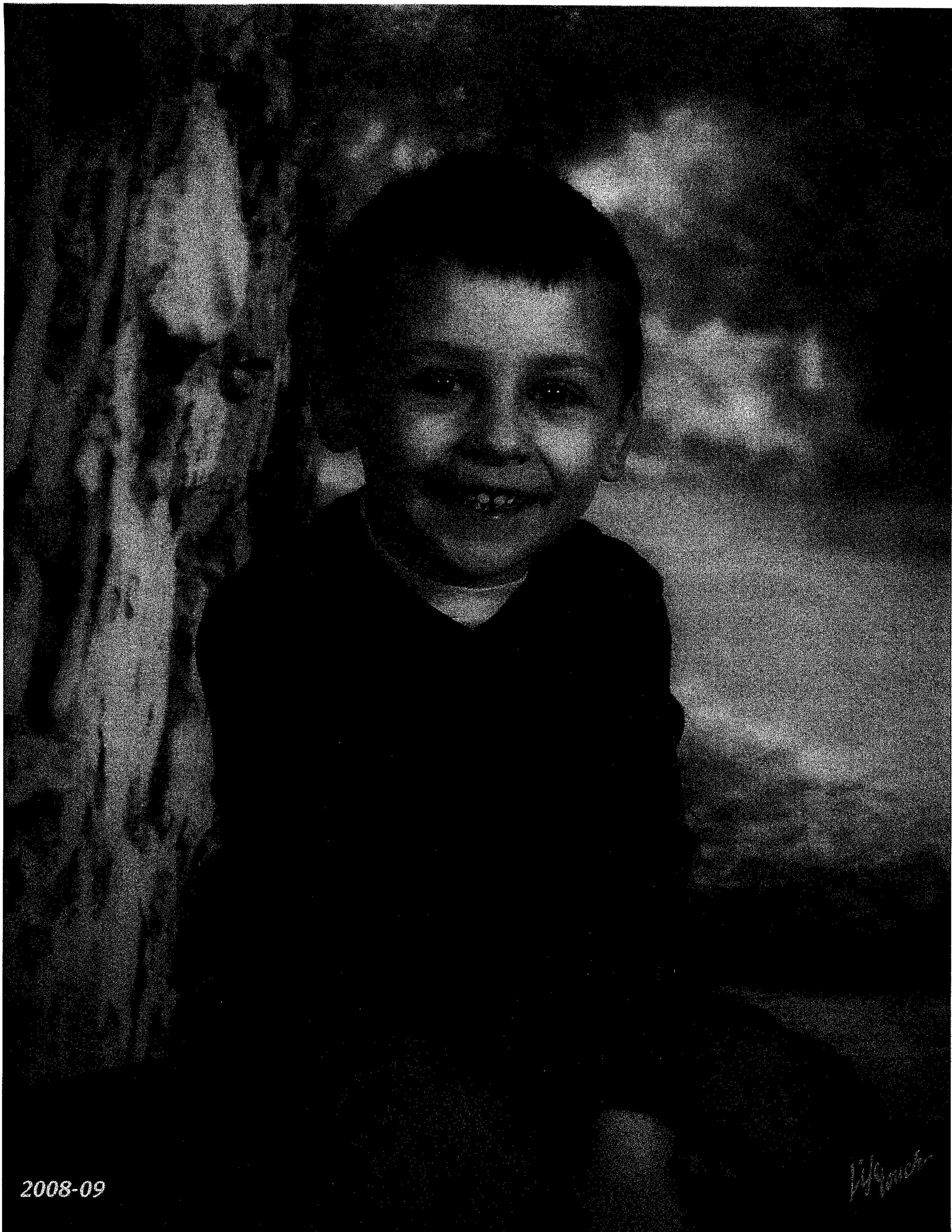
2008-09

Senator Shapiro, Senator Watson, and Members of the Education Committee:

I have heard that you all would like to hear from parents of children with Autism Spectrum Disorders who are currently facing difficulties with their school districts. My son Mikey is 5 and a half years old and has had a diagnosis of PDD-NOS, an Autism Spectrum Disorder, since he was 11 months old. His diagnosis came from his Pediatric Neurologist, Dr. Wilfred Castro-Reyes. Mikey had also suffered from a seizure disorder since he was 1 month old. Mikey was referred for Early Childhood Intervention, ECI, by Dr. Castro-Reyes upon his diagnosis of PDD-NOS. Since then we have been doing lots of work to give Mikey as much therapy as we can to improve his prognosis for the future.

