeking monetary damages, the plaintiff must show the defendants acted with

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[211] *Id.* at 181.
[212] *See id.* at 182.
[213] *Id.*
[214] *See generally* Alex G. *ex rel.* Steven G. v. Bd. of Trustees of David Joint Unified Sch. Dist., 387 F. Supp. 2d 1119 (E.D. Cal. 2005); *see also* C.N. *ex rel.* J.N. v. Willmar Pub. Schs., I.S.D No. 347, 2008 WL 3896205 (D. Minn. Aug. 19, 2008), aff'd, 591 F.3d 624 (8th Cir. 2010).
[215] *Alex G.*, 387 F. Supp. 2d at 1124; *see also* Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2002).
[216] *Alex G.*, 387 F. Supp. 2d at 1124.

deliberate indifference.[217] The least common of these four requirements is that a judicial officer will find that a school district or school teacher made any decision to use restraint or seclusion in bad faith or with deliberate indifference against a student.

In *C.N. ex rel. JN v. Willmar School District*, the district conducted its own investigation into the use of restraint and other allegations of abuse.[218] The investigation only found evidence indicating the teacher denied C.N. the use of the restroom and the incident was attributed to a mere lapse in judgment.[219] Although C.N. did not file a section 504 claim as part of her lawsuit, it is unlikely the court would overrule the school's investigation or a determination from an administrative hearing. The courts are expected to "give due-weight to these proceedings," and are "mindful that the judiciary generally lacks the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy."[220] Additionally, courts are unwilling to overturn a decision made at an administrative hearing or by a school district if a thorough and careful review has already been conducted.[221] Since none of the other allegations were determined to be true in the district's investigation, the allegations of restraint, verbal abuse, and physical abuse against C.N. would likely be given very little weight.

In his case in the Eastern District of California, Alex, a third-grade boy with autism, alleged that he was subjected to multiple incidents of physical restraint by his special education teachers.[222] On two occasions, the special education teachers pinned Alex up against the wall for fear he was going to physically injure himself as he jumped across wet tables.[223] After several other incidents in which Alex seemed uncontrollable, the school district obtained a temporary restraining order against Alex.[224] Alex's parents requested several due process hearings, and the hearing officer found in favor of the district on some issues and in favor of Alex on other issues.[225] When it came to Alex's section 504 claims, the judge was unwilling to find in favor of Alex.[226]

Because many states have laws allowing the use of restraint and seclusion, it is difficult to show in a section 504 claim that the school

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[217] *Id.*
[218] C.N. *ex rel.* J.N. v. Willmar Pub. Schs., Indep. Sch. Dist. No. 347, 591 F.3d 624, 628 (8th Cir. 2010).
[219] *Id.*
[220] L. v. N. Haven Bd. of Educ., 624 F. Supp. 2d 163, 178 (D. Conn. 2009)
[221] *Id.*
[222] *Alex G.*, 387 F. Supp. 2d at 1121.
[223] *Id.* at 1125.
[224] *Id.* at 1123.
[225] *Id.*
[226] *Id.* at 1125–26.

acted in bad faith or with indifference. The district court in California held that it is unclear if the school district's actions against Alex violated any law, "given that the state law explicitly allows school officials to physically restrain students . . . ."[227] Furthermore, even if the restraints cause physical harm, injury, or death to the student being restrained, it is unlikely to be considered as acting in bad faith if the restraint is approved by the district.[228]

Judges are disinclined to provide additional protection for the children who are being restrained in schools. Even when there seems to be an instance of discrimination or retaliation, judges often assume the school district or personnel were acting reasonably. Alex tried to argue the school district was retaliating against him due to his disability by continually restraining him, suspending him, and eventually trying to move him to a different school.[229] However, the district court found that these claims lacked evidence[230] and further stated that the school made a good faith effort to implement an appropriate program for Alex, and was simply protecting other students and staff members from a "disruptive and violent student."[231]

Although section 504 is intended to be another protection for children with disabilities, when courts analyze whether or not a school district acted in bad faith or with deliberate indifference, the courts seem to forget the child has a disability. In *Rasmus v. Arizona*, Charles was an eighth grader with ADHD and was diagnosed as emotionally disabled.[232] Charles was placed in a locked seclusion room for calling another student a name.[233] Although in most schools children without disabilities are almost never secluded for calling another student a name, children with disabilities are often restrained or secluded for such minor infractions. In this case, the court determined that the use of the seclusion room did not violate section 504 because the student was excluded for his own behavior.[234] Additionally, it was only a ten-minute period and Charles was able to return to his classroom and was never denied any benefit.[235]

