PHYSICAL EDUCATION: AMENDING THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT TO RESTRICT RESTRAINT AND SECLUSION IN PUBLIC AND PRIVATE SCHOOLS

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There are no federal laws restricting the use of restraint or seclusion in public or private schools. Such laws exist at the state level, but the specifics vary from jurisdiction to jurisdiction. Federal legislation is necessary in order to ensure that students are not treated differently in each state based on legislative disparities between those states. The lack of a uniform standard for restraint and seclusion subjects students, a disproportionate number of whom have disabilities, to unreasonable physical control by other persons. These practices convey punishment, fear, abandonment, and provide little positive benefits. The amendment proposed in this Note will ensure that seclusion and restraint are only used when the student poses a direct threat to the health or safety of him or her self or others. Staff must be trained in the safe and proper use of these procedures so that they are performed in a reasonable manner, including utilization for a limited amount of time and the exhaustion of positive disciplinary alternatives prior to the utilization of these procedures. Furthermore, parental consent to the use of these procedures is imperative.

I. INTRODUCTION

Each of the following students was receiving special education under the Individuals with Disabilities Education Act (IDEA). A fourteen-year-old student with a history of emotional and physical abuse and post-traumatic stress disorder was unable to remain seated in class. Due to his inability to remain seated, the student was pinned face down on a mat, with his arms underneath him while his teacher lay on top of him. The child was five feet and one inch tall and weighed one hundred and twenty-nine pounds. The teacher was six feet tall and weighed in excess of two hundred and thirty pounds. After more than fifteen minutes in this hold, the child died.

A nine-year-old student with Attention Deficit Hyperactivity Disorder and a learning disability repeatedly whistled, slouched, and waved his hands in class. He was confined to a time-out room seventy-five times over a period of six months, sometimes for an hour or longer. The room was the length of an adult’s arm span, lined with ripped and dirty padding, and smelled of “dirty feet and urine.”

Seclusion is a person’s involuntary confinement, usually solitary. Restraint is the partial or total immobilization of a person using drugs, mechanical devices such as leather cuffs, or physical holding by another person. On May 19, 2009, the Government Accountability Office (GAO) released a report stating that there were no federal laws restricting the use of seclusion and restraint in public and private schools, and such laws were widely divergent at the state level.

The United States government has shifted its views on restraint and seclusion in schools since the release of the GAO report. On the day following the release of the report, United States Secretary of Education Arne Duncan announced his intention to monitor how states use restraint and seclusion and requested that all chief state education officers submit plans for using seclusion, restraint and other practices for physical intervention in their schools. On July 24, 2009, the Chairman of the House of Representative’s Committee on Education and Labor announced that he was working with the Obama administration on “a new set of [federal] rules that could limit the use of restraint and seclusion, provide funding to train school staff, and require communication with parents if extreme disciplinary measures are used.”

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On July 31, 2009, Secretary Duncan sent a letter to all the chief education officers asking them to use positive behavioral interventions and supports and recommending that the website for the Center on Positive Behavioral Interventions and Supports be used as a reference. Secretary Duncan also requested that the chief officers limit the use of restraint or seclusion to students who pose safety risks to themselves or others and not allow them to be used for punishment, and recommended requiring documentation of each incident to be provided to parents within twenty-four hours. As of November 2010, the “Keeping All Students Safe Act,” which requires implementation of many of these procedures, has been passed by the House of Representatives but awaits a vote before the United States Senate. However, as passage has yet to occur, an IDEA amendment is a viable alternative that will effectively protect students with disabilities.

This Note advocates that IDEA should be amended to implement federal standards on the use of seclusion and restraint against students with disabilities. Among the practices that should be implemented in these standards are: (a) ensuring that seclusion and restraint are only used when the student poses a direct threat to the health or safety of him or her self or others; (b) the training of staff in the safe and proper use of these procedures; (c) the performance of these procedures in a reasonable manner, including for a limited amount of time; and (d) parental consent to the use of these procedures. Federal legislation is necessary in order to ensure that students are not treated differently in each state based on legislative disparities between those states.

Part II of this Note will focus on a brief history of IDEA and the status of the current law regarding special education. This introduction will explain the background of the law, thus facilitating a greater understanding of the need for and the appropriateness of the proposed remedy. Part III will identify why the use of seclusion and restraint on students with disabilities constitutes a problem, as well as the effects of seclusion and restraint on these students. Part IV will analyze when restraint and seclusion should be allowed as well as discuss alternatives to restraint and seclusion. Part V will address the importance of parental consent to the use of restraint and seclusion, and how it should be obtained. Part VI focuses on the possible federalization issue posed by the proposed amendment to IDEA. Finally, this Note will conclude with a brief summary and some final observations.