When Mikey was 2 and a half years old he had an evaluation by the school district to qualify him for special education services. At that time the school did not choose to label him as autistic, but Other Health Impairment (OHI). Mikey transitioned from ECI into PPCD (Preschool Program for Children with Disabilities) at Bill Brown Elementary when he turned 3. When Mikey was younger he made very little eye contact, did not like to be touched, kissed, or hugged, other various sensory integration issues, and suffered from severe cognitive, emotional, social and communication delays. At age 3 his vocabulary consisted of less than 25 words. He would repetitively bang his head on walls, floors, furniture, anything he could really, and it was difficult to tell why he was doing it, what had set him off. He was 3 years 8 months old when he first recognized his own name.

The school district has received my doctor's diagnosis. They consider them and then they ignore them. At the ARD meeting I asked them "Why?" and they would not answer other than they "considered it" and allowed my question to be entered into the minutes. They administered an Autism test called ADOS, but they tested him developmental age instead of chronological age. When I questioned them as to why they did this their reply was that his results would have shown autistic characteristics. So my son's results reflected that he presents as a quasi-normal 2 year old, instead of an autistic 5 and a half year old. Their evaluation also contains much more contradictory and biased information regarding his behavior, social skills, communication, cognitive, self-help abilities, etc.

I have also had the school psychologist call me and tell me to put my son on anti-psychotic medications, although his medical doctors, his pediatrician, his pediatric neurologist, and a child psychologist have all told me that he definitely should not be on those medications. In November 2008 I asked the school psychologist in writing to do a Functional Behavior Assessment on Mikey, to date I have still not received this. In December 2008 I asked in writing her to do a Full Individual Evaluation on Mikey. The laws I have read state these should be completed in 60 calendar days. On March 6 I called an ARD because she had still not even started the FIE. The minutes of that ARD meeting reflect that she agreed to complete the FIE by

April 3, provide me with a copy by April 7, and we would have another ARD to review the findings on April 13. On April 7th I went to pick up my copy and was presented a "draft" copy that was not signed by any evaluators and had a section of the report on autism missing. I went home and in writing requested a signed, complete, final copy of the FIE. On April 9th I was given a "final" copy with one signature and the missing autism piece added. On April 13th at the ARD meeting I was given a second "final" copy with all signatures but the recommendations on the report had been changed from what they previously had given me. After the ARD meeting I was faxed a third "final" copy of the FIE.

The ARD was with fourteen district and school officials. I don't know how many of you have ever had fourteen school and district officials at a parent-teacher conference, but let me tell you, as a parent it sure does feel like the school is more interested in fighting and bullying me than working as a team to determine Mikey's individual educational needs.

Prior to yesterday's ARD I also received an email from the school psychologist asking me to go and set up an appointment to view Timberwood Park Elementary because "his curent staff feel he will need behavior support for kinder, therefore the campus would be TPES." I was always under the impression that I was a member of the IEP team and that placement was supposed to be agreed upon by the IEP team members, not pre-determined by the staff outside of an ARD meeting. Well I went to this school to tour it, and was extremely surprised when they showed me this behavior support classroom and it's blue padded closet. I had no idea that public schools had padded rooms. Those are things I imagined only existed in asylums in the old days, like in One Flew Over the Cuckoo's Nest. Well I stood in that padded room and tried to imagine how my small 5 year old baby boy would feel like when he would be tossed into this padded cell. The room doesn't have a door. I asked what would happen to my son if he wanted out of the room. The teacher told me "He's not allowed out." I asked, "What would happen to my son if he tries to get out?" He told me he would "physically restrain" my son until he was completely and totally calm. There is a checklist on the wall that defines what they consider as calm so that one can leave the padded room. I imagined how frightened and traumatized my little boy would feel if he was confined to this small padded room and if he tried to get out he would be physically restrained by this man who was bigger than me. From my understanding of the Procedural Safeguards, this is an inappropriate use of physical restraint by the school. My son's teacher recently began keeping a behavior log on Mikey. Every half hour Mikey tries to earn a smiley face. If he doesn't earn one for that 30 minutes, the teacher records why. 95% of the bad behaviors captured by this teacher are fairly small violations, having to do with a short temper tantrum (what autistic child doesn't have these), or Mikey's repetitive (echolalia) use of the word "stupid" and the phrase "you're fired". I asked what behaviors would cause Mikey to

These are just a few examples of some of the many difficulties I have encountered with the school district.

