Case No. 11-1273

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EBONIE S., by her mother and next friend, MARY S.
Plaintiffs – Appellants,

v.

PUEBLO SCHOOL DISTRICT 60, MARILYN GOLDEN, in her official and individual capacities, GARY TRUJILLO, in his official and individual capacities, MARY JO BOLLINGER, in her official and individual capacities, LOUISE RIVAS, in her official and individual capacities, SHARON WELLS, in her official and individual capacities, ISABEL SANCHEZ, in her official and individual capacities, and KRISTEN POTTER, in her official and individual capacities,
Defendants – Appellees

On Appeal from the United States District Court for the District Of Colorado
Hon. William J. Martinez, Presiding, Civil Action No. 09-CV-00858-WJM-MEH

AMICUS CURIAE BRIEF OF COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC. IN SUPPORT OF REVERSAL OF SUMMARY JUDGMENT ORDER

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CERTIFICATE OF INTERESTED PERSONS

The following statement is made pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c): *Amicus Curiae* has no parent corporation, subsidiaries or affiliates that has issued shares to the public.

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I. STATEMENT OF IDENTITY OF AMICUS CURIAE

The Council of Parent Attorneys and Advocates Inc. ("COPAA") is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA believes that the key to effective educational programs for children with disabilities lies in collaboration between parents and educators as equal parties. COPAA provides training and resources for parents and attorneys to help each child to obtain the free appropriate public education ("FAPE") guaranteed by the Individuals with Disabilities Education Act ("IDEA"). As a national voice for special education rights and advocacy, COPAA's primary goal is to protect the educational and civil rights of students with disabilities. Through this experience COPAA has seen far too many children being subjected daily to harmful and at times deadly techniques in response to challenging behaviors in school. It is COPAA's position that every time a child is held in restraint, forced into an isolated room or subject to aversive treatments, the risk of injury, death or trauma is exceedingly high, much higher in fact than the alleged danger of their actions.

As *Amicus*, COPAA's interest is to offer this Court insight on the issue of whether the use of a restraint, a wraparound desk that was bolted to the floor, was warranted in non-emergency situations in light of accepted professional judgment and educational practice and standards, and equal protection guaranteed by the

Fourteenth Amendment. Such issues are germane to the District Court's Order granting summary judgment in favor of the Defendants-Appellees.

COPAA's authority to file this brief is based on COPAA's Motion for Leave to File *Amicus Curiae*, filed contemporaneously herewith

II. STATEMENT PURSUANT TO FED. R. APP. P. 29(C)(5)

COPAA and its counsel independently authored and submitted this Brief. COPAA has no relationships or involvements as identified in Fed. R. App. P. 29(c)(5).

III. ARGUMENT AND AUTHORITIES

When a school's actions dip below what is the minimum constitutional standard for a school's treatment of a student, a court must act and step into the world of education to determine whether the school's actions are reasonable. That is what COPAA is asking the Court to do here. When it does, this court will find that Appellees' actions were not reasonable because school personnel used a wraparound restraint desk with Ebonie S. that prevented her from voluntarily standing up or moving about. This physical restraint violated Ebonie S.'s constitutional rights by substantively departing from accepted professional practice and by denying Ebonie S. of a fundamental liberty interest. *See, e.g., Youngberg v. Romero,* 457 U.S. 307, 314 (1982).

COPAA's position is that the use of this restraint desk with Ebonie S. was unacceptable under all but emergency circumstances because it served no pedagogical purpose and failed to meet any accepted professional standards.

The District Court was in error when it granted summary judgment because the court failed to learn that mechanical and physical restraint, especially the chair used here, is ineffective in the education setting. The District Court also erred by relying on a distinguishable and flawed decision in *Couture v. Board of Educ. of the Albuquerque Public Schools,* 535 F.3d 1243 (10th Cir. 1996).

Instead of deferring to what experts on education and children's psychology tell us about the use of physical restraints such as the chair used here, the lower court abdicated its authority to the parent, who lacked guidance about the fact that, and the reasons why, the use of such a restraint is rejected in the educational field. The Court strained to find that a consent to the use of the chair by other educators in her child's previous school, relieves the school district of its need to review, consider, and discuss with the Individual Education Plan ("IEP") team the literature on the use of restraints in the classroom and how the wraparound desk was going to be used in Ebonie S.'s new classroom. This analysis can only lead to the conclusion that the wraparound desk restrains Ebonie S.'s liberty and therefore violates a fundamental right, as well as her right to equal protection under the law.

A. ROUTINELY AND UNREASONABLY USING A WRAPAROUND DESK IN NON-EMERGENCY SITUATIONS IS UNWARRANTED AND CONTRARY TO EDUCATIONAL STANDARDS BECAUSE IT CONSTITUTES A MECHANICAL RESTRAINT.

Appellees' repeated restraint of Ebonie S. cannot be justified by any data, methodology, or professional standards currently employed by modern educators. By their own admission, restraint was used not because Ebonie S. was violent or unruly, but because she "was not paying attention or did not want to work." Order at 5. Restraint was used in place of positive behavior interventions; there is no evidence that Ebonie S.'s teachers utilized positive behavior supports and strategies in an effort to teach her without the need to restrain her. Appellees' actions diverged so far from any acceptable educational practice or judgment as to be outside the law.

It is clear that Appellees misused the wraparound desk with Ebonie S., in part by using the desk, which was secured with a restraint bar bolted to the floor, as punishment. Misuse of a restraint serves no legitimate educational purpose, and improper use of restraint in this way is explicitly prohibited by state administrative regulations. Even if Ebonie S.'s IEP included "use of wraparound desk," it did not authorize the misuse at issue here. Appellees' actions did not contribute to the education of Ebonie S. nor did they meet minimum constitutional standards.