II. HISTORICAL BACKGROUND OF THE LAW IN SPECIAL EDUCATION

A. HISTORY OF IDEA

In 1954, the United States Supreme Court unanimously held in Brown v. Board of Education that “separate educational facilities [were] inherently unequal,” rejecting the “separate but equal” doctrine of Plessy v. Ferguson. Two decades later in 1972, a Pennsylvania District Court ruled that schools may not exclude students who have been classified with mental retardation. In addition, the Court mandated that all Pennsylvania students must be provided with a “free public program of education.” A few months later, the District Court for the District of Columbia held that no child should be excluded from a “free and suitable public education” regardless of mental, physical, or emotional disability or impairment. The District Court’s language guided future federal legislation by rejecting the District’s argument that funds were insufficient to educate students with disabilities.

In response to these cases, Congress passed Section 504 of the Rehabilitation Act of 1973, which states that no “otherwise qualified individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.” Two years later, Congress passed the Education for All Handicapped Children Act (EHA) to ensure that “handicapped children” receive a “free appropriate public education.” EHA was reauthorized in 1990 and renamed IDEA. IDEA was reenacted in 1997 and 2004. The requirement that handicapped children be provided an education in EHA mirrored the holding in the D.C. case and remains in the current statute.
B. CURRENT STATUS OF IDEA

Congress enacted IDEA to ensure that students with disabilities receive a Free and Appropriate Public Education (FAPE) and to protect the rights to an education of both children with disabilities and their parents. The United States Supreme Court held in Board of Education of Hendrick Hudson Central School District v. Rowley that in the context of children with disabilities, a FAPE is special education and related services provided at the public’s expense and under public supervision and direction. The term “special education” means “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability.” The special education and related services must also meet the standards of the state educational agency and include “appropriate preschool, elementary school, or secondary school education in the State involved.” These education and related services must be provided “in conformity with the [student’s] individualized education program.

A FAPE must be provided in the “least restrictive environment” (LRE) possible. IDEA explains that in order to place the students with disabilities in the least restrictive environment, the students must be educated with their non-disabled peers to the “maximum extent possible.” Special classes or separate schooling should occur only when “education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” In Sherri A.D. v. Kirby, the Fifth Circuit Court of Appeals expounded that the notion of the LRE involves “not only freedom from restraint, but the freedom of the child to associate with his or her family and able-bodied peers.”

A FAPE is generally provided to a student through an Individualized Educational Program (IEP). An IEP is a written statement for each student that is developed, reviewed, and revised to assess the student’s present levels of academic achievement and functional performance, develop and implement measurable annual academic and functional goals, and state the special education, related services, and supplementary aids that will be provided to or on behalf of the student. The IEP is written by a team that consists of various professionals, including special education teachers and representatives of the local educational agency who can provide specially designed instruction, and also includes the student’s parents.

The parents’ role is also crucial; they must give consent for the initial IEP’s creation or implementation. Also, if the parents do not give consent to the initial evaluation, the school is not obligated to provide the student with a FAPE, and the school may file for a due process hearing to initiate the first evaluation. If the parents disagree with the school’s evaluation, they may seek an independent educational evaluation (IEE). An IEE is an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question and is provided at public expense. The IEP team then reviews the IEE. The parents may also file for a due process hearing should there be a disagreement with the school.

The IEP must provide an “educational benefit” to the student. IDEA does not specifically define an “educational benefit,” but most courts require that the student make educational progress. Where the student’s behavior impedes the student’s learning, or that of others, the IEP may allow the use of peer-reviewed “behavioral interventions and supports” (BIPs), such as providing a student having trouble completing assignments with a study period that he must finish before the next subject.

Material failures by a school to implement an IEP violate IDEA because they constitute a failure to provide a FAPE that provides an educational benefit to the child. A material failure to implement an IEP occurs when there is a major discrepancy “between the services a school provides to a disabled child and the services required by the child’s IEP,” such as not providing services listed in an IEP. A failure to follow the student’s BIP may constitute a material failure. However, the failure to follow the plan must result in the failure to obtain an educational benefit, which, while not defined, usually means that the child advances educationally. Should a school violate IDEA, the parents may sue, and the courts “shall grant such relief as the court determines is appropriate.” Relief includes reimbursement for the cost of private special education when a school district fails to provide a FAPE and reasonable attorney’s fees.
IDEA states that “in the case of a child whose behavior impedes the child’s learning or that of others, [teachers should] consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.”\textsuperscript{69} If behavior that impedes learning results in the child being placed for more than ten days in an interim educational setting,\textsuperscript{70} another setting altogether, or suspension, then the IEP team must meet to determine whether the behavior was a manifestation of the disability.\textsuperscript{71}

**III. IDEA DOES NOT SET GUIDELINES ON RESTRAINT AND SECLUSION**

**A. SECLUSION AND RESTRAINT ENDANGER CHILDREN**

While IDEA has made great strides in ensuring equal education for children with disabilities, IDEA does not explicitly mention restraint or seclusion anywhere. The May 19, 2009 Government Accountability Office (GAO) report stated that there have been “hundreds of allegations at public and private schools” of restraint and seclusion on students between 1990 and 2009.\textsuperscript{72} In addition, the report stated that “almost all” of the allegations found involved “children with disabilities.”\textsuperscript{73} The GAO report also noted that restraint and seclusion was sometimes used when students were not being physically aggressive.\textsuperscript{74} Four of the ten case studies identified in the report involved restraint techniques that restricted the flow of air to the student’s lungs.\textsuperscript{75} Six of the case studies also involved staff who were not properly trained in the use of restraints.\textsuperscript{76}