I fully support all the hard work that you have all done and continue to do to assist the many families in Texas that are affected by autism and other disabilities and special needs. Thank you all.

Respectfully,

Regina Radulski

Texas Senate Education Committee – Interim Charge #6
Overview of Recommendations from:
Regina Reyes-Radulski
626 Midway Crest
San Antonio, TX 78258
210-216-4097
regina.radulski@gmail.com

Seclusion & Restraint - four recommendations as to effective policy in this area:

(1) that most problem behaviors that are used to justify seclusion and restraint can be prevented with early identification and intensive early intervention;

(2) that seclusion and restraint can be included as a safety response, but should not be included in a behavior support plan without a formal functional behavioral assessment;

(3) that seclusion and restraint should only be implemented
(a) as safety measures
(b) within a comprehensive behavior support plan,
(c) by highly trained personnel, and
(d) with public, accurate, and continuous data related to fidelity of implementation and impact on behavioral outcomes; and

(4) that school-wide positive behavior support (SWPBS), explained in the paper, may reduce the need for, and improve the effectiveness of, restraint and seclusion interventions.

Medical Diagnosis vs. Educational Diagnosis
Currently schools must consider a doctor's diagnosis, however schools are immediately dismissing these doctor's diagnosis in ARD meetings in favor of their own "specialists". A board certified medical doctor's diagnosis should have more weight and consideration than that of the school's specialist, who are often unlicensed individuals, the only reason they are called specialists in many cases are because that is their job title.

TEA should not be in charge of hearing due process cases as they have a vested interest in finding against the parents and a proven track record of being biased.

Hearing officers should have specific knowledge of special education law. At this time many do not.

Traumatic Brain Injury as a label for special education needs should include brain injuries at birth, at this time those are excluded.

Mental Retardation should be removed and replaced with Intellectual Disabilities. The current terminology is archaic, hurtful and disrespectful.

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CRS report updated, OSEP paper released on restraint and seclusion

Legal Clips, June 2009

The Congressional Research Service (CRS) issued an updated version of its April 19, 2009 report on the legal issues concerning the use of restraint and seclusion in schools, including their application both to children covered by the Individuals with Disabilities Education Act (IDEA) and to those not covered by IDEA. The May 19 version is updated to reflect the findings of another report issued on the same day by the Governmental Accountability Office (GAO). These reports, along with background on Congressional scrutiny of these issues, reports by advocacy groups, and state legislative action, are available starting from the NSBA link below.

In addition, a short paper issued by the Technical Assistance Center on Positive Behavioral Interventions and Support of the U.S. Department of Education's Office of Special Education Programs (OSEP) acknowledges the concerns and makes four recommendations as to effective policy in this area: (1) that most problem behaviors that are used to justify seclusion and restraint can be prevented with early identification and intensive early intervention; (2) that seclusion and restraint can be included as a safety response, but should not be included in a behavior support plan without a formal functional behavioral assessment; (3) that seclusion and restraint should only be implemented (a) as safety measures (b) within a comprehensive behavior support plan, (c) by highly trained personnel, and (d) with public, accurate, and continuous data related to fidelity of implementation and impact on behavioral outcomes; and (4) that school-wide positive behavior support (SWPBS), explained in the paper, may reduce the need for, and improve the effectiveness of, restraint and seclusion interventions.

CRS report, May 21, 2009
NSBA School Law pages on restraint and seclusion
OSEP paper, April 29, 2009

© 2010 National School Boards Association
1680 Duke Street, Alexandria, VA 22314
Phone: (703) 838-6722 Fax: (703) 683-7590 E-mail: info@nsba.org

The Use of Seclusion and Restraint in Public Schools: The Legal Issues

Nancy Lee Jones
Legislative Attorney

Jody Feder
Legislative Attorney

May 21, 2009

Congressional Research Servic
7-570
www.crs.go
R4052

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

Seclusion and restraint have been used in various situations to deal with violent or noncompliant behavior. Because of recent congressional interest in the use of seclusion and restraint in schools, this report focuses on the legal issues concerning the use of these techniques in schools, including their application both to children covered by the Individuals with Disabilities Education Act (IDEA) and to those not covered by IDEA.