Like claims filed under IDEA, section 504 claims are difficult to

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[227] *Alex G.*, 387 F. Supp. 2d at 1125.
[228] *See id.*
[229] *See id.* at 1124–25.
[230] *Id.*
[231] *Id.* at 1126–27. In many cases, children are referred to as "disruptive and violent," "menacing," "psychotic," or even "rageful," rather than being described as children with autism, Asperger's, ADHD, or emotional disorders.
[232] Rasmus v. Arizona, 939 F. Supp. 709, 712 (D. Ariz. 1996).
[233] *Id.*
[234] *Id.* at 718.
[235] *Id.*

win in federal court. Thus far, most courts are unwilling to hold a school district or a teacher liable if the state has any law indicating that restraint or seclusion is an acceptable method of intervention. And for those states without laws or regulations, courts have determined that "individual defendants could have objectively believed that their conduct and policies were lawful."[236] Even in a situation where a teacher removed his tie, rolled up his sleeves, physically threatened a student, forced a student to stand up, pushed the student against the wall, and began to choke the student,[237] this was not enough to be malicious or in bad faith.[238] Instead, the court held this was an appropriate action because it was intended to punish the child and was in no way random, malicious, or an unprovoked attack.[239]

With such deference to schools and teachers in cases regarding restraint and seclusion, the misrepresentation of children with disabilities, and the continued protection of school personnel, section 504 claims have continually failed to stop the use of restraint and seclusion techniques.

3. *Fourth Amendment: Illegal Seizure*

Parents of children with disabilities have also tried to bring claims against schools for a violation of their child's right to be free from illegal seizures. The Fourth Amendment is intended to protect against unreasonable seizures, and it has been understood to apply to children in a school setting.[240] As courts have chosen to defer to the teacher's expertise regarding the management and disciplinary techniques used in a classroom, parents have found it difficult to bring a successful illegal seizure claim.[241]

A Fourth Amendment claim alleging illegal seizure must prove that a person was seized and that the seizure was unreasonable.[242] First, a situation is determined to be a seizure when, under the circumstances, a reasonable person would believe he was not free to leave.[243] However, in a school setting, since children are generally not free to leave the school's campus, a child must be able to show the limitation on the

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[236] *Id.* at 719.
[237] Flores v. Sch. Bd. of DeSoto Parish, 116 F. App'x 504, 506 (5th Cir. 2004).
[238] *Id.* at 511.
[239] *Id.*
[240] Couture v. Bd. of Educ. of the Albuquerque Pub. Schs., 535 F.3d 1243, 1255 (10th Cir. 2008).
[241] *Id.*
[242] Rasmus v. Arizona, 939 F. Supp. 709, 713 (D. Ariz. 1996).
[243] *Couture*, 535 F.3d at 1250.

child's freedom of movement significantly exceeded those limitations inherent in the everyday atmosphere of a school.[244] Additionally, after proving a seizure took place, it must then be shown that the seizure was unreasonable and therefore violated the Fourth Amendment. Once again though, in a school setting the "reasonableness standard operates differently."[245] The courts have recognized the "substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that [seizures] be based on probable cause."[246] Instead, the legality of the seizure in a school setting depends on the reasonableness under all the circumstances of the seizure.[247] Therefore, in a school setting a seizure will meet the reasonableness standard if the seizure is reasonably "related to the objectives of the [seizure] and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[248]

In one case, a second grader, M.C., was emotionally disturbed and had various behavior issues.[249] M.C. was often secluded in a "time out" room in order to calm down.[250] Ms. Couture, M.C.'s mother, filed a claim against the school district for violating her son's Fourth Amendment rights.[251] During his time at school, M.C. was placed in seclusion for numerous reasons including not following directions, refusing to complete his spelling test, and behaving aggressively.[252] While in seclusion, M.C. spent between as little as five minutes to at most one hour and forty-two minutes for conduct as minor as not following directions.[253] However, the court found that the seizures were reasonable and the school district did not violate M.C.'s Fourth Amendment right.[254] The court held that it is for the teachers to make a pedagogical judgment at the time, and unless it is blatantly not tailored to meet the child's needs, the teacher's choice will be respected.[255] Furthermore, the court expanded the protection for the use of restraint and seclusion to include ensuring that students follow directions.[256]

In the Fifth Circuit, the court has practically eviscerated all Fourth

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[244] *Id.* at 1251.
[245] *Rasmus*, 939 F. Supp. at 714.
[246] *Id.*
[247] *Id.*
[248] *Id.* (quoting New Jersey v. T.L.O., 469 U.S. 325, 342 (1985)).
[249] *See Couture*, 535 F.3d at 1246–47.
[250] *Id.* at 1247.
[251] *Id.* at 1253–54.
[252] *Id.* at 1247, 1254.
[253] *Id.*
[254] *Couture*, 535 F.3d at 1256.
[255] *Id.* at 1254–55.
[256] *Id.* at 1252.