1. Appellees' Abuse of Restraint Technique with Ebonie S. Was a Substantive Departure from Accepted Professional Judgment, Practice, and Standards.

It is well established that professional – pedagogical – judgment in fact was not exercised "when the decision by the professional is such *a substantial departure* from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Youngberg v. Romero,* 457 U.S. 307, 314 (1982). Applying mechanical restraints in a non-emergency situation is *a substantial departure* from accepted professional practice. *Id*. Here, Appellees routinely placed Ebonie S. in a desk described by the Appellee School District as comprising a table that wraps around the front and sides of the child sitting in it, bolted to a floorboard, with a removable board that could be added to restrain the child. Order at 3-4. Ebonie S. could not voluntarily get up or move around once she was secured in the desk, which constitutes a mechanical restraint under Colorado law. *Id.* Ebonie S. was never violent nor dangerous while attending Bessemer, the school at issue in this case. Order at 3-6. Nor did she need the restraint for support. *Id.*

Contrary to the Appellee School District's claim that the desk was only used in "emergency situations" with students "who posed a serious imminent threat," the Bessemer staff who locked Ebonie S. behind the desk admitted that the wraparound desks were used on a regular basis to assist Ebonie S. "with learning,"

to "threaten," to "discipline," and to "punish." ECF No. 80 at 5; *Id.* at *8. Ebonie S. was locked in when she "was not paying attention or did not want to work." *Id.* Bessemer staff also reported that on some occasions, "staff would carry her to the table." *Id*. at *9.

The practice of using a mechanical restraint to threaten, focus, punish, or simply to keep a non-dangerous student from moving around in a non-emergency situation serves no educational purpose;[1] Appellees' actions, therefore, cannot be justified by "pedagogical judgment."

2. There Is Growing Legal, Educational, and Scientific Consensus That Restraints Must Be Rejected In All But Emergency Circumstances.

It is critical to distinguish emergency procedures from proactive programming. Current accepted practices in the education of students with disabilities do not include restraining students during non-emergency behavioral episodes.[2] Use of school restraint techniques in non-emergency circumstances does not ensure a safe classroom, does not further any legitimate or research-based behavior management system, and has never been recognized as serving any

[1] *See generally*, Council for Children with Behavioral Disorders, *The Use of Physical Restraint Procedures in School Settings* 10 (May 2009).
[2] *Id.*

pedagogical purpose.[3] Wanda K. Mohr et al., *Adverse Effects Associated With Physical Restraint*, 48 Can. J. Psychiatry 330, 330-37 (2003).

A clear distinction must be made between crisis intervention strategies for infrequent use in emergency situations and ongoing proactive programming designed to produce substantive positive change. School restraint techniques should be employed to control acute or episodic aggressive behavior only when: (a) the student's actions pose a clear, present, and imminent physical danger to himself/herself or to others; (b) less restrictive measures have not effectively de-escalated the risk of injury; (c) the restraint lasts only as long as necessary to resolve the actual risk of danger or harm; *and* (d) the degree of force applied does not exceed what is necessary to protect the student or other persons from imminent bodily injury.[4] Crisis intervention procedures should never be allowed to turn into an ongoing restraint, or be used as a defense for the absence of effective

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[3] *See, e.g.*, restraint and seclusion are not effective means of calming or teaching children but tend to have the opposite effect, producing anxiety, fear, and a decreased ability to learn. Linda M. Finke, *The Use of Seclusion Is Not Evidence-Based Practice*, 14 J. Child & Adolescent Psychiatric Nursing 186, 186-90 (2001). Reports that physical restraints are effective in any manner are based on anecdotal evidence and subjective case reports. David M. Day, *Examining the Therapeutic Utility of Restrains and Seclusion with Children and Youth: The Role of Theory and Research in Practice*, 72 Am. J. Orthopsychiatry 266, 266-78 (2002).

[4] Jessica Butler, Council of Parent Attorneys and Advocates, Inc., *Unsafe in the Schoolhouse: Abuse of Children with Disabilities* 10 (2009), *available at* http://copaa.net/pdf/UnsafeCOPAAMay_27_2009.pdf; *see also* Council for Children with Behavioral Disorders, *Position Summary: The Use of Physical Restraint Procedures in School Settings* 12 (2009), *available at* http://www.casecec.org/pdf/seclusion/PositionSummaryRestraintandSeclusion5-09.pdf; Nat'l Ass'n of State Mental Health Program Directors, *Six Core Strategies© to Reduce the Use of Seclusion and Restraint in Inpatient Facilities* (2005); U.S. Dept. of Health & Human Service, Substance Abuse & Mental Health Services Admin., *National Action Plan on Seclusion and Restraint* (2003); K.A. Huckshorn, *Re-Designing State Mental Health Policy to Prevent the Use of Seclusion and Restraint,* 33 Admin. & Policy in Mental Health 4 (2006).

programming. *See* R. H. Horner et al., *Towards a Technology of "Nonaversive" Behavioral Support,* 15 Research & Practice for Persons with Severe Disabilities 125, 125-32 (1990).