On May 27, 2009, the Council of Parent Attorneys and Advocates (COPAA) released a report on a two-month study of information collected on one hundred and eighty-five cases of school usage of restraint and seclusion, and other aversive treatments on students with disabilities.\textsuperscript{77} 64.4% of these cases involved abuse through restraints, while 58.3% involved seclusion and 30% involved other aversive treatments.\textsuperscript{78} In many cases, more than one procedure was used against the student.\textsuperscript{79}

The study reported that in 71% of the cases the school failed to meet its statutory burden of providing BIPs containing research-based positive interventions.\textsuperscript{80} In 10% of the cases, the school provided the behavioral intervention plans, but in some cases did not implement them appropriately.\textsuperscript{81} In one case, a child with autism was restrained because he would not choose food from his lunch box on staff command, despite the fact that his IEP mandated that he be allowed to eat his entire packed lunch at one time.\textsuperscript{82} In 13% of the cases, the parents did not know whether the school provided a BIP.\textsuperscript{83}

The numbers provided in the COPAA report are striking because they indicate that schools react to students’ behavioral outbursts with aversive interventions rather than proactively providing behavior plans that lessen the likelihood of such outbursts.\textsuperscript{84} Furthermore, the requirement of an IEP containing a BIP for students with disabilities has been part of the federal statutory scheme since Congress amended IDEA in 1997.\textsuperscript{85} The sheer percentage of cases in which research-based BIPs were not implemented despite being required for over a decade\textsuperscript{86} displays a failure of the statutory scheme to fully achieve its purpose.

**B. THE EFFECTS OF USING RESTRAINT AND SECLUSION ON CHILDREN**

Proponents of restraint argue that it is effective in inhibiting aggressive behavior\textsuperscript{87} and “encourage[s] children to verbalize and act out strong feelings.”\textsuperscript{88} Proponents of seclusion argue that it teaches self-control.\textsuperscript{89} However, most people who are restrained or secluded do not actually benefit from the procedure.\textsuperscript{90} Unfortunately, empirical literature addressing coercive interventions on children are “exceedingly sparse.”\textsuperscript{91} One of the few researchers to examine the use of seclusion on children, D.E. Miller, had forty children, aged five to thirteen, draw a picture about their seclusion experience.\textsuperscript{92} Their descriptions conveyed punishment, fear, and abandonment.\textsuperscript{93}

Children with disabilities are at a significant disadvantage during periods of high stress and they may become traumatized or re-traumatized.\textsuperscript{94} When faced with the prospect of or actually being
restrained, a child’s body becomes hyper-aroused because the child senses danger and perceives it as abuse.95 The child may become injured or killed by either his or her struggling or by the incidental force of the restrainer.

If the child is lying prone on the floor, the school agent is likely going to be on top of the child to keep him or her pinned, or on the side of the child if the child is small. In either case, the risk remains that the restrainer places too much force on the spine, pharynx,96 or other sensitive bones or organs. Too much pressure on the spine may result in temporary or permanent paralyzation.97 Too much pressure on the larynx can cause asphyxia. Furthermore, if the student is in the prone position, it is more difficult to monitor breathing because the student’s chest is on the ground. If the restrainer is on top of the student, the only ways to monitor breathing would be to lower the restrainer’s head to look for visual cues in the student’s face. The student might then be able to attack the restrainer’s lowered head. Trying to feel the student’s back for the intake and outtake of air that signifies breathing is difficult, at best.

Restraining students when they no longer pose a threat is unreasonable and unnecessary.98 Unreasonably prolonging restraint may lead to unnecessary injury to both the restrainer and the person being restrained.99 Eventually, the restrainer will tire, and the student might gain a second wind and struggle more. The restrainer might become frustrated with the student and keep the child restrained as punishment, creating an endless cycle. Furthermore, the child may see the actions as a threat and try to hurt the restrainer.100 Therefore, restraint must be discontinued as soon as possible in order prevent unnecessary injury to the student or the restrainer. However, as restraint and seclusion will be necessary at times, the statute should incorporate the best practices in utilizing these procedures.

IV. BEST PRACTICES FOR RESTRAINT AND SECLUSION

A. BEST PRACTICES FOR RESTRAINT

1. Discontinue Restraint As Soon As Possible

Students’ constitutional rights are at stake when they are subjected to restraint, making the need for best practices all the more important. The United States Supreme Court held in Ingraham v. Wright that schoolchildren have a liberty interest in freedom from unreasonable restraint and mistreatment.101 Nearly twenty years later, the Court described Ingraham as stating that while “children sent to public school are lawfully confined to the classroom, arbitrary corporal punishment represents an invasion of personal security to which their parents do not consent when entrusting the educational mission to the State.”102 That right is not extinguished by lawful confinement,103 such as when students are being restrained in the defense of others or for their own safety.104 Relying on Ingraham, the Ninth Circuit, as well as a number of other circuits, has held that excessive and unreasonable corporal punishment of public school students violates the students’ constitutional rights.105 Thus, any use of restraint or seclusion should be limited to those students that pose a threat.