Amendment claims relating to restraint and seclusion.[257] In 2002, the Fifth Circuit, affirming a district court opinion, redrafted the requirements for a Fourth Amendment claim specifically for a child with disabilities.[258] Instead of simply looking to see if the seizure was reasonable, the Fifth Circuit questioned whether a "disruptive and troubled schoolchild . . . has a clearly established right under the Fourth Amendment to be free from" restraint.[259] The court decided that the Fourth Amendment did not protect the raging child from being wrapped in a blanket and duct-taped to a cot.[260]

As late as 2004, the Fifth Circuit noted that the momentary use of force against a student is "not a scenario to which the Fourth Amendment textually or historically applies."[261] Furthermore, the court recognized that the preservation of order in the schools allows for "closer supervision and control of the school children."[262] The Fifth Circuit continued to say that students are not allowed to bring claims against school personnel for excessive force under the Fourth Amendment.[263] Since school children have a special constitutional status—and momentary seizure is not normally the type of restraint associated with the Fourth Amendment—the Fifth Circuit has declined to recognize claims under the Fourth Amendment for the use of restraint or seclusion.[264]

All states allow the use of some form of restraint and seclusion, so it is unlikely the Supreme Court will ever determine that the use of these techniques is unreasonable. Courts have provided teachers with wide latitude in making decisions as to how to manage and discipline their students.

4. *Fourteenth Amendment Due Process Claims*

Fourteenth Amendment claims are probably the most common claim brought against school districts and personnel. Unfortunately, the Fourteenth Amendment standard is a very high standard to meet.

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[257] *See* Doe v. S&S Consol., 149 F. Supp. 2d 274, 286 (E.D. Tex. 2001), *aff'd*, 309 F.3d 307, 307 (5th Cir. 2002).
[258] *See id.*
[259] *Id.* at 286.
[260] *Id.* at 287.
[261] Flores v. Sch. Bd. of DeSoto Parish, 116 F. App'x 504, 510 (5th Cir. 2004) (quoting Kurilla v. Callahan, 68 F. Supp. 2d 556, 563 (M.D. Pa. 1999)) (internal quotation marks omitted).
[262] *Id.* (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655–56 (1995)).
[263] *Id.* at 509–10.
[264] *Id.*

According to the Eighth Circuit, "substantive due process is concerned with violations of personal rights . . . so severe . . . so disproportionate to the need presented, and . . . so inspired by malice . . . that it amount[s] to brutal and inhumane abuse of official power literally shocking to the conscience."[265] Therefore, to adequately plead a substantive due process claim, the party must allege that actions by a government official violated a fundamental constitutional right in a way that was shocking to the contemporary conscience.[266]

The Supreme Court has held that a person has a constitutionally protected interest in freedom from bodily restraint.[267] However, to prove that the actions taken by a teacher were beyond negligence—or were so unreasonable to as to shock the conscience—the Court has also held that there is a necessity to balance the "'liberty of the individual' and 'the demands of an organized society.'"[268] Due Process rights can be circumscribed by the need for effective (and often immediate) action by school officials to maintain order and discipline.[269]

Unfortunately, this additional requirement has nearly ensured that claims will fail, because most educators and school personnel argue that their use of restraint and seclusion was for emergency situations, in which a person's physical health was in danger. In *Doe v. S&S Consolidated I.S.D.*, Doe was a first grader who was wrapped in a blanket, duct-taped to a cot, and left there until her mother came to pick her up hours later.[270] This, however, did not reach the point of shocking the conscience because the volatile situation the school faced was a situation that called for immediate action.[271] The school personnel did not intend to harm Doe and tried to ensure her safety.[272] Therefore, the court determined that under the circumstances, the school's actions were not conscience-shocking.[273]

In a similar case in Alabama, D.D. was a four-year-old receiving services for a multitude of disorders including ADHD and Impulse Control Disorder.[274] When D.D. became disruptive in class, his teacher placed him in a Rifton toddler chair.[275] During the incident in question,