The current accepted method of behavior modification and management in non-emergency situations is the use of positive behavioral interventions and supports. Scientific research demonstrates that positive behavioral interventions and supports are practical and valued approaches for successful intervention programming for students.[5] The Colorado Department of Education, United States Department of Education, the United States Office of Special Education Programs, and the National Institute of Mental Health all promote the use of positive behavior supports in schools. The Individuals with Disabilities Education Act (IDEA), 20 USCS §§ 1400 *et seq.,* expressly requires that when a student's behavior "impedes the child's learning or that of others," the school district must "consider the use of positive behavioral interventions and *supports*, and other strategies, to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(i) (emphasis added); *see also School Bd. of the City of Norfolk v. Brown,* 769 F. Supp. 2d 928 (E.D. Va. 2010), *Yates v. Washoe Cnty. Sch. Dist*., No. 03:07-CV-00200-LRH-RJJ, 2008 U.S. Dist. LEXIS 68937 (D. Nev. Aug. 28, 2008) (ordering that the IEP team consider the

[5] *See, e.g.,* Rob Horner & George Sugai, Univ. of Or., OSEP Center on Positive Behavior Support, *School-Wide Positive Behavior Support Implementers' Blueprint and Self-Assessment* (2004), *available at* http://www.osepideasthatwork.org/toolkit/pdf/SchoolwideBehaviorSupport.pdf.

use of positive behavioral interventions and supports and other strategies to address the plaintiff student's specific behavioral problems as required under 20 U.S.C. § 1414(d)(3)(B)(i)). This shift from restraints to positive behavioral supports in educational philosophy recognizes that using non-emergency restraints exposes students to greater risk than benefit and serves no educational purpose.

There is also growing legal consensus that restraints must be rejected in all but emergency circumstances. The United States Government Accountability Office presented testimony before the House of Representatives Committee on Education and Labor regarding the extensive use of seclusion and restraint techniques in schools.[6] It observed that many of these practices are physically dangerous and can result in serious injury or death. Even if they do not result in physical harm, they can leave children "severely traumatized." *Id.,* at 1. The majority of the *GAO Testimony* recounts numerous case studies of students subjected to abusive restraint techniques by public school employees. *Id*., at 7.[7] In a policy letter to chief state school officers, the Secretary of Education stated that

[6] U.S. Gov. Accountability Office, *Testimony Before the Committee on Education and Labor*, *House of Representatives, Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers* (2009) (statement of Gregory D. Kutz), *available at* http://www.gao.gov/new.items/d09719t.pdf ("GAO Testimony").

[7] See also Nat'l Disability Rights Network, *School is Not Supposed to Hurt: Investigative Report on Abusive Restraint and Seclusion in Schools* 8 (2009) ("NDRN Report") (The NDRN Report identified that the Joint Commission on Accreditation of Healthcare Organizations has stated that the "use of restraint or seclusion poses an inherent risk to the physical safety and psychological wellbeing of the [individual being restrained] and the staff.")(citing Joint Comm'n on Accreditation of Healthcare Orgs. *2006-07 Standards for Behavioral Health Care*). Jessica Butler, Council of Parent Attorneys and Advocates, Inc., *Unsafe In the Schoolhouse: Abuse of Children with Disabilities* (2009), *available at* http://copaa.net/pdf/UnsafeCOPAAMay_27_2009.pdf (compiling almost two hundred incidents where students have been subjected to restraints, seclusion, and the use of aversives.)

he was "deeply troubled" by this report. *See* Arne Duncan, *Elementary & Secondary Education, Key Policy Letters Signed by the Education Secretary or Deputy Secretary* (July 31, 2009), http://www2.ed.gov/policy/elsec/guid/secletter/090731.html. He encouraged each state to review its policies and guidelines "regarding the use of restraints and seclusion in schools to ensure that each student is safe and protected." *Id.*

Efforts are underway at the federal level to secure legislation to limit the use of restraints in schools. The Keeping All Students Safe Act was passed in March 2010 by the United States House of Representatives and was reintroduced in the House on April 6, 2011. The Act establishes various standards regarding restraint and seclusion techniques, including specifically that "school personnel shall be prohibited from imposing [mechanical restraints] on any student."[8]

More than half of the states have passed laws, regulations, or guidance regarding the proper use of restraints in schools, including Colorado. *See* GAO

[8] Keeping All Students Safe Act, H.R. 1381, 112th Congress (2011), *available at* http://www.govtrack.us/congress/bill.xpd?bill=h112-1381; Keeping All Students Safe Act, H.R. 4247, 111th Congress (2010), *available at* http://www.govtrack.us/congress/bill.xpd?bill=h111-4247.

Testimony.[9] Colorado law and Colorado Department of Education regulations mandate extensive procedural safeguards before and after restraint is used:

> 2620-R- 2.01 BASIS FOR THE USE OF RESTRAINT
>
> 2.01 (1) Restraints shall only be used:
>
> 2.01 (1) (a) In *an emergency* and with extreme caution; *and*
>
> 2.01 (1) (b) after
>
> 2.01 (1) (b) (i) the failure of less restrictive alternatives (such as *Positive Behavior Supports*, constructive and non-physical de-escalation, and restructuring the environment); or
>
> 2.01 (1) (b) (ii) a determination that such alternatives would be inappropriate or ineffective under the circumstances.
>
> 2.01 (2) Restraints must never be used as a *punitive* form of discipline or as a *threat* to control or *gain compliance* of a student's behavior.

