March 22, 2012

Dear Member of Congress,

The Council of Parent Attorneys and Advocates, Inc. (COPAA) is an independent, nonprofit, §501(c)(3) tax-exempt membership organization of attorneys, advocates, parents and related professionals. COPAA members work to protect special education rights and secure excellence in education on behalf of the 7.1 million children with disabilities in America. With close to 1300 members nationwide, COPAA is at the forefront of special education legal advocacy.


On March 6, 2012, the US Department of Education released data that indicate that of the tens of thousands of school-aged children who are secluded or restrained at school, 70 percent are students with disabilities.¹ These data give a factual context in which restraint and seclusion are clearly imposed disproportionately upon students with disabilities and minority students by educational providers.

COPAA agrees with and supports the excellent points made about staff training and injury in a March 13, 2012 letter from the Consortium of Citizens with Disabilities.² In addition, COPAA addresses below each of the misleading and inaccurate arguments made in the statement of the American Association of School Administrators (AASA), a document based only on a handful of anecdotes and unsupported conclusory arguments.

First, AASA premises its long-held opposition to the prohibition of seclusion and restraint in public schools on its belief that “the use of seclusion and restraint has enabled many students with serious emotional or behavioral conditions to be educated not only within our public schools, but also in the least restrictive and safest environments possible.” AASA points to no peer-reviewed research to support this claim. Instead, AASA offers only two letters received in response to its “nationwide” solicitation of “stories and examples from school districts.” Neither of those letters makes the case for which it is offered.³ AASA then asserts: “If school districts were unable to occasionally use these

³ The first letter, submitted by a “special educator” to Kansas Legislators and the State Board of Education, describes a child” with multiple behavioral, cognitive and sensory issues” for whom various enumerated strategies were tried. Conspicuously absent from the list is any mention of a Functional Behavior Assessment, Behavior Intervention Plan, or any positive behavior supports and interventions. After noting the strategies used, the author asserts that her daughter could not have remained in school “without the appropriate use of seclusion and restraint procedures. Appropriate is not defined.
techniques with students with severe behavioral or emotional disorders, then these students would have to be institutionalized or sent to private facilities where they may not have the same rights and services available to them.” However, contrary to AASA’s dire portrait of what would happen if S. 2020 and HR 1381 were to become law, reality would look considerably different. Both S. 2020 and HR 1381 would expressly allow the use of restraint to prevent injury to self or others (See, e.g., S.2020, § 4(2)(A)); therefore, school districts would not be prohibited from using restraint when appropriate if these bills were enacted.

Second, while AASA admits that some school personnel are not perfect and “make mistakes, sometimes intentionally, that can hurt children”, it opposes federal legislation prohibiting the use of restraint and seclusion because “99 percent of school personnel ... use seclusion and restraint safely, responsibly and only when circumstances truly demand their application.” Again, AASA points to no peer-reviewed study to support this percentage. AASA does point to its own “randomized survey of school administrators” but does not provide any information about the methodology of its survey or its reliability or validity. Nothing in the results cited by the AASA supports its 99% claim. Indeed, if anything, the cited statistics seem to contradict the 99% claim.

Third, AASA’s position is based on at least two faulty premises. For one, assuming that the abuse of restraint and seclusion is the “vast exception to the rule”, it simply does not follow that federal legislation to limit the use of restraint and seclusion is unnecessary. This is what is known as proving too much. It is the case that 99% of Americans do not murder or rob banks. Yet, all Americans are subject to laws prohibiting murder and bank robbery. The same is true for lesser offenses, such as tax evasion, racial discrimination, and water pollution. Banning conduct in which only a tiny proportion of the population engages is not new or inappropriate. Federal legislation is necessary to protect all school children from possible abuse by restraint or seclusion by whatever number of wrongdoers may be out there. AASA would have Congress ignore the hundreds of documented and untold numbers of unreported incidents in which children have suffered injury and death at the hands of school personnel. Indeed, the message sent by AASA is that some amount of injury and even death of children at the hands of school personnel is an acceptable risk if school administrators and staff think they themselves will be safer.