It is sometimes difficult to discern when a student poses a threat. Therefore, the proposed amendment requires “imminent danger,” where there is an immediate, real threat to a person’s safety,106 such as when a teacher reasonably believes a student is about to attack a peer, before restraint or seclusion may be utilized. A student should not be subjected to restraint or seclusion because of an unrealistic or hypothetical threat, such as saying that he or she would “nuke” a peer if she took her lunch. There must be some discretion left to the school agent present at the time of each incident. However, in order for there to be oversight, an amendment should implement objective standards for the agent to consider. One example would be a threshold that must be crossed before the school agent can intervene with physical force, such as “behavior that is clearly indicative of an imminent threat to the student or another person.”107 This standard takes the situation out of a hypothetical or unrealistic threat scenario and into an imminent danger scenario. Therefore, the school agent can take into account the physical, emotional, and neurological capabilities of the child and act accordingly.
Congress can look to the language of the Children’s Health Act of 2000’s prohibition of certain uses of seclusion and restraints in health care facilities receiving federal funding. The Act only allows restraint or seclusion to “ensure the physical safety of the resident, a staff member, or others.” Moreover, the Act requires that less restrictive interventions have been determined to be ineffective before seclusion and restraint can be employed in health care facilities receiving federal funding. This approach is recommended by numerous individuals and organizations. Schools should follow these guidelines for identifying the necessity for utilizing each procedure. The likelihood of abuse will decrease if both parents and schools know when and how far they can go in exerting control over a child.

2. Educators Should Primarily Rely Upon Supine Restraints

When necessary, the safest way to restrain the child is to place him or her in the “supine” position, or lying on the back and facing upward. Studies have shown that when a person is placed in the “prone” position, or lying on the chest and facing downward, it is harder for that person to breathe. The child risks dying from positional asphyxiataion if the child has an insufficient intake of oxygen as a result of body position or the positional asphyxia causing cardiac arrhythmia, or a disturbance in the heart’s rhythm due to insufficient oxygen in the blood. COPAA and other groups contend that prone restraints should be abolished outright. However, there will be times when it is necessary for the student to be placed in a prone position. For instance, a student may bring a weapon into school, and teachers and other agents will not necessarily be able to get the student on his or her back without risk of injury, and for their own safety must keep the student in the prone position in order to remove the weapon. The amendment should primarily mandate supine restraints, but allow for reasonable deviation from the norm that would be reviewable by the district or state. In order to provide oversight and prevent school agents from repeatedly saying that it was reasonable under the circumstances to restrain the student in the prone position, the amendment should require that reasonable efforts be taken “to subdue the child while avoiding any practice, maneuver, or technique that may restrict or inhibit the child’s ability to breathe.” There should be clear-cut exceptions to the primary rule, such as when a student has a weapon and it would be safer to restrain the student in the prone position to remove the weapon. In this case, the student must then be placed into a supine position.

3. Exhaust Less-Restrictive Interventions

The American Psychiatric Association, the American Psychiatric Nurses Association, and the National Association of Psychiatric Health Services suggest numerous less restrictive interventions to employ prior to restraint or seclusion in psychiatric settings, and these can be employed in schools. One suggestion is to try to determine the underlying message conveyed by the child’s behavior in order to address the real issue that is frustrating the child. For example, instead of restraining a child for being unable to sit still, the staff member should try to figure out why the child is acting out. Perhaps the child is upset about something that happened that day, and counseling the child will negate the need to restrain the child, while also helping to build emotional management skills. The organizations’ inpatient child unit also instituted reforms, including focusing on positive reinforcement, such as “spending more time with children [and] focusing on good behavior” rather than negative reinforcement, such as secluding children in the hopes of conditioning them not to act in manners that will initiate further seclusion, and saw a 97% decrease in seclusion episodes in two months. If students with disabilities receive positive reinforcements rather than negative reinforcements such as seclusion for an outburst, it seems likely that there would be a similarly high decrease in seclusion episodes. This would partly be because seclusion would not be implemented as often, but the focus on positive reinforcement would also limit episodes of seclusion to those that are absolutely necessary. Positive reinforcement could be similarly applied to restraint.
The amendment should require that less restrictive interventions be exhausted prior to the institution of seclusion or restraint, and the Children’s Health Act of 2000 provides proper, if not perfect, guidance regarding wording.127 The Act states that “restraints and seclusion may only be imposed . . . in emergency circumstances and only to ensure the immediate physical safety of the [person being restrained or secluded], a staff member, or others and less restrictive interventions have been determined to be ineffectiv[ed].”128 However, the amendment should state that when there is no opportunity to exhaust lesser restrictive activities, such as when a student has begun fighting with a teacher or another student or is threatening to imminently take his or her own life, seclusion or restraint can be temporarily implemented until the threat subsides.