1 Colo. Code Regs. § 301-45 2620-R- 2.01 (emphasis added). The only justification for restraint of a school-age child in Colorado is an "emergency," defined as "serious, probable, imminent threat of bodily harm to self or others

[9] *See generally* Conn. Gen. Stat. § 46a-152; Ill. Admin. Code Tit. 23, § 1.285(d),(h)(2); Md. Code Regs. 13A.08.04; 603 Mass. Code Regs 46.04; *see also* Mich. Dep't of Educ., *Supporting Student Behavior: Standards for the Emergency Use of Seclusion and Restraint* (2006), *available at* http://www.michigan.gov/documents/mde/Seclusion_and_Restraint_Standards_180715_7.pdf; Kan. State Dep't of Educ., *Seclusion Restraint Guidelines* (June 19, 2008), http://www.ksde.org/Default.aspx?tabid=3119; N.H. Dep't of Education, Bureau of Special Educ., *Guidance on Considering the Use of Physical Restraints in New Hampshire School Settings* (2005), *available at* http://www.ldanh.org/docs/nhdoePhysicalRestraintDocument%5B1%5D.pdf; N.D. Dep't of Public Instruction, *Guidelines: Resources for Working with Children, Youth, and Young Adults with Emotional Disturbance in North Dakota* (2007), *available at* http://www.dpi.state.nd.us/speced/guide/ED_doc3_7_07_1.pdf.

where there is the present ability to effect such bodily harm." § 301-45 2620-R-2.00(2).

Bessemer mistreated Ebonie S. by using the wraparound desk with restraint bar in a manner explicitly prohibited by state regulations. Appellees used the desk on a regular, non-emergency basis, failing to place a teacher or aide near Ebonie S. when the restraint bar was locked in place, failing to use positive behavior supports as an alternative, and imposing it as punishment.

3. The District Court's Faulty Decision Results From a Dangerous And Unwarranted Expansion of *Couture.*

The District Court reached the wrong conclusions in the case at bar because it expanded the flawed reasoning of the case of *Couture v. Bd. of Educ. of the Albuquerque Public Schools,* 535 F.3d 1243 (10th Cir. 1996). The District Court based its conclusions overwhelmingly on the holding of this Court in *Couture,* which Ebonie S. has argued is distinguishable from the facts here.

In *Couture*, this Court held that restraint can be justified to control physically dangerous and disruptive behavior. Expanding that holding to justify the use of frequent restraint to keep a young child in her seat to do routine class work is unacceptable. In *Couture,* M.C. assaulted teachers and other students. *Id*. at 1247. By contrast, Ebonie S.'s behavior in this case simply involved not staying in her seat when required to do so, not paying attention in class, and not working on assignments. Order at 4-5. Moreover, the restraint in *Couture* was a time-out

room, an act much less intrusive and restrictive than the extreme restraint on movement imposed on Ebonie S. *Couture*, 535 F.3d at 1247; Order at 3-4.

The reasoning of the *Couture* decision is flawed and should not be applied to the Ebonie S. facts because *Couture* assumes any act not "malicious" is justified as a "pedagogical judgment" and excuses any outcome as proof that the educators "misjudged the circumstances." *Couture*, 535 F.3d at 1254. By improperly applying and expanding the holding in *Couture*, the District Court found that it does not matter whether the restraints "ultimately were ineffective and may have exacerbated the student's behavior" because "[t]his was primarily a pedagogical judgment" and "there is no allegation that defendants acted maliciously." Order at *17 (quoting *Couture*, 535 F.3d at 1254). Applying a maliciousness standard for legally assessing teachers' behavior regarding restraint of students in non-emergency situations impermissibly and unnecessarily erodes students' rights to the point where only the most heinous acts will be found to be outside accepted practice and legal limits.

Behavior intervention can be unconstitutional without being malicious. That is what occurred here. The restraint desk used here is the simplest and clearest example of a non-malicious act by educators that falls below even the bare minimum constitutional standard. This Circuit-created lower standard strays much

too far from this Court's and society's interest in protecting children, particularly those who are most vulnerable.

4. The District Court's Faulty Decision Resulted from an Overreliance on a Disputed Consent by Ebonie S.'s Parent.

The District Court also relied heavily on an alleged consent to the use of the wraparound desk by Ebonie S.'s parent. The District Court's decision fails to recognize the growing consensus of experts in mental health, behavior intervention, and special education that restraint is an unreliable and unsuccessful method of behavior intervention. In fact, even when schools use restraint in accordance with specified procedures and even when parents have agreed to the use of restraint, its use may still cause harm.

The District Court justifies its holding and Order largely because Ebonie S.'s mother, Mary S., originally consented to the restraint of Ebonie S. in the classroom at Columbian Elementary School. Order at 12. Ebonie S.'s mother alleged that after she saw how frequently and under what circumstances the restraint was being used at Bessemer, Ebonie S.'s kindergarten placement, she informed the principal that she no longer agreed to the use of the wraparound desk as part of Ebonie S.'s IEP and the principal agreed to no longer use the wraparound desk for Ebonie S. absent an emergency. Order at 6, n. 6. The Appellee School District challenges this allegation, but given that the District Court decided this issue on summary judgment, the evidence and any reasonable inferences must be construed in the

light most favorable to the non-moving party. *Anderson v. Liberty Lobby Inc.,* 477 U.S. 242, 252 (1986). Thus, the District Court should have found that Mary S. did not provide consent for the use of the wraparound desk except in emergency situations.

Even if consent was found to have been provided for the use of the wraparound desk with the restraint bar, the principles at issue in this case are so significant that parental consent becomes irrelevant. As set forth above, the use of restraints like the wraparound desk in non-emergency situations have been found to neither serve a pedagogical purpose nor provide a safe and effective behavior management system. Under such circumstances, parental consent cannot shield Appellees because they proposed and utilized the use of restraints in their classrooms in a manner that has been rejected by both educational and scientific consensus, and thus are implementing an IEP that is designed in part to utilize techniques that serve no reasonable pedagogical purpose or serve to provide effective behavioral intervention.

Parental consent does not preempt a parent's right to challenge an inappropriate program or activity regarding his or her child. Thus, regardless of a parent's consent or lack thereof, the use of restraint on the pretext of educating children with disabilities simply should not be tolerated.