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[265] C.N. *ex rel.* J.N. v. Willmar Pub. Schs., Indep. Dist. No. 347, 591 F.3d 624, 634 (8th Cir. 2010) (quoting Flowers v. City of Minneapolis, 478 F.3d 869, 873 (8th Cir. 2007)).
[266] *Id.* at 634
[267] Youngberg v. Romeo, 457 U.S. 307, 316 (1982).
[268] Doe v. S&S Consol. I.S.D., 149 F. Supp. 2d 274, 293 (E.D. Tex. 2001) (quoting *Youngberg*, 457 U.S. at 320).
[269] *Id.* at 293.
[270] *Id.*
[271] *Id.* at 296.
[272] *Id.*
[273] *Doe v. S&S*, 149 F. Supp. 2d at 296.
[274] *D.D. ex rel. Davis v. Chilton Cnty Bd. of Educ,* 701 F. Supp. 2d 1236 (M.D. Ala. 2010).
[275] *Id.* at 1239 (noting that a Rifton chair is generally used as a toddler chair and is meant to be

the teacher used the Velcro straps to keep D.D. in the chair and made him face the wall and wait until his mother came to pick him up from school.[276] Since D.D. was unable to show that the teacher intentionally used force that was obviously excessive and presented a foreseeable risk of serious bodily injury, the court found that the school's actions did not shock the conscience.[277] If a teacher is using physical restraint for safety purposes, and it does not result in serious bodily injury, it is unlikely to shock the conscience.[278]

Furthermore, the courts have upheld the use of restraint and seclusion in some cases by holding that they do not deprive a child of their property interest in education, because these interventions are part of the child's education.[279] In the *Couture* case, the court held that because of M.C.'s age and severe emotional and behavior difficulties, seclusion was actually used as a way to teach self-control and did not deprive him of his right to education.[280]

Even in the most extreme cases, where the state's actions have led to the death of a child, the courts have been reluctant to recognize any protection under the Fourteenth Amendment. In *King v. Pioneer Regional Education Service Agency*, the court found that the school did not violate King's substantive due process rights by placing him in seclusion, where he later committed suicide. King was a thirteen-year-old boy with ADHD and emotional and behavioral issues. In 2004, King was placed in a seclusion room for being disruptive. He was checked on every fifteen minutes by a teacher. During one of the fifteen-minute intervals, King hanged himself with the rope belt the school had given him earlier that day.[281] Since King's death was ultimately caused by "private actors" and not the actions of the state, the court held that the Due Process Clause does not provide any protection.[282]

Even though the Fourteenth Amendment is the broadest claim that one can make, the Fourteenth Amendment Due Process Clause has proven to be yet another failure for those seeking judicial relief. As long as the judicial branch continues to give great deference to the educators and school districts, students who are harmed by the use of restraint and seclusion will not have many protections.

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therapeutic).

[276] *Id.*

[277] *Id.* at 1242.

[278] *See id.*

[279] *See* Couture v. Bd. of Educ. of the Albuquerque Pub. Schs., 535 F.3d 1243, 1257–58 (10th Cir. 2008).

[280] *Id.*

[281] King v. Pioneer Reg'l Educ. Serv. Agency, 688 S.E.2d 7, 12 (Ga. Ct. App. 2009).

[282] *Id.* at 13–14.

C. Lack of Serious Punishment for the Misuse of Restraint and Seclusion

Given the lack of state regulation and judicial support, it is not surprising to know that there have been very few cases which have resulted in some form of repercussion. According to the GAO report, the teachers or staff members involved in five out of the ten cases it evaluated continued either to teach or work in some capacity with children.[283] Since there is no national regulation, it is rather simple for a teacher to transfer to a different state. For example, the teacher responsible for killing a fourteen-year-old boy in Texas, is currently teaching in Virginia, even though the child's death was ruled a homicide.[284] This particular teacher's name was also placed on the Texas registry of individuals found to have abused or neglected children.[285] In another case, an assistant principal who caused the death of a student by using prone restraint is currently a principal at another public school in the same school district.[286]

For many states, the regulations and laws implemented by legislatures or the education department fail to provide any form of punishment for teachers who abuse the use of restraint or seclusion. Based on the Texas statistics, two students in Anna ISD were restrained approximately twenty-four times each during one academic year, which is over twice the average per child in Texas.[287] Unfortunately, no state regulates the overuse of restraint.[288] Teachers will most likely stay at their current placements or move to another school, school district, or even state, without being questioned about their past teaching record.

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[283] Kutz, *supra* note 1, at 9.

[284] *Id.* at 10. Although the death was ruled a homicide, no formal charges were ever brought against the teacher. *Id.*

[285] *Id.*

[286] *Id.*

[287] Data collected by Advocacy, Inc. provided by Senior Attorney Steve Elliot.