B. BEST PRACTICES FOR SECLUSION

1. Monitor Seclusion

Due to the inherent dangers of traumatization to those that are subjected to seclusion, centers that participate in Medicare and Medicaid129 must ensure that secluded individuals are monitored for their safety.130 Kim Masters, M.D., the medical director of a private psychiatric hospital in Georgia, recommends that staff ratios be flexible enough to monitor people in seclusion.131

This policy and practice can be implemented in schools as well. Many schools have designated time-out rooms.132 In most schools, there are numerous security guards, administrative personnel, and teachers on break from teaching classes, each of whom is a potential monitor.133 For schools that do not have a specially designated time-out room, school agents would likely have to rely solely on restraints.

In order to monitor the student, there are a few different options, each increasing in cost. First, a monitor can stay in the secluded area with the student, allowing constant feedback on the student’s emotional and physical state. However, this places the monitor at risk of injury if the child becomes agitated. Second, the monitor can enter the seclusion area at designated time intervals to check on the student’s condition. This risks the student trying to escape during the checkups, but allows a degree of physical safety to the monitor. Third, the door can have a window or a viewing slot. This allows the monitor to check on the student, but will come at a cost to school districts. Fourth, the school can put a closed-circuit camera in the seclusion area to allow constant monitoring.

This last option is likely the most expensive but also provides the monitor with complete safety. The amendment should require that the student be monitored either in-person or through the use of both video and audio equipment that are in close proximity to the student. These are likely the most effective methods, as evidenced by the fact that the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO) requires either of these to be implemented for patients who are simultaneously restrained and secluded.134

2. Time Limit

JCAHO imposes time limits on the seclusion of children according to age range outside of a doctor’s order allowing otherwise (four hours for individuals ages eighteen or older, two hours for individuals between nine and seventeen, and one hour for individuals under nine),135 with hospitals that fail to adhere risking loss of accreditation.136 This standard can easily be reduced to a thirty-minute time limit on seclusion in schools. This time limit avoids unnecessary harm to the student by allowing him or her to vent, calm down, relax, and get ready to go back to class. The limit also allows easier reintegration of the student back into his or her studies. The amendment should have a thirty-minute limit on how long seclusion can last, but Congress may deem another period of time fit after consultation with behavior analysts, psychiatric authorities, school districts, educators, and other affected and interested parties.
3. Notification

The Children’s Health Act of 2000 mandates that each death caused by, or likely to have been caused by restraint or seclusion, be reported to the State within twenty-four hours and include the name of the decedent and the procedures used. Since restraint and seclusion may traumatize a student, there should be a system of notification to the student’s parents when the student is subjected to one of these procedures. The notification system will allow the school districts and state officials to keep track of procedural usage, as well as keep parents informed of their child’s progress. If a parent hears that their child is being restrained or secluded, they will likely consider revising their child’s IEP and BIP. The amendment should include the notification requirement, and CHA’s system would be proper for restraint and seclusion. To avoid school districts spending extra cost and time, the amendment should require a monthly update to state officials.

V. PARENTAL CONSENT SHOULD BE AN INFORMED CONSENT

Not all parents will consent to the use of physical force against their children. Therefore, parents should be asked to consent to the use of restraint or seclusion against their child when the child poses a direct threat to him or her self or others as a prerequisite to the implementation of an IEP. These standards should be placed in students’ IEPs under 20 U.S.C. § 1414.

In 71% of the COPAA cases, the parents did not consent to the use of restraint, seclusion, or aversive treatments for their student. 16% of parents consented to the use of these procedures, though several parents were under the impression that these interventions would only be used during crises. The remaining 13% did not know or were classified as “other.” These results are striking because parental consent is required to conduct an initial evaluation to determine whether the student requires special education, to provide initial special education or services to the child, or to conduct a reevaluation of the child. Parents should consent to limited restraint and seclusion, but they should also be fully informed of the effects of these procedures. In order to obtain consent, the necessity for and guidelines surrounding the use of restraint and seclusion should be explained to the parents in great detail.

Educators should explain to parents that according to their child’s IEP, restraint and seclusion will only be used if their child poses a direct threat to the health or safety of him or her self or others, and will be used as a last resort, when possible. Despite parents’ anxieties over having their children physically restrained in any manner, educators should strive to promote parental understanding of why these procedures will be used. Educators should show parents educational textbooks dealing with aggressive or violent behavior, or students with emotional or behavioral disorders, that suggest that physical restraint may be warranted to ensure students’ and educators’ physical safety. In most medical, psychiatric, and law enforcement applications, there are strict guidelines in place that ensure proper and safe application of restraint, so educators should explain that similar safeguards are implemented in the school setting. Under the amendment, restraint will be discontinued as soon as possible, and the student will be restrained in the supine position. If the person(s) restraining the child cannot safely place the student into the supine position, the student will be placed in a prone position, with the student’s breathing carefully monitored. Seclusion will be carefully monitored and limited in both time and place. Both procedures will be utilized only if less restrictive alternatives are unavailable, and parents will be notified in each instance that one of these procedures is used. Once all of this is explained, parents should be required to provide explicit consent to implementation of emergency-use restraint and seclusion as a prerequisite for special education. This provides schools with the ability to control the classroom and parents with the knowledge that their children will be treated safely and respectfully.