In this case, as in many others in which the school district asserts that consent was provided, the Court must consider the situation in which the parents gave the consent. The Individuals with Disabilities Education Act considers parent participation in the special education process to be of paramount importance. Many provisions of the statute and regulations spell out requirements regarding notice, consent, participation in meetings, and other basic rights. In particular, "informed consent" must obtained from a parent before an assessment for special education services can be completed, before the provision of initial special education services, and before any change in the placement of the child. 20 U.S.C. §§ 1414(a)(1)(D), (c); CFR § 300.300(b), (c). The team that met with Ebonie S.'s mother was obligated to discuss with her any peer-reviewed research, in the unlikely event any might exist, that supported the use of the wraparound desk. The team also should have discussed with her the current peer-reviewed research that discusses the dangers of restraint and its ineffectiveness in the education setting. Only then could Ebonie S.'s mother make an informed decision and provide informed consent for the inclusion of the use of the wraparound desk in her daughter's IEP.

To the extent any consent was provided, it was initially to use the wraparound desk in the classroom at Columbian. This was after Mary S. observed the limited and infrequent use of the wraparound desk in the classroom at

Columbian for other students. The use of the wraparound desk at Bessemer was very different than the use at Columbian – the teachers and staff testified that at Bessemer they used the wraparound desk with the restraint bar "if Ebonie S. was not paying attention or did not want to work" and "for discipline, punishment and time-out." Order at 5-6. This dramatic difference in use essentially constituted a change in Ebonie S.'s placement. Not considered by the District Court was the fact that the change between the two schools was so dramatic and that the desk was now being used in such a way that Ebonie S.'s placement became more restrictive. The dramatic change in the frequency and reasons for use of the wraparound desk required that a new IEP meeting be held during which the proposed new use of the wraparound desk would be thoroughly discussed (as set forth above) and Mary S. would have to provide informed consent for the change in use before the change could be implemented.

Each of the reasons set forth above amply demonstrate that the District Court improperly relied on the alleged consent to support its conclusion that the Appellee School District's use of the wraparound chair was permissible.

B. APPELLEES' USE OF A WRAPAROUND DESK WITH RESTRAINT BAR ON EBONIE S. VIOLATED HER CONSTITUTIONAL EQUAL PROTECTION RIGHTS AS GUARANTEED BY THE FOURTEENTH AMENDMENT.

Appellees' frequent restraint of Ebonie S. using a wraparound desk with restraint bar deprived her of her fundamental right to liberty and freedom from

physical restraint in violation of her Constitutional right to equal protection guaranteed by the Fourteenth Amendment. The District Court, in denying this claim, erred in two respects. First, the District Court applied a "rational basis" standard of review rather than strict scrutiny by erroneously finding that no fundamental right was at issue. Second, the District Court found that Ebonie S. was not treated differently than similarly situated persons by erroneously comparing her only to 15 other students in her Significantly Limited Intellectual Capacity ("SLIC") classroom, rather than more broadly to students with and/or without disabilities generally. Reversal is warranted for both reasons.

1. Freedom From Physical Restraint Is A Fundamental Right.

To avoid finding that Ebonie S.'s fundamental rights were violated, the District Court adopted a flawed rationale. The District Court claimed that one of the most fundamental of constitutional rights, freedom from undue restraint, is not actually a fundamental right. This conclusion is legally unsupportable.

At the outset, the District Court correctly cited this Court's opinion in *Brown v. Zavaras*, 63 F.3d 967 (10th Cir. 1995), for the proposition that Ebonie S. can state an equal protection claim by alleging she was denied a fundamental right. *Id.* at 971. Although rational basis review may be appropriate if the party is not a member of a Constitutionally-protected class and no fundamental right is at issue, this Court's holdings are clear: "We will apply strict scrutiny, however, if state law

impinges upon fundamental rights protected by the Constitution." *Okla. Educ. Ass'n v. Alcoholic Beverage Laws Enforcement Comm.*, 889 F.2d 929, 932 (10th Cir. 1989).[10]

The District Court then contended that Ebonie S. – in arguing Appellees' use of the wraparound desk with restraint bars violated her fundamental right to be free from involuntary bodily restraint – "misunderstands what constitutes a 'fundamental right' under the Equal Protection Clause." Order at 17. COPAA agrees that what constitutes a "fundamental right" was misunderstood; however, it was the District Court that misunderstood this concept.

The District Court initially cited this Court's opinion in *Oklahoma Educ. Ass'n,* which listed several fundamental rights including the right to procreate, the right to interstate travel,[11] the right to associate to advance political beliefs, and the right to vote. Order at 17 (citing *Okla. Educ. Ass'n,* 889 F.2d at 932). In that opinion, however, this Court clearly was providing only a few examples of fundamental rights rather than an exhaustive list. *Id.* (preceding its list with the

[10] The District Court correctly cited the Supreme Court's opinion in *City of Cleburne v. Cleburne Living Ctr.*, for the proposition that persons with disabilities have not been recognized as a suspect class for purposes of equal protection analysis. 473 U.S. 432, 446 (1985). However, the District Court then erroneously concluded that rational basis scrutiny must therefore apply. *Cleburne* only addressed whether persons with disabilities were in a Constitutionally-suspect class for purposes of interpreting a zoning ordinance, and did not address the standard of review when a fundamental right is at issue. Strict scrutiny also applies when a fundamental right is impinged regardless of whether the party is in a Constitutionally-suspect class. *Id.* at 440.