Moreover, recent reports prepared by the General Accountability Office, COPAA, and the National Disability Rights Network (NDRN) strongly suggest that the use of restraint and seclusion is

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4 The reader is left to guess, for example, what questions were asked, how they were framed, how they were distributed, how many people received them, whether a random sample was chose and if so how and if not, what they mean by “randomized.” See also CCD letter.
often, unfortunately, not the exception but the default. COPAA’s report alone found more than 180 cases of children being traumatized and hurt by the use of seclusion, restraints, and aversive interventions (Butler, 2009). Striking was the fact that over 71% of respondents indicated the absence of any kind of behavioral intervention plan prior to the imposition of restraint or seclusion, indicating that rather than proactively providing positive behavior support to lessen or avoid challenging behaviors, school personnel went straight to restraint and seclusion—reactive, aversive interventions.

Further, in opposing “federal policies built around the few wrongful individuals who choose to disobey school policies, state regulations, or state and federal criminal laws,” Report at 1 (emphasis added) AASA ignores the fact that restraint and seclusion remain largely unregulated. As Jessica Butler documented in her recent report, only 14 states limit the use of restraints to physical safety emergencies and only 11 states either ban seclusion entirely or restrict it to physical safety emergencies. The proposed bills are not “built around” a few violations of existing laws and regulations because in many places there are none.

Fourth, AASA appears to oppose a federal bill because school personnel, even those trained in what it labels, without defining, “proper seclusion and restraint techniques” have been injured when doing so. Without facts describing the circumstances, it is impossible to directly respond to this point. However, as noted above, S. 2020 expressly allows school personnel to use restraint if “the student’s behavior poses an immediate danger of serious bodily injury to self or others.” Section 4(2)(A)(i).

Fifth, AASA objects to a federal prohibition on including restraint and seclusion in IEPs because this would mean “that school personnel are unable to work with parents to create a plan for coping with the student when their behavior becomes unmanageable.” This is simply not true. Neither S. 2020 nor HR 1381 changes the right of parents to participate in developing IEPs and BIPs. Instead the bills specify that when writing those plans, schools cannot force parents essentially to consent in advance to the use of techniques that, under the bill, could only be used to prevent serious bodily injury. If the law allows it, there is no need to put it in the IEP. If the law disallows it except in emergencies, it cannot be in the IEP as a routinely-used intervention.

AASA also asserts: “If IEP teams comprised of both parents and school personnel agree the use of seclusion and restraint will enable a student to remain in the least restrictive environment possible and to educationally benefit from the teaching and services the student needs, then these techniques should be allowed to be written into the student’s IEP.” This assertion ignores the reality of IEP meetings in which parents are outnumbered by school personnel who can and do tell parents that if they dislike the team’s decision their recourse is to go to due process, an option that is extremely difficult, if not impossible for many parents to exercise. Also, sometimes, if not often, parents are presented with restraint and seclusion as the only option; there is no discussion of alternatives.
including the use of functional behavioral analyses along with development and refining of positive individualized behavior intervention plans.

Contrary to AASA’s suggestion, planned use of restraint and seclusion is inconsistent with the IDEA. It is inconsistent with an IEP process that is supposed to identify each student’s needs, including behavioral and functional needs, and to develop individualized services, based on peer-reviewed research, to meet those needs so as to enable the student to progress in the general curriculum. In the absence of peer-reviewed research attesting to the efficacy of restraint and seclusion, these aversive interventions have no place in IEPs or BIPs. In fact, the only peer-reviewed research of which we are aware demonstrates that restraint and seclusion do not have any treatment or educational value and that no amount or type of staff training can assure their safe use. (Haimowitz, Urff, and Huckshorn, 2006; Nunno, Holden, and Tollar 2006). Including restraint and seclusion in IEPs will decrease the likelihood of including peer-reviewed positive behavior intervention techniques in IEPs, as the IDEA mandates and, precisely because they are listed, increase, rather than decrease the use of restraint and seclusion in practice.