[288] *See generally* Kutz, *supra* note 1; Summary of Seclusion and Restraint Statutes, *supra* note 137.

V. KEEPING ALL STUDENTS SAFE ACT, H.R. 4247[289]

A. What is the Keeping All Students Safe Act?

With all of the attention and publicity the GAO report created around restraint and seclusion, along with the increase in news coverage about the serious injuries and deaths caused by these techniques, the Obama administration and Congress have attempted to take some action.

In March 2010, the House of Representatives passed the bill with a vote of 262–153.[290] This new bill would require the Secretary of Education to issue regulations and guidelines for all public and private schools that receive federal funding.[291] This bill is intended to reduce or prevent the use of restraint and seclusion. Furthermore, the bill would ensure that restraint and seclusion are only being used in emergency situations where a student's behavior poses an imminent or immediate danger of physical injury to a student, not to property.[292] Furthermore, the bill makes it clear that restraint and seclusion shall not be used as a disciplinary measure.[293]

The bill would establish policies and procedures to keep all students and staff safe; provide the necessary tools and training to implement these interventions; collect and analyze data; and implement effective preventions and techniques to reduce the use of restraint and seclusion.[294]

In addition, under the bill, all schools would have to meet minimum standards if they choose to use restraint or seclusion techniques.[295] First, under the Act, all schools are prevented from using mechanical restraints, chemical restraints, physical restraints that restrict breathing, or any aversive behavior interventions that compromise the health and safety of a child.[296] Second, the bill allows the use of restraint or seclusion only if other less-restrictive interventions would be ineffective and the child is continually monitored face to face or in continuous direct visual

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[289] The Keeping All Students Safe Act was formerly known as the Preventing Harmful Restraint and Seclusion in Schools Act.

[290] House Vote On Passage: H.R. 4247: Keeping All Students Safe Act, http://www.govtrack.us/congress/vote.xpd?vote=h2010-82. Following passage in the House, the bill moved to the Senate, where it was considered but never voted on.

[291] Legislative Digest, H.R. 4247: Preventing Harmful Restraint and Seclusion Act (2010), *available at* http://www.gop.gov/bill/111/1/hr4247.

[292] Keeping All Students Safe Act, H.R. 4247, 111th Cong. § 3 (2009).

[293] *Id.* § 3(3)(C).

[294] *Id.* § 3(5)(A)–(D).

[295] *Id.*

[296] *Id.* § 1.

contact.[297] The use of restraint and seclusion must "end immediately upon the cessation of the conditions" described in § 5(3)(A) and (B) of this bill.[298] The use of restraint and seclusion cannot be written into a student's IEP or behavioral plan,[299] but it can be part of a school's crisis or safety plan.[300]

In addition to the procedural requirements for the use of these techniques, schools are also required to give parents verbal or electronic notification on the same day of the incident and written notification within twenty-four hours.[301]

To help reduce the number of restraints, a state is required to keep reports of the total number of incidents in an academic year. The state is also required to keep track of other information including resulting injuries, deaths, whether the staff member was trained, and the age and disability status of the student.[302]

Finally, when states do not follow its minimum requirements, the Act provides remedies. Under § 6(c), the Secretary of Education can withhold funds, require the state to implement a corrective plan, or issue a complaint to compel compliance by the state's educational department.[303] When it is determined that the state has met the minimum requirements, the Secretary of Education can release the federal funding to the state.[304]

B. The Keeping All Students Safe Act is a Good First Step

The Keeping All Students Safe Act, although not enacted, is a good first step in the fight against the use of restraint and seclusion. First, it increases the amount of regulation all states are required to have. Second, it gives the national Department of Education a chance to further research this area and to develop new policies to help prevent and reduce the reliance on restraint and seclusion. Finally, the bill provides a better

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[297] Keeping All Students Safe Act, H.R. 4247, 111th Cong. § 5(a)(2)(B), (C) (2009).

[298] *Id.* § 5(a)(2)(E).

[299] This clause of the Keeping All Students Safe Act was later removed during the review by the Senate. Although the Senate has yet to vote on the bill, this change has caused a divide among disability organizations. Some organizations no longer support the bill because they believe this clause adds much needed protection for students with disabilities. *See generally* Michelle Diamente, *Restraint And Seclusion Bill Hits Bumpy Road On Path To Senate*, Disability Scoop, Aug. 3, 2010, http://www.disabilityscoop.com/2010/08/03/restraint-senate-iep/9615.