[11] Oddly, the District Court recognized the equal protection clause includes a fundamental right not to be confined within one U.S. state, but ruled no fundamental right exists when a person is much more restrictively confined in a wraparound desk with restraint bars.

signal "*See, e.g.*"). The *Okla. Educ. Ass'n* opinion then held the right *to pursue a particular line of employment* has not been recognized as a fundamental right under the equal protection clause. *Okla. Educ. Ass'n*, 889 F.2d at 932-33. That holding is inapposite to the issues herein. Rather, the District Court's recognition of a fundamental right to interstate travel is more closely analogous to the facts of this case, which similarly addresses the right to freedom of movement and to not be restrictively confined.

The District Court's only other authority is a citation to Justice Stevens' 101-page *dissenting opinion* in *McDonald v. City of Chicago*, __ U.S. __, 130 S.Ct. 3020, 3092 (2010) (addressing whether Second Amendment right to keep and bear arms applies to individual states under the Fourteenth Amendment's Due Process and Privileges and Immunities clauses). In his dissent, Justice Stevens analyzed the Fourteenth Amendment's due process clause and observed that the Supreme Court's "usual" approach has been to ground prohibitions against state action on due process. *Id.* Contrary to the District Court's ruling, Justice Stevens did not state in his dissent that liberty (or more specifically here, the right to be free from involuntary bodily restraint) has not been extended to the equal protection clause.

The District Court correctly observed that fundamental rights are those particular rights, embodied in the U.S. Constitution, which the Supreme Court has

recognized as having fundamental importance. Order at 17. The Supreme Court unquestionably has recognized that freedom from bodily restraint is a fundamental right. "While the contours of this historic liberty interest in the context of our federal system of government have not been defined precisely, they always have been thought to encompass freedom from bodily restraint and punishment." *Ingraham v. Wright*, 430 U.S. 651, 673-674 (1977) (recognizing a fundamental right "to be free from, and to obtain judicial relief for, unjustified intrusions on personal security"); s*ee also Youngberg v. Romeo*, 457 U.S. 307, 316 (1982) (holding that an individual with mental retardation who was placed in shackles at a mental facility had a constitutionally protected right to be free from bodily restraint, which was at "the core of the liberty" protected by the Fourteenth Amendment). Courts have consistently recognized this fundamental right. "We have always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992), quoting *United States v. Salerno*, 481 U.S. 739, 750 (1987). "It is beyond cavil that the right to be free of physical restraint, in the most general sense, has been afforded special protection in the constitutional history and jurisprudence of the United States." *Tracy v. Hedgepeth*, 284 F. Supp. 2d 145, 154 (D.D.C. 2003) (citing *Foucha*, 504 U.S. at 86; *Ingraham*, 430 U.S. at 673-74); *see also Jefferson v. Ysleta Indep. Sch. Dist.*, 817 F.2d 303, 305 (5th Cir. 1987) ("A young student

who is not being properly punished or disciplined has a constitutional right not to be lashed to a chair throughout the school day…").

The fundamental constitutional right to be free from bodily restraint is well established.[12] Justice Stevens' dissent in the *McDonald* case notwithstanding, the District Court's attempt to parse the Fourteenth Amendment as providing a fundamental liberty right solely in the due process clause but not the equal protection clause cannot be reconciled with Supreme Court precedent:

> The fourteenth amendment, in declaring that no state "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights ….

Barbier v. Connolly, 113 U.S. 27, 31 (1885).[13]

In *Foucha v. Louisiana*, the Supreme Court issued a plurality opinion expressly holding that freedom from physical restraint is a fundamental right under the Fourteenth Amendment's equal protection clause, as well as the due process

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[12] COPAA also agrees with Ebonie S.'s assertion in her opening brief to this Court that this restraint constitutes a violation of her rights under the Fourteenth Amendment's due process clause. The Supreme Court held in *Rochin v. California*, 342 U.S. 165, 169 (1952), citing multiple precedents, that: "Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental', *Snyder v. Massachusetts*, 291 U.S. 97, 105 [(1934)], or are 'implicit in the concept of ordered liberty'. *Palko v. Connecticut*, 302 U.S. 319, 325 [(1937)]." Accepting Ebonie S.'s position that this argument is properly before the Court, COPAA fully supports it.

[13] Similarly, in his *McDonald* dissent Justice Stevens described equal protection analysis as "substantive due process' constitutional cousin." *McDonald*, 130 S.Ct. at 3100, n. 23 (Stevens, J., dissenting).

clause. *Foucha v. Louisiana,* 504 U.S. 71, 84-86 (1992) (plurality opinion of Justices White, Blackmun, Stevens and Souter). "Freedom from physical restraint being a fundamental right, the State must have a particularly convincing reason, which it has not put forward, for such discrimination…." *Id*. at 85. In a concurring opinion, Justice O'Connor declined to join that portion of the opinion but similarly recognized that the petitioner had a "strong interest in liberty" and that "[e]qual protection principles may set additional limits" on the state's interest in confining him. *Id*. at 88 (O'Connor, J., concurring).

In light of the Supreme Court's holdings that liberty is the core of fundamental Constitutional rights, its opinion in *Barbier* that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights, and its majority, plurality and concurring opinions in *Foucha*, the District Court erred in ruling that Appellees' physical restraint of Ebonie S. did not implicate a fundamental right under the Fourteenth Amendment's equal protection clause. The record is clear that Appellees subjected Ebonie S. to physical bodily restraint by frequently locking her in a wraparound desk with a restraint bar that was bolted to the floor. The District Court's ruling that Appellees' extreme deprivation of Ebonie S.'s freedom of movement did not implicate a fundamental equal protection right (but apparently would have if

Appellees had merely restricted her from interstate travel), is legally unsupportable.