VI. FEDERALIZATION OF AREAS SUBJECT TO STATE REGULATION

Opponents of the amendment may argue that it federalizes areas of educational policy that are usually the subject of state regulation. However, areas of traditional state regulation may still be
superseded by federal regulation. While states retain police powers on health and safety matters, Congress has repeatedly and successfully passed laws regulating health and safety matters when they involve civil rights, such as IDEA, the Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act. The ADA prohibits discrimination based on employment, by public entities and transportation, and public accommodations. Section 504 applies all nondiscrimination laws based on disability to employers and organizations that receive financial assistance from any Federal department or agency. The reason for all of these permissible intrusions is that the United States has a national interest in protecting children with disabilities.

The May 19, 2009 GAO report stated that there were no federal laws restricting the use of seclusion and restraints in public and private schools, and such laws are widely divergent at the state level. Due to this discrepancy, in one state, a student might be restrained or secluded while in another state the student would be verbally reprimanded for the same behavior. For instance, New York regulations only allow agents of the school district to use physical force (a) to protect oneself; (b) to protect another from injury; (c) to protect the property of the school, school district, or others; or (d) to restrain or remove a student who interferes with the “orderly exercise and performance of school or school district functions, powers and duties” after being requested to refrain from further disruptive acts. New York also prohibits the use of interventions “intended to induce pain or discomfort to a student for the purpose of eliminating or reducing maladaptive behaviors,” including movement limitations.

New York requires that BIPs not include the use of aversive interventions unless the student threatens the physical well being of others, but the staff must be trained and the parents must have consented to the use of such interventions. Any use of force must be reasonable, not be used as punishment, and be properly documented. Seclusion may only be used in conjunction with a BIP unless there is an “immediate concern” for the physical safety of the student or others, and must be unlocked, must allow the staff to hear and view the student at all times, and be of an adequate size and empty of hazards.

Like New York, Michigan also has stringent standards, and prohibits corporal punishment in schools unless a student’s behavior interferes with the “orderly exercise and performance of school . . . functions[,]” the student poses a threat to his self or others, to quell a disturbance that threatens physical injury to a person, to obtain a weapon from the student, or to protect property. Michigan does not require documentation of restraints or seclusions, though it still requires a threat to implement restraint or seclusion.

According to the GAO report, the following states do not have laws related to the use of restraint or seclusion in public and private schools: Arizona, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, New Jersey, North Dakota, Oklahoma, South Carolina, South Dakota, Vermont, Wisconsin, and Wyoming. Without guidelines on restraints or seclusion, these states may use painful restraint positions and lock students away for hours at a time without regard to the threat the students pose. Due to the wide variations in laws, children across the nation continue to be harmed at alarming rates. A Model State Statute would not effectively protect children because it would require ratification prior to its enforcement. Amending IDEA would also be superior to a regulation by the Department of Education because IDEA already provides a funding stream to offset the costs associated with implementing the amendment.

Since the GAO report stated that “almost all” of the allegations regarding restraint and seclusion involved “children with disabilities,” the solution to the problem should primarily address individuals with disabilities. IDEA was enacted to ensure that students with disabilities were provided with a FAPE and to protect their rights. As behavioral interventions and supports are necessary to provide a FAPE under IDEA where a student’s behavior impedes his or her ability to learn, and seclusion and restraint can be properly utilized as part of behavioral interventions and supports, IDEA provides the proper statutory framework to implement regulation of restraint and seclusion.

Restraint and seclusion inherently implicate the civil rights of those subjected to them, so inaction or the lack of appropriate action to protect the rights of students with disabilities will prove dangerous. In numerous cases, it has already proven fatal. Congress must act to protect these
students, and this amendment to IDEA will do so effectively and efficiently. Congress may pass the Keeping All Students Safe Act in the future, but students with disabilities need safety right now.

VII. CONCLUSION

The use of restraint and seclusion in schools is an important issue that needs to be addressed on a national scale. Children are being abused and killed, and amending the Individuals with Disabilities Education Act to add guidelines for restraining and secluding students in their Individualized Education Plans will greatly reduce, if not eliminate, procedures that result in harm or death. This amendment will also eliminate legal inconsistencies regarding physically restraining and secluding children from state to state.