[300] Keeping All Students Safe Act, H.R. 4247, 111th Cong. § 5(a)(4) (2009).

[301] *Id.* § 5(a)(5)(A).

[302] *Id.* § 6(b).

[303] *Id.* § 6(c).

[304] *Id.*

chance of individuals bringing successful claims against school districts in courts.

The greatest benefit of the Keeping All Students Safe Act is that it forces all states to meet the minimum standards. As already noted in Part IV, the use of restraint and seclusion is widely unregulated in the United States. There are over nineteen states that do not have any form of legal regulation for the use of these interventions. By forcing states to meet minimum requirements, school districts and personnel are forced to be become more conscious of their actions and rethink what steps to take first. If the bill does nothing else, it requires these nineteen states to enact some type of regulation on the use of restraint and seclusion. This is especially helpful with regard to the use of prone restraint or other restraints that block a child's airways. The GAO found this to be the most deadly form of restraint, but only eight states have banned its use. The new bill would effectively ban its use in all public and private schools across the country.[305]

Another area that is in greater need of regulation is the requirement of teacher training.[306] A study conducted from 2002 to 2004 determined that the more training a teacher receives, the less likely restraint or seclusion will be used.[307] In the study, all staff underwent extensive training in conflict de-escalation using therapeutic intervention, and participated in crisis-prevention training.[308] During the 2002–2003 school year, prior to training, there were 439 incidents of restraint and seclusion. Following the 2003–2004 year, in which all staff members were trained, the school had just 266 incidents of restraint and seclusion.[309] Restraint incidents decreased by almost forty percent and seclusion incidents were reduced by thirty-four. Requiring all states to train staff members who might use restraint or seclusion can immediately decrease the number of incidents. More importantly, under the bill, staff members are not only required to learn procedural techniques, they are also required to be trained in alternative interventions.[310]

Another benefit of the new bill is that it requires the Department of Education to keep an assessment of how states are performing.[311] The GAO report collected a lot of information in a short amount of time. Unfortunately, the GAO was unable to do research on all aspects of restraint and seclusion and only focused on a handful of incidents.

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[305] Keeping All Students Safe Act, H.R. 4247, 111th Cong. § 5(a)(1)(D) (2009).
[306] *Id.* § 5(a)(2)(D)(1).
[307] Ryan et al., *supra* note 122, at 212.
[308] *Id.* at 207.
[309] *Id.* at 209.
[310] Keeping All Students Safe Act, H.R. 4247, 111th Cong. § 4(16) (2009).
[311] *Id.* § 8(a)–(b).

However, even the small amount of research conducted by the GAO had a wide impact. Disability organizations became more involved in the fight against restraint and seclusion, and states became more aware of their current regulations and began implementing new ones. If the Keeping All Students Safe Act requires the Department of Education and all of the states to collect and report data, it will provide more information on the use of restraint and seclusion, and we may be able to prevent not only the use of, but the harm caused by, these techniques.

Finally, under the new bill, protection and advocacy organizations are given more power to monitor, investigate, and enforce the protections provided for students.[312] Although many schools fear an increase in litigation, the bill provides additional regulations to protect students, making it easier to make adequate claims against schools under IDEA, section 504 of the ADA, and the Fourteenth Amendment. The majority of these claims fail because courts continually find either (1) that the school staff member was acting within their educational discretion and using techniques approved by the school district or (2) that the staff member is protected because without a law banning such techniques, the staff member could only assume his/her use is acceptable. Now, plaintiffs can use the bill as evidence that the use of physical restraint and seclusion has some limits, and if a teacher goes beyond them, it is a violation of the student's rights.

In *Rasmus v. Arizona*, the plaintiff used a publication by the Arizona Department of Special Education to show that the use of seclusion was not a favored technique and was a violation of the student's rights.[313] The court found that the document contained guidelines prepared by the state with the specific prohibition of locked seclusion. Therefore, by placing the student in a locked seclusion room, the school's actions were an unreasonable response to the student's behavior.[314]

If all states are required to use the same minimum regulations and guidelines outlined in the bill, it will make it easier for judges to determine whether the school employee was aware of these guidelines, and if so, whether the employee reasonably followed the guidelines.

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[312] *Id.* § 9. The legislation uses vague and overly broad language prohibiting certain practices in schools, creating a window of opportunity for trial lawyers to capitalize on schools' efforts to keep students and teachers safe. Kline, *supra* note 37.

[313] Rasmus v. Arizona, 939 F. Supp. 709, 715–16 (D. Ariz. 1996).

[314] *Id.* at 717.