The fact that Ebonie S. has a disability does not change the analysis. As the Supreme Court has held, "the mentally retarded, like others, have and retain their substantive constitutional rights in addition to the right to be treated equally by the law." *Cleburne*, 473 U.S. at 447; *see also Heller v. Doe*, 509 U.S. 312, 341 (1993) (Souter, J., dissenting) ("We do not presume that a curtailment of liberty of those who are disabled is, because of their disability, less severe than those who are ill. Even if the individuals subject to involuntary commitment proceedings previously had been shown to be mentally retarded, they would thus still retain their 'strong' legally cognizable interest in their liberty."). While the District Court and Appellees contend that Ebonie S.'s rights were diminished because she is a student with a disability (and therefore has an IEP and Behavior Support Plan for purposes of receiving a free and appropriate public education), the mere finding that a person requires special treatment due to a medical condition does not diminish his or her Constitutional rights.

2. Reversal Is Required Because the District Court Applied The Wrong Standard of Review And Failed To Recognize That Appellees Violated Ebonie S.'s Equal Protection Rights By Treating Her Differently From Similarly Situated Persons, Subjecting Such Acts To Strict Scrutiny Analysis.

The District Court further erred in determining that Ebonie S. was not deprived of her equal protection right because she was not treated differently from similarly situated persons. The District Court limited its comparison of students similarly situated to Ebonie S. to other students in her specific classroom. Order at 16. In arriving at this conclusion, the District Court compared Ebonie S. to only approximately 15 other students in her SLIC class, in which four others also were subject to the wraparound desk. Order at 4, 17. The District Court declined to include within the scope of those similarly situated to Ebonie S. other students with disabilities in Appellee School District who were not in her 15-student SLIC class, or other students with behavioral problems in Appellee School District who did not have disabilities or IEPs.

No rationale justifies limiting the scope so narrowly as to only compare the treatment of Ebonie S. to the other students assigned to her specific classroom. Under this rationale, no equal protection violation could be found if the few other students in Ebonie S.'s classroom all were discriminatorily mistreated. Ebonie S.'s fundamental constitutional rights cannot be deprived by such gerrymandering.

As authority for its narrow definition of who is similarly situated, the District Court cited *U.S. v. Moore*, 543 F.3d 891 (7th Cir. 2008). In *Moore*, the Seventh Circuit considered a "class of one" equal protection claim by a criminal defendant who was sentenced to a federal mandatory minimum term, and contended that others who were prosecuted in state court received lower sentences. The court discussed what a "class of one" challenger must show to be considered similarly situated to others who were treated differently. Here, by contrast, Ebonie S. is not a "class of one" challenger. Rather, the District Court found that four others in the SLIC classroom also were subjected to the wraparound desk. Order at 4. The correct analysis, therefore, is whether the group of students who were subjected to the wraparound desk was treated differently from other similarly-situated students.

"Inevitably, the degree to which others are viewed as similarly situated depends substantially on the facts and context of the case." *Jennings v. City of Stillwater*, 383 F.3d 1199, 1214 (10th Cir. 2004). Analyzing the facts of this case, the District Court observed that Appellees had presented a variety of explanations for frequently placing Ebonie S. in the wraparound desk. Ebonie S. was never violent or dangerous, and did not need the restraint for support. Order at 6. The restraint bar was used "if Ebonie S. was not paying attention or did not want to work," or "if Ebonie S. wanted to go play instead of doing the assignment at

hand." Order at 5. "Defendant Paraprofessionals said the wraparound desks were used to 'threaten' children." Order at 5. "Defendant Golden testified that she used the wraparound desk 'for discipline, punishment, and time-out." Order at 5-6.[14] In the context of Appellees' use of the wraparound desk, there is no logical basis for restricting the scope of others similarly-situated only to students in the SLIC class. The District Court gave short shrift to Ebonie S.'s argument that there were other students without disabilities who failed to stay on task, ignored instructional demands or wandered around the classroom, yet were not subjected to wraparound desks with restraint bars.

Despite citing to the Supreme Court's *Cleburne* opinion in its order, the District Court failed to recognize that in *Cleburne* the Supreme Court compared the would-be residents of a group home for people with mental retardation (denied a zoning permit) to others who did *not have mental retardation,* including occupants of apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, hotels, hospitals, etc. *Cleburne*, 473 U.S. at 447-48. The Supreme Court held that those with the disability classification of

[14] Appellees and Appellee School District's legal counsel also made contradictory claims that the restraint bar was used to assist Ebonie S. with learning and for her safety, and that wraparound desks were only used to effect the safe handling of students in emergency situations and who posed an imminent threat to themselves and others. Order at 5. Given the procedural posture of this case--a grant of summary judgment in Appellees' favor-- Ebonie S. is entitled to base her equal protection claim on Appellees' admissions that the wraparound desk and restraint bar were actually used more extensively, *i.e.*, to restrain students who were not paying attention and wanted to play rather than work, and as a punishment for misbehavior.

mental retardation "were different from others not sharing their misfortune," but that "this difference is *largely irrelevant* unless the Featherston home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not." *Id*. at 448 (emphasis added). Similarly here, Ebonie S. may be different in some respects from students outside the SLIC class, but the distinction is largely irrelevant for equal protection purposes. Ebonie S. was never violent or dangerous. She did not need the restraint for support. Appellees placed her in restraints when she was not paying attention or wanted to play instead of work, which is no different from the behavior of students outside the SLIC class who were not subjected to a restraint that was bolted to the floor as a consequence for such behavior.