Under the amended IDEA, the nine-year-old with Attention Deficit Hyperactivity Disorder and a learning disability who repeatedly whistled, slouched, and waved his hands in class would not have been secluded in a tiny room that smelled of urine seventy times in six months. Furthermore, the fourteen-year-old student with a history of emotional and physical abuse and post-traumatic stress disorder who was unable to remain seated in class would not have been pinned face down by a teacher nearly twice his weight and died. Instead, each teacher would have asked why their respective student acted out and addressed the problem, averting the need to physically restrain or seclude either student.

NOTES

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3. GAO-09-719T, supra note 1, at 16.

4. Id.

5. Id.

6. Id.

7. Id.

8. Id. at 27–28.

9. Id.

10. Id. at 28. (This student recovered under the prohibition against unlawful seizure under the Fourth Amendment.)


12. Id.

13. GAO-09-719T, supra note 1, at 3.


15. The Honorable George Miller.


18. Id. (citing ILL. ADMIN. CODE tit. 23, § 1.285 (2002)).
21. Restraint and seclusion should be regulated for non-disabled students as well as students with disabilities, but the focus of this Note is the advancement of such measures as feasible under IDEA’s statutory scheme.
25. Id. at 307; see infra notes 34–55 and accompanying text.
27. Id. at 876, 878 (holding that insufficient resources many not be the basis for exclusion).
34. 20 U.S.C. § 1414(d)(1),(a), see § 1400(c)(3).
35. Id. § 1400(d)(1)(b).
37. The term “related services” means transportation, developmental, corrective and supportive services “as may be required to assist a child with a disability to benefit from special education. . . .” 20 U.S.C. § 1401(26)(a).
42. 20 U.S.C. § 1412(a)(5).
43. Id.
44. Id.
45. 975 F.2d 193, 207 n.23 (1992).
47. Id. §§ 1414(d)(1)(A)(ii)(I)-(IV).
48. Id. §§ 1414(d)(1)(B)(i)-(vi).
49. Id. § 1414(a)(1)(D)(i).
50. Id. §§ 1414(a)(1)(D)(ii)-(III).
51. Id. § 1415.
52. Id. § 1415(b)(1).
54. Id. § 300.502(b). (note that there are specific requirements for IEEs to be provided at public expense, and parents also have the right to pay for their own IEE. However, this Note does not focus on such details.)
55. Id. § 1415(f).
56. Rowley, 458 U.S. at 207.
61. Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 819 (9th Cir. 2007); Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 (8th Cir. 2003) (IDEA is violated when a school fails to implement an “essential” element of an IEP); Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000) (de minimis failures to implement an IEP do not violate IDEA, but failures to implement “substantial” or “significant” IEP provisions do).
62. Van Duyn, 502 F.3d at 815.
63. Shaun M. ex rel. Kookie W. v. Hamamoto, 2009 WL 5218032, at *1 (Judge stated that defendants materially failed to implement student’s IEP by failing to provide transition services for adult life).

64. Clark, 315 F.3d at 1028 (holding that because the student’s IEPs did not appropriate address his behavior problem, the student was denied a FAPE); cf. Van Dyne, 315 F.3d at 823–24 (several elements of the student’s elementary school behavior management plan were not implemented at the student’s middle school. The court found that this was not a material violation because the IEP did not clearly state how those elements were to be implemented, nor did it require that they be used in the same manner as the previous school. The school still followed other parts of the plan. The court also determined that the elementary school plan may have been inappropriate for middle school. Furthermore, the student’s behavior improved at the middle school. This suggests that if the behavior management plan was properly expounded and tailored to the student’s current needs, the failure to follow the plan would constitute a material violation).

65. Rowley, 458 U.S. at 188; see Burke v. Amherst Sch. Dist., 2008 WL 5382270, at *11 (D.N.H.) (holding that failure to implement the IEP requirement that the student be videotaped during group and social interactions for her own review did not constitute a failure because the student’s behavioral problems were kept in check due to IEP implementation of monitoring and other services. She still obtained an educational benefit by obtaining academic achievement).


69. Id. § 1414(d)(3)(B)(i).


71. 20 U.S.C. §§ 1415(k)(1)(B), (E), (F)(ii).

72. GAO-09-719T, supra note 1, at 5.

73. Id. (Note that for the purposes of the report, the definition of a student with a disability did not indicate special education eligibility under IDEA.).

74. Id. at 7.

75. Id. at 9.

76. Id.


78. Id. at 5.

79. Id.


81. COPAA, supra note 77, at 3.

82. Id. at 38.

83. Id. at 3. (note that the remaining 6% were deemed “other” or not applicable.)

84. Id.


91. Sheila S. Kennedy & Wanda K. Mohr, A Prolegomenon on Restraint of Children: Implicating Constitutional Rights, 71 AM. J. ORTHOPSYCHIATRY 26, 28 (2001); Linda M. Finke, The Use of Seclusion Is Not Evidence-Based Practice, 14 J. CHILD & ADOLESCENT PSYCHIATRIC NURSING 186, 187 (2001) (The majority of the research examining the use of seclusion in the psychiatric setting has been done with adult patients. Little research has examined the use of seclusion with children; therefore, clinicians are left in part to draw conclusions from studies of adult patients.).