Several recent reports have documented instances of deaths and injuries resulting from the use of seclusion or restraints in schools, but there is no general reporting requirement so the exact parameters of the problem are unknown. On May 19, 2009, the Government Accountability Office (GAO) released a study examining the use of seclusion and restraint in the education setting, finding hundreds of cases of alleged abuse and death due to the use of seclusion and restraint. Federal law does not contain general provisions relating to the use of seclusion and restraints, and there are no specific federal laws concerning the use of seclusion and restraint in public schools. The Individuals with Disabilities Education Act requires a free appropriate public education for children with disabilities, and an argument could be made that some uses of seclusion and restraint would violate this requirement. In addition, certain procedures may violate constitutional rights or state laws. Although there are some judicial cases, they do not provide clear guidance on when, if ever, seclusion and restraint may be used in schools.

Contents

Introduction 1
Background 1
Constitutional Issues 2
Individuals with Disabilities Education Act 4
    Statutory Provisions 4
    IDEA Judicial Decisions Involving Seclusion and Restraints 5
State Laws and Policies 7

Contacts

Author Contact Information 8

Introduction

Seclusion and restraint have been used in various situations to deal with violent or noncompliant behavior. One of the most common settings for their use has been psychiatric hospitals,[1] but seclusion and restraint have also been used in other residential facilities[2] and in schools.[3] Because of recent congressional interest in the use of seclusion and restraint in schools,[4] this report focuses on the legal issues concerning the use of these techniques in schools, including their application both to children covered by the Individuals with Disabilities Education Act (IDEA)[5] and to those not covered by IDEA.

Background

Several recent reports have documented instances of deaths and injuries resulting from the use of seclusion or restraints in schools but there is no general reporting requirement so the exact parameters of the problem are unknown.[6] On May 19, 2009, the Government Accountability Office (GAO) released a study examining the use of seclusion and restraint in the education setting, finding hundreds of cases of alleged abuse and death due to the use of seclusion and restraint.[7] GAO also examined state laws and noted that it "could not find a single Web site, federal agency, or other entity that collects information on the use of these methods or the extent of their alleged abuse."[8]

Federal law does not contain general provisions relating to the use of seclusion and restraints. However, certain uses of seclusion and restraints in health care facilities that receive federal funds and in certain non-medical, community-based facilities for children and youth are prohibited by the Children's Health Act of 2000.[9] In the 111th Congress, H.R. 911, a bill that would extend these

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[1] See Stacey A. Tovino, "Psychiatric Restraint and Seclusion: Resisting Legislative Solution," 47 Santa Clara L. Rev. 511 (2007).

[2] "Residential Facilities: State and Federal Oversight Gaps May Increase Risk to Youth Well-Being," Testimony of Kay E. Brown, GAO, Before the House Committee on Education and Labor (April 24, 2008).

[3] National Disability Rights Network, School is not Supposed to Hurt: Investigative Report on Abusive Restraint and Seclusion in Schools (January 2009) http://www.napas.org/sr/SR-Report.pdf.

[4] *Examining the Abusive and Deadly Use of Seclusion and Restraint in Schools: Hearings Before the House Comm. on Education and Labor,* 111th Cong. (2009), http://edlabor.house.gov/hearings/2009/05/examining-the-abusive-and-dead.shtml.

[5] 20 U.S.C. §1400 et seq.

[6] National Disability Rights Network, School is not Supposed to Hurt: Investigative Report on Abusive Restraint and Seclusion in Schools (January 2009) http://www.napas.org/sr/SR-Report.pdf. Protection & Advocacy, Inc., "Restraint & Seclusion in California Schools: A Failing Grade" (June 2007), http://www.disabilityrightsca.org/pubs/702301.pdf; Mark Sherman, "Lawmakers Discuss Nationa Teacher Registry," 42 EDUCATION DAILY 1 (May 20, 2009).

[7] Government Accountability Office, *Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers,* GAO-09-719T (May 19, 2009), http://www.gao.gov/new.items/d09719t.pdf.

[8] *Id.* After release of the GAO report, the Secretary of Education, Arne Duncan, was quoted as stating that "he will monitor how states are using restraint and seclusion in public schools, and has plans to ensure that all states have clear policies in place on restraint, seclusion, and other physical interventions that are used in schools for the coming academic year." Frank Wolfe, "Duncan Says He'll Target Low-Performing Schools," 42 EDUCATION DAILY (May 21, 2009).