Sixth, AASA takes issue with the “serious bodily injury” standard apparently because it feels the standard will present school personnel with a conundrum: do nothing, because you conclude that the immediate danger is only of “bodily” rather than “serious bodily injury” or use restraint and risk a lawsuit. AASA asks how a parent would be told that her child had been stabbed with a pencil by another child while being evacuated from the classroom. Again, as noted above, nothing in the Senate bill prevents intervention by school staff if they believe a student “poses an immediate danger of serious bodily injury.” Although AASA attempts to paint the standard as a conundrum, the bottom line is this: The Senate pending bill recognizes that restraint and seclusion are serious intrusions on liberty with safety ramifications for the child and for staff, and that they should not be used on a routine basis. Drafters in the Senate seemed to recognize that a certain amount of injury is inherent in the educational setting but that to warrant the use of restraint and seclusion something much more is required, i.e., serious bodily injury. Serious bodily injury is a well defined and interpreted legal term. The potential for litigation is a red herring. Neither the Senate or House bill provides for a private cause of action; rather the bills simply preserve existing rights under federal or state law or regulation.

Seventh, AASA argues that the bills, if enacted, would lead to more injuries to school personnel and offers only four anecdotal examples (two for one student) from its network to make its case on this point. In all four cases, it appears that staff members chose not to use restraint before injury occurred. This does not make the case against a law prohibiting restraint except where serious bodily injury appears to be imminent. With regard to the two examples for one student described in the margin, we find nothing in the pending bills that would have prevented the use of restraint. In


addition, we would certainly hope that trained personnel would have first, perhaps successfully, de-es- 
scalated the situation by use of blocking techniques or other proven methods.

In the Missouri case, nothing in the proposed legislation would have prevented the use of restraint. Once again AASA omits important facts. For example, we do not know the size of the child or proximity of the child to the teacher and we know nothing about whether the teacher was well trained. The New Mexico example also provides insufficient facts upon which to determine what really occurred.

Eighth, AASA argues that federal law is unnecessary because 36 states have laws or regulations governing the area and this is a state matter. As we indicated earlier, Jessica Butler documented in her recent report that only 14 states limit the use of restraints to physical safety emergencies and only 11 states either ban seclusion entirely or restrict it to physical safety emergencies. We do not understand the math used to reach 36 and believe that AASA actually makes the case for federal law precisely because there are still many states with weak or no standards.

Ninth, claiming that restraint or seclusion are therapeutic interventions flies in the face of clear evidence to the contrary showing that restraint and seclusion are harmful, traumatizing and deadly. Federal law must limit the imposition of restraint to situations presenting clear and imminent danger of serious bodily injury.

Finally, AASA claims that seclusion protects students. No evidence exists to support this claim. Rather, several studies show its lack of efficacy and harm. Millstein and Cotton (1990) found that the use of seclusion did not differentiate among the children in their ability to cope with the environment using the Adaptive Behavior Index, and in fact, the time an individual child spent in seclusion grew over time, demonstrating that seclusion did not teach the children behavioral control. Miller (1986) surveyed 5 to 13 year olds in their perception of seclusion, which included use of a locked isolation room, sitting on a chair, and being sent to one's room. Miller found that when children were asked to draw and comment about seclusion or time-out, the pictures they drew did not indicate the children gaining self-control while in seclusion. Instead, the pictures conveyed punishment, where the child was crying and pleading for help. The children's descriptions of seclusion conveyed fear and abandonment. Federal law must eliminate the use of seclusion in schools. A child should never be locked in a room, closet, box, or other place, or secluded in place from which the child cannot freely exit.

AASA states towards the end of its document that it “refuses to accept the idea that public school employees are over-using seclusion and restraint and/or using it inappropriately.” This is a persuasive argument for the need for federal standards and oversight. AASA continues to defend and promote actions by school personnel that are not supported by research or evidence. AASA refuses to acknowledge that these actions are ineffective and negligent at best and abusive at worst.

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It is long past time to stop discrimination and abuse through the imposition of restraint and seclusion on students in our nation’s schools. COPAA urges you to reject the claims made in the AASA document and swiftly pass federal legislation to Keep All Students Safe.

Sincerely,

Denise Stile Marshall, Executive Director

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