92. Finke, supra note 91 (citing D.E. Miller, The Management of Misbehavior by Seclusion, 4 RESIDENTIAL TREATMENT FOR CHILD. & YOUTH 63, 63–73 (1986)). (note that the definition of “seclusion” in this study was expanded to include sitting on a chair and being sent to one’s room.)
93. Id.
94. Kennedy & Mohr, supra note 91, at 32.
96. The passageway from a person’s head to their stomach; used for respiration and digestion. Britannica Online Encyclopedia, http://www.britannica.com/.
103. See Hutto v. Finney, 437 U.S. 678 (1978) (holding that lawful confinement for penal services did not deprive inmates the right to be free from the 8th Amendment’s prohibition against cruel and unusual punishment).
105. See P.B. v. Koch, 96 F.3d 1298, 1304 (9th Cir. 1996) (concluding that teacher’s use of excessive force with high school students in 1990 and 1991 violated plaintiffs’ substantive due process rights); see also Metzger v. Osbeck, 841 F.2d 518, 520 (3d Cir. 1988) (holding excessive force in public school context is a violation of substantive due process guaranteed by the Fourteenth Amendment); Wise v. Pea Ridge Sch. Dist., 855 F.2d 560, 565 (8th Cir. 1988); Webb v. McCullough, 828 F.2d 1151, 1159 (6th Cir. 1987); Garcia v. Miera, 817 F.2d 650, 653 (10th Cir. 1987); Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980).
106. BLACK’S LAW DICTIONARY 175 (3d pocket ed. 1996).
117. Lethal Hazard, supra note 112, at 5.
119. See Supporting Student Behavior, supra note 107, at 13, 18 (Prone restraint is prohibited, but the policy on restraint is not intended to forbid actions “to take a weapon away from a student.” “[S]chool personnel who find themselves involved in the use of a prone restraint as the result of responding to an emergency must take immediate steps to end the prone restraint[,]”); Letter from Michael Remus, Chairperson, Best Practices in Special Educ. & Behavior Mgmt. Task Force, to Ken Bennett, Ariz. Sec’y of State 6, 7 (Aug. 20, 2009), http://www.azsos.gov/info/reports/08272009Behavior_Task_Force_Best_Practices_Report.pdf (Prone restraint is prohibited, but the policy on restraint is not intended to forbid actions “to take a weapon away from a student.”).
120. Cf. Supporting Student Behavior, supra note 107, at 18 (“[A]ny restraint that negatively impacts breathing” is prohibited under all circumstances.).
121. See id. ("school personnel who find themselves involved in the use of a prone restraint as the result of responding to an emergency must take immediate steps to end the prone restraint").

122. Learning From Each Other, supra note 111.

123. Id. at 7.

124. The hospital patient receives food and lodging as well as treatment. MERRIAM-WEBSTER, supra note 112.

125. Learning From Each Other, supra note 111, at 11.

126. See LOWER MERION COMM. FOR SPECIAL EDUC., What Every Teacher Should Know About... Punishment Techniques and Student Behavior Plans, http://www.lmcse.org/behavior-support.html (last visited Jan. 8, 2011) ("positive techniques alone will adequately improve problem behavior...to avoid ‘behavioral triggers’ that lead to problems") (citing Jim Wright, Punishment and Student Behavior Plans, www.interventioncentral.org).

127. Section 3208, supra note 110.

128. Id.

129. These are two federal health benefit programs, which for the purposes of the Note will not be discussed.


133. See MO. DEPTO OF ELEMENTARY & SECONDARY EDUC., Model Policy on Seclusion and Restraint July 2010 1, 6, http://dese.mo.gov/schoollaw/documents/seclusionpolicy.pdf (The purpose of the policy is to “[p]rovide school personnel with clear guidelines about the use of seclusion, isolation and restraint in response to emergency situations,” and defines “school personnel” as any “person...working on school grounds in an official capacity” or “working on school grounds...for another agency providing educational or related services to students.”).


138. Kennedy & Mohr, supra note 91, at 32.


141. COPAA, supra note 77, at 4.

142. Id.

143. Id.

144. 34 C.F.R. § 300.300(a)(1)(i), (b)(1), (c)(1)(i) (2006).

145. Effective Responses, supra note 139 ("Most educational textbooks dealing with aggressive or violent behavior, or students with emotional or behavioral disorders suggest that physical restraint might be warranted for purposes of safety.")

146. Id.

147. See U.S. CONST. amend. X.


152. GAO-09-719T, supra note 1, at 3.


154. Id. § 19.5(b)(2).

155. Aversive interventions, or “aversives,” are procedures that use painful stimuli in response to behavior deemed unacceptable by the caregivers. COPAA, supra note 77.


157. Id. § 200.22(d)(3), (e)(10).

158. Id. §§ 200.22(d)(1)-(2), (4).

159. Id. § 200.22(c).


161. GAO-09-719T, supra note 1, at 33–58.

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