The District Court contended that students outside Ebonie S.'s classroom were not similarly situated because they did not have an IEP or behavior support plan. Order at 16. In so ruling, the District Court ignored evidence that Ebonie S.'s IEP and behavior support plan were developed at another school, and implemented very differently than at Appellees' school. Appellees used the wraparound desk with restraint bar "with much more frequency" than at the Columbian school where the IEP and behavioral support plan were developed. Order at 4-5. The paraprofessionals in the SLIC classroom "were not spending as much one-on-one time with her" while she was in the wraparound desk, which

admittedly occurred "regularly." *Id.* Ebonie S.'s mother, Mary S., expressed concern to the school's principal, Appellee Trujillo, about the use of the wraparound desk at Appellees' school, and evidence was presented that she sought to revoke her consent to its use. *Id.* at 6, n. 5. The IEP and behavioral support plan did not insulate Appellees from liability for depriving Ebonie S. of her fundamental rights because, among other reasons, they implemented the use of the wraparound desk and restraint bar in a manner that greatly exceeded the use in Ebonie S.'s previous classroom at Columbian. Although it is questionable whether use of involuntary physical restraint in the classroom is constitutionally permissible under any circumstances, it is at least clear in this circumstance that the manner in which Appellees used the wraparound desk and restraint bar violated the Constitutional rights of those who were subjected to it.

The District Court also attempted to distinguish students without disabilities as not similarly situated by drawing a false analogy to Ebonie S.'s arguments in support of her claims under the Americans with Disabilities Act ("ADA") and Rehabilitation Act. The District Court found it inconsistent that Ebonie S. would contend in support of those claims that she had various disabilities that affected her classroom behavior differently than what might be expected of typical students, yet contend for equal protection purposes that she was similarly situated to those students without disabilities. Order at 16-17. As a matter of law, there is no

inconsistency in such claims. Determining whether a school district has committed discrimination under the ADA and Rehabilitation Act requires "a comparison between the treatment of disabled and nondisabled children, rather than simply requiring a certain set level of services for each disabled child." *Mark H. v. Lemahieu*, 513 F.3d 922, 936-37 (9th Cir. 2008). Under the ADA, the fact that a plaintiff may require a reasonable accommodation does not alter the fact that the appropriate comparison for discrimination purposes is to similarly situated persons without disabilities. *See, e.g., Duvall v. Georgia-Pacific Consumer Products*, 607 F.3d 1255, 1262 (10th Cir. 2010) (ADA's purpose is to put disabled individuals "on equal footing" with non-disabled individuals). There is nothing inconsistent with Ebonie S.'s claims that she was discriminated against under the Rehabilitation Act and ADA, and that she was deprived of a fundamental right to be free from involuntary physical restraint that was not imposed on similarly situated students without disabilities who engaged in similar behavior.

Reversal is required because the District Court applied the wrong standard of review, and Appellees' conduct does not pass strict scrutiny. As the Supreme Court has held, "[W]e have treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.' With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that

its classification has been precisely tailored to serve a compelling government interest." *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982).

Here, the District Court erred by applying rational basis review rather than strict scrutiny to Appellees' deprivation of Ebonie S.'s fundamental right to be free from involuntary physical restraint. The record is clear that Appellees' use of the wraparound desk with restraint bar was not precisely tailored to serve a compelling government interest. Rather, Appellees "frequently" and "regularly" used a restrictive restraint, with inadequate supervision, to address behavior issues common to students outside as well as inside the SLIC classroom, and by students without as well as with disabilities. It is beyond question that other students who failed to pay attention in class, who wanted to play instead of work, or who wandered the classroom were not, and could not permissibly be, contained behind a desk with a bar that was bolted to the floor, preventing voluntary exit.

Justice Marshall's concurring and dissenting opinion in *Cleburne* vividly illustrates that District Court erred in discounting Ebonie S.'s fundamental constitutional rights and allowing her to be discriminated against because of her disability. Justice Marshall observed that individuals classified as having mental retardation have been subjected to a "lengthy and tragic" history of segregation and discrimination "that can only be called grotesque." *Cleburne,* 438 U.S. at 462 (Marshall, J., concurring in part and dissenting in part). Justice Marshall noted in

particular that children classified as having mental retardation have been victimized based on "the false stereotype that all were ineducable and on the purported need to protect nonretarded children from them." *Id.* at 462-63. "Prejudice, once let loose, is not easily cabined." *Id.* at 464. "As the history of discrimination against the retarded and its continuing legacy amply attest, the mentally retarded have been, and in some areas may still be, the targets of actions the Equal Protection Clause condemns." *Id.* at 473. Here, the manner in which physical restraints are being used in classrooms on Ebonie S. and certain other students with disabilities bears out that Justice Marshall's concerns are well-founded.

IV. CONCLUSION

COPAA's position is that the use of this restraint desk with Ebonie S. was unacceptable under all but emergency circumstances because it served no pedagogical purpose and failed to meet any accepted professional standards.

No child should be subject to being regularly strapped into a wrap-around desk bolted to the floor with a restraint bar merely because she was not paying attention in class. The District Court's error in finding no problem with the fact that Ebonie S., a young child with significant disabilities, was regularly restrained in this manner is a legal wrong that must be corrected by this Court.

For the foregoing reasons, the District Court was in error when it granted summary judgment and COPAA respectfully requests that the Court reverse the District Court's erroneous entry of judgment on Ebonie S.'s claims and remand this matter for trial on her claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)

I hereby certify that Amicus Curiae Brief of Council of Parent Attorneys and Advocates, Inc. complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). According to the word count of the Microsoft Word 2003 word-processing system, this brief contains 6,991 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated September 16, 2011.

/s/ Kimberly F. Rich
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CERTIFICATE OF SERVICE

I certify that on September 16, 2011, a true and correct copy of the foregoing *Amicus Curiae Brief of Council of Parent Attorneys and Advocates, Inc.* was served through the court's ECF system on the following:

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