C. The Keeping All Students Safe Act is Still Not Enough

Even though Congress and the Obama administration have made huge strides in trying to get this bill passed, in the end it is still not enough to keep students with disabilities safe in schools. One of the major concerns with the bill is that it will override current state law. In reality, the Keeping All Students Safe Act is nothing more than a mirror image of the laws that are already on the books.

For example, the new bill requires all states to keep data for all incidents of restraint and seclusion, as California and Connecticut already do. Although this is an improvement for the states in which such a requirement does not exist, experience shows that it does not reduce the number of incidents. From 2007 to 2009 the number of restraints and seclusions in California rose from around 14,000 to over 21,000 incidents.[315] Despite this increase, according to the Department of Education's summary on state seclusion and restraint laws and developments, California is not currently making any effort to analyze this data and create more effective regulations.[316]

Similarly, current Texas law states that seclusion is never allowed, and restraint is only allowed when there is an immediate or imminent danger of harm to a person or property.[317] Yet, there are over 18,000 incidents of restraint each year. The new bill not only allows restraint, but it also allows seclusion to be used for the same situations. If Texas has a relatively stringent law, allowing only restraint in the most severe situations, what will happen in a state that still allows both restraint and seclusion?

In Connecticut, all teachers are required to undergo training in alternative behavior interventions and de-escalation techniques. In December 2010, Connecticut released a report indicating that there were over 18,000 incidents of restraint—and Connecticut has less than one-sixth the number of children as Texas.[318]

There are several other major issues with the current bill, as it sits in the Senate. First, the bill creates exceptions to the training requirement. Second, restraint and seclusion techniques could be included in a student's IEP. And finally, the bill fails to remove dangerous teachers from the classroom.

Under section 5 of the bill, teachers are required to receive training in de-escalation and the use of restraint and seclusion. However, a

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[315] *See supra* notes 169–71 and accompanying text.

[316] *See* Summary of Seclusion and Restraint Statutes, *supra* note 137, at 23–24.

[317] *See* 19 Tex. Admin. Code § 89.1053 (2007).

[318] Children in the States Factsheet, *supra* note 149.

teacher can still perform either of these techniques without training. Under section 5(a)(2)(D)(2), if there are no trained and certified personnel present, and an emergency arises that requires immediate use of restraint or seclusion, an untrained staff member may perform these procedures.[319] As a result, the training requirement in the bill is nothing more than an empty clause. In order to be an effective clause, the bill should require all school staff to undergo training, not just those who are likely to have to perform such techniques.

If schools are allowed to place these interventions in a student's IEP, a child may be left with no constitutional protections. Once a parent consents to the use of restraint or seclusion in an IEP, regardless of whether they change their mind down the road, courts have held that teachers are required to perform those interventions. Otherwise they are placing themselves in danger of violating IDEA by not following the IEP. If the Senate allows this addition to pass, the bill is once again nothing but empty words.

The bill does not allow the use of restraint and seclusion solely for disciplinary reasons or out of convenience. However, when the school's action is noted in a student's IEP as an intervention, it is nearly impossible to draw a line between discipline, convenience, and possible harm. Whatever the reason for a school's restraint or seclusion action, teachers are protected from any sort of repercussions.

Teachers currently remain in the classroom even after it is discovered that they have abused their power or caused harm to a child while using restraint or seclusion. Even if the bill is passed, teachers will continue to have that protection. The GAO found that in five of the ten evaluated cases the teacher or staff member responsible for causing harm, remained in the classroom. Yet, the new bill does nothing to remove these teachers from a school setting.[320]

Finally, the biggest disappointment of the Keeping All Students Safe Act is that it continues to allow schools to use the same techniques that have caused serious bodily injury, psychological harm, and even death to students across the country. The bill effectively prohibits the use of any sort of restraint that may cause suffocation, but it is silent about the techniques that have caused students to break an arm or leg or bust open their chin. Furthermore, techniques like these have been proven to cause students psychological harm for the rest of their lives, including suicidal ideation.

Although the bill will add additional regulations, provide more protections than currently exist, and ban prone restraint in all schools, it

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[319] Keeping All Students Safe Act, H.R. 4247, 111th Cong. § 5(a)(2)(D)(ii) (2009).
[320] Ryan et al., *supra* note 123.

does not guarantee that students will be free from harm.

VI. WHAT NEEDS TO CHANGE IN ORDER TO PROTECT STUDENTS FROM THE USE OF RESTRAINT AND SECLUSION?

There are only two requirements that should be mandated by the Department of Education with regard to the use of restraint and seclusion. First, the use of restraint and seclusion should be eliminated entirely. Second, schools should be required to implement positive support plans and training in the use of de-escalation techniques.