[9] P.L. 106-310, 42 U.S.C. §290ii.

rights to certain residential programs for children, passed the House on February 23, 2009,[10] and legislation regarding the use of seclusion and restraint in public and private schools may also be considered. Currently, there are no specific federal laws concerning the use of seclusion and restraint in public schools, although the Individuals with Disabilities Education Act requires a free appropriate public education for children with disabilities, and an argument could be made that some uses of seclusion and restraint would violate this requirement. In addition, certain procedures may violate constitutional rights or state laws.

Prior to examining legal principles involved in the use of seclusion and restraint in school, it is helpful to define the terms. Unfortunately, there is no specific federal statutory definition of the terms as used in school settings, although the terms have been defined in the context of community-based facilities for children and youth under the Children's Health Act of 2000.[11] For community-based facilities, seclusion is defined as the involuntary confinement of an individual alone in a room or an area from which the person is physically prevented from leaving.[12] Restraint is defined as a manual method, physical or mechanical device, material, or equipment, that immobilizes or reduces an individual's freedom of movement.[13]

Constitutional Issues

At times, the use of seclusion and restraint in public schools has been subject to constitutional challenge. Such challenges have primarily been based upon the Fourteenth Amendment's guarantee of due process and the Fourth Amendment's prohibition against unreasonable seizures, although other types of constitutional claims have been asserted at times.[14]

The Due Process clause of the Fourteenth Amendment prohibits the government from depriving an individual of his liberty without due process of the law.[15] Although the Supreme Court has not directly considered whether the use of seclusion and restraint in public schools violates the Due Process Clause, the Court has considered a related case involving restraint of a mentally retarded adult confined to a state hospital. In *Youngberg v. Romeo*,[16] the Court applied a reasonableness standard, holding that there is a constitutionally protected liberty interest in reasonably safe

[10] A similar bill, H.R. 6358, 110th Cong., passed the House on June 25, 2008, but was not considered in the Senate.

[11] P.L. 106-310, 42 U.S.C. §290ii.

[12] See 42 U.S.C. §290ii(d)(2), §290jj(d)(4); 42 C.F.R. §482.13(e)(1)(ii). Various terms are sometimes used to describe related practices. One article has noted that in the educational setting the general term "timeout" can be divided into four types of interventions: (1) inclusion, (2) exclusion, (3) seclusion, and (4) restrained timeout. Inclusion timeouts are defined as the least restrictive and involved placing a student in a classroom area where she can observe the classroom but cannot participate in activities. Exclusion timeout is where a student is separated in a designated area away from his peers but is not prevented from leaving. Examples of exclusion timeouts include sitting in a corner of the classroom facing the wall or having a student place his head on his desk. Seclusion timeout is where a student is removed from the classroom environment, placed alone in a room, and prevented from leaving. Restrained timeout is a combination of use of timeout procedures and physical restraint. An example would be positioning a student in a chair in a corner and restraining the student from moving. Joseph B. Ryan, Reece L. Peterson, and Michael Rozalski, "State Policies Concerning the Use of Seclusion Timeout in Schools," 30 Education and Treatment of Children 215 (2007).

[13] See 42 U.S.C. §290ii(d)(1) §290jj(d)(1) and (2); 42 C.F.R. 482.13(e)(1)(i).

[14] See, e.g., Ingraham v. Wright, 430 U.S. 651 (1977) (holding that the Eighth Amendment's prohibition against cruel and unusual punishment was not applicable to corporal punishment inflicted by school administrators).

[15] U.S. Const. amend. XIV, § 1.

[16] 457 U.S. 307 (1982).

conditions of confinement and freedom from unreasonable bodily restraint. However, in order to determine what is reasonable, courts must defer to the judgment of qualified professionals.

In the public school setting, due process challenges to the use of seclusion and restraint have generally been rejected if such tactics are deemed to be reasonable, especially if such use constitutes a routine disciplinary technique. For example, in *Wallace by Wallace v. Bryant School District*, the court held that the plaintiff's isolation in a music room for three class periods was not a due process violation,[17] and in *Dickens v. Johnson County Board of Education*,[18] the court similarly rejected a due process challenge to a brief "timeout" imposed on a student because his seclusion "was not unduly harsh or grossly disproportionate."

In some cases, however, the use of seclusion and restraint may be actionable under the Due Process Clause if it is found to be unreasonable.[19] Courts are even more likely to find the use of seclusion and restraint to be unreasonable if such use is so extreme that it "shocks the conscience." Although many of these cases involve more extreme disciplinary methods, such as corporal punishment,[20] there have been some cases that involve seclusion and restraint. In *Orange v. County of Grundy*,[21] the court declined to dismiss a substantive due process claim, ruling that "placing school children in isolation [in a storage closet] for an entire school day without access to lunch or a toilet facility 'shocks the conscience.'" Indeed, the court emphasized that the use of seclusion must be reasonable, and school officials bear the responsibility to supervise students who are in isolation. Ultimately, however, the due process inquiry, and the reasonableness standard upon which it relies, are subjective and highly dependent on the facts in a given case, thus making it difficult to predict the outcome of a due process challenge to the use of seclusion and restraint in public schools.

Meanwhile, some plaintiffs have also claimed that the use of seclusion and restraint violates the Fourth Amendment, which prohibits the government from subjecting individuals to "unreasonable searches and seizures."[22] As with due process claims, courts assess such Fourth Amendment claims using a reasonableness standard.[23] For example, in *Rasmus v. Arizona*,[24] the court refused to dismiss a student's claim that his brief seclusion in a locked closet constituted a seizure in violation of the Fourth Amendment, reasoning that the seizure could be considered unreasonable because it violated the fire code and behavior management guidelines. In contrast, the court in *Couture v. Board of Education of the Albuquerque Public Schools* found that the use of supervised timeouts for a student who engaged in disruptive and threatening behavior was reasonable, particularly in light of the fact that the use of timeouts was authorized by the student's Individualized Education Plan (IEP).[25] Ultimately, like due process cases, the resolution of Fourth

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[17] 46 F. Supp. 2d 863, 867 (E.D. Ark. 1999).

[18] 661 F. Supp. 155 (E.D. Tenn. 1987).

[19] See, e.g., Jefferson v. Ysleta Independent School Dist., 817 F.2d 303 (5th Cir. Tex. 1987).

[20] See, e.g., Ingraham v. Wright, 430 U.S. 651 (1977); Neal v. Fulton County Bd. of Educ., 229 F.3d 1069 (11th Cir. Ga. 2000); Metzger v. Osbeck, 841 F.2d 518 (3d Cir. Pa. 1988); Hall v. Tawney, 621 F.2d 607 (4th Cir. W. Va. 1980). Physical restraint may rise to the level of corporal punishment, which involves physical pain inflicted upon the body, if such restraint is used as a form of physical punishment rather than as an educational or safety technique.

[21] 950 F. Supp. 1365 (E.D. Tenn. 1996).

[22] U.S. Const. amend. IV.

[23] N.J. v. T. L. O., 469 U.S. 325 (1985).

[24] 939 F. Supp. 709 (D. Ariz. 1996).

[25] 535 F.3d 1243 (10th Cir. N.M. 2008).

Amendment claims involving the use of seclusion and restraint generally depends on the facts of a given case, with a violation unlikely to be found except in cases involving excessive or unreasonable uses of such tactics.

Finally, it is important to note that constitutional claims have, in some cases, been limited by courts that may be reluctant to find constitutional violations for actions that could ordinarily be remedied under state tort law. For example, in *Ingraham v. Wright*, the Supreme Court acknowledged that "corporal punishment in public schools implicates a constitutionally protected liberty interest" under the Due Process Clause, but the Court nevertheless held that "the traditional common-law remedies are fully adequate to afford due process."[26] Thus, remedies for the unlawful use of seclusion and restraint should also be sought under state tort law.[27]

Individuals with Disabilities Education Act

Statutory Provisions

The Individuals with Disabilities Education Act (IDEA)[28] is the major federal statute for the education of children with disabilities. IDEA both authorizes federal funding for special education and related services[29] and, for states that accept these funds,[30] sets out principles under which special education and related services are to be provided. The requirements are detailed, especially when the regulatory interpretations are considered. The major principles include the following requirements:

- States and school districts make available a free appropriate public education (FAPE)[31] to all children with disabilities, generally between the ages of 3 and 21. States and school districts identify, locate, and evaluate all children with disabilities, regardless of the severity of their disability, to determine which children are eligible for special education and related services.
- Each child receiving services has an individual education program (IEP) spelling out the specific special education and related services to be provided to meet his

[26] Ingraham v. Wright, 430 U.S. 651, 672 (1977).

[27] Although public school officials may defend against such constitutional and tort claims by citing their qualified immunity from liability for the performance of official duties, that immunity is not available if the official violates a clearly established statutory or constitutional right of which a reasonable person would have had knowledge. Harlow v. Fitzgerald, 457 U.S. 800 (U.S. 1982). In some circumstances, however, state entities may be entitled to sovereign immunity under the Eleventh Amendment.

[28] 20 U.S.C. §1400 et seq. For a more detailed discussion of IDEA see CRS Report RS22590, *The Individuals with Disabilities Education Act (IDEA): Overview and Selected Issues*, by Richard N. Apling and Nancy Lee Jones.

[29] Related services (for example, physical therapy) assist children with disabilities to help them benefit from special education (20 U.S.C. §1401(26)).

[30] Currently, all states receive IDEA funding.

[31] It should be emphasized that what is required under IDEA is the provision of a free appropriate public education. The Supreme Court, in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 177 (1982), held that this requirement is satisfied when the state provides personalized instruction with sufficient support services to permit a child to benefit educationally from that instruction, and that this instruction should be reasonably calculated to enable the child to advance from grade to grade. IDEA does not require that a state maximize the potential of children with disabilities.

or her needs. The parent must be a partner in planning and overseeing the child's special education and related services as a member of the IEP team.

- "To the maximum extent appropriate," children with disabilities must be educated with children who are not disabled; and states and school districts provide procedural safeguards to children with disabilities and their parents, including a right to a due process hearing, the right to appeal to federal district court, and, in some cases, the right to receive attorneys' fees.

IDEA provides that when the behavior of a child with a disability impedes the child's learning or the learning of others, the IEP team must consider "the use of positive behavioral interventions and supports, and other strategies, to address that behavior."[32] Nothing in IDEA specifically addresses the use of seclusion and restraints, and the Department of Education has stated that "[w]hile IDEA emphasizes the use of positive behavioral interventions and supports to address behavior that impedes learning, IDEA does not flatly prohibit the use of mechanical restraints or other aversive behavioral techniques for children with disabilities.[33] The Department also noted that state law may address whether restraints may be used and, if restraints are allowed, the "critical inquiry is whether the use of such restraints or techniques can be implemented consistent with the child's IEP and the requirement that IEP Teams consider the use of positive behavioral interventions and supports when the child's behavior impedes the child's learning or that of others."[34]

IDEA Judicial Decisions Involving Seclusion and Restraints

The Supreme Court has not specifically addressed the use of seclusion or restraints under IDEA; however, in *Honig v. Doe,*[35] the Court examined IDEA's requirements for children who exhibited violent or inappropriate behavior, and held that a suspension longer than 10 days violated IDEA's "stay-put" provision.[36] In *Honig*, the Court observed that this decision "does not leave educators hamstrung" and that educators may utilize "normal procedures" which "may include the use of study carrels, timeouts, detention, or the restriction of privileges" as well as a 10-day suspension.[37]

Despite the lack of specific language in IDEA regarding the use of restraints and seclusion, cases have been brought alleging that their use violates a child's right to a free appropriate public education.[38] In *Melissa S. v. School District of Pittsburgh,*[39] the Third Circuit addressed

[32] 20 U.S.C. §1414(d)(3)(B).

[33] Letter to Anonymous, 50 IDELR 228 (OSEP March 17, 2008). It should be noted that some definitions of restraints encompass the use of drugs as well as physical restraints. See 42 C.F.R. §482.13(e)(1)(i). IDEA specifically prohibits schools from requiring a child to obtain certain medication. 20 U.S.C. §1412(a)(25).

[34] Letter to Anonymous, 50 IDELR 228 (OSEP March 17, 2008).

[35] 484 U.S. 305 (1988).

[36] Generally, IDEA requires that if there is a dispute between the school and the parents of a child with a disability, the child "stays put" in his or her current educational placement until the dispute is resolved using the due process procedures set forth in the statute. 20 U.S.C. §1415(j). For a more detailed discussion of Honig and the "stay put" provision see CRS Report RL32753, *Individuals with Disabilities Education Act (IDEA): Discipline Provisions in P.L. 108-446*, by Nancy Lee Jones.

[37] 484 U.S. 305, 325 (1988).

[38] In addition to the cases discussed subsequently, at least one case has been brought by a protection and advocacy agency seeking student records concerning the use of a seclusion room. The court denied access to the records. (continued...)

allegations of IDEA violations involving a school's response to the child's serious behavior problems. The court noted