A. Completely Eliminating Restraint and Seclusion

In the Green Bay Area Public School District, the executive director of educational services has taken a new approach, and has attempted to eliminate the use of restraint and seclusion even though it is not banned by the state.[321] According to the executive director, restraint and seclusion are antiquated ways of dealing with students who are noncompliant.[322]

Teachers insist on the continued use of these intervention techniques even though there is no confirmed research supporting their effectiveness. The director of the Green Bay Area Public School District did not see any benefit to the use of seclusion, so she eliminated it.[323] So far the research shows that restraint and seclusion are harmful techniques that cause an *increase* in the unwanted behavior instead of a decrease. Many of these students have disabilities that impair impulse control or understanding which "lead[s] them to be prone to difficult behavior."[324] Using intervention will only perpetuate this behavior.[325]

Furthermore, it is clear from state data reports, the GAO report, and the numerous other studies that the use of restraint and seclusion will not decrease unless the regulations are even more stringent than the current laws. Texas has the most stringent law regulating restraint and has still been unable to reduce the number of restraints below 18,000. Eliminating these techniques will not only protect children from physical

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[321] SpecialEdConnection.com, *supra* note 31.
[322] *Id.*
[323] *Id.*
[324] Susie Bucaro, *A Time Out or A Knock Out: Has the Use of Restraint Against Students with Disabilities Become a Form of Corporate Punishment*, 15 Pub. Int. L. Rep. 62, 65 (2009).
[325] *Id.* at 66.

harm and death, it will also protect staff members who try to use restraint to keep from being physically injured. The more restraint is used, the more likely the person performing the restraint will also be injured.[326]

Eliminating restraint and seclusion will also force teachers and school districts to provide necessary and appropriate educational services for students with disabilities. A new teacher may be unaware of the behaviors that come along with autism, ADHD, or emotional disorders, and may not be prepared to handle these situations. Allowing educators to use dangerous and harmful restraint and seclusion techniques without proper training will only make their jobs more difficult. By using these types of techniques, neither the teacher nor the student learns how to communicate or deal with similar situation.[327] These students need professional support and counseling to address their issues; physically restraining them or locking them in a closet will not improve their behavior and will only cause harm to the student and the staff member. If Congress and the Obama administration are truly committed to eliminating physical harm and death of students with disabilities at the hands of educators, then restraint and seclusion must be eliminated in the classroom.

Unlike aversive techniques, the positive behavioral interventions and supports (PBIS) system allows a child to change their behavior in the long term, learning to control behavior and decrease violent or uncontrollable outbursts. If teachers and school districts implement this type of intervention, they will be able to successfully eliminate the use of restraint and seclusion. As the Green Bay Area Public School District demonstrates, they will no longer have a need for such techniques.

B. Introduction of New Interventions

Many educators are understandably fearful of the complete elimination of restraint and seclusion because they believe this is the only way to deal with violent children. Research shows that the best strategy is to use positive support plans or behavior support interventions. Aversive techniques such as restraint and seclusion reduce the immediate problem, but they fail as long-term solutions. These types of techniques fail to teach students how to behave properly and how to deal with their own emotions.[328] Instead, teachers and schools should encourage students to learn positive or desirable self-directed behaviors

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[326] Specialedconnection.com, *supra* note 31.
[327] Restraint and Seclusion in California Schools, *supra* note 169, at 27–28 (2007).
[328] *Id.* at 27–28.

that students can use and maintain in the long term.

Implementing positive behavior support plans provides a better chance for the student's behavior to improve over time, because the student learns to deal with his/her own behavior issues. PBIS "is based upon understanding why the student behaves in a certain way and what he is trying to communicate with the maladaptive behavior, and then replacing the inappropriate behavior with a suitable functionally equivalent replacement behavior."[329] In order for PBIS to work, schools must be willing to create and implement plans designed for each individual student based on their behaviors.

VII. CONCLUSION

The use of restraint and seclusion has done nothing more than cause physical and emotional harm to children with disabilities, without improving the behavior of these students. Restraint and seclusion do not achieve their intended goals, and only make the situation worse in the long term. By eliminating restraint and seclusion and implementing positive behavior intervention support plans, students will learn how to control their behavior, and over time, the need for restraint and seclusion will disappear. If the Obama administration and Congress truly intend to protect students with disabilities and decrease the number of deaths and incidents that result in bodily injury, the only way to ensure such a result is to eliminate the use of restraint and seclusion altogether.

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[329] *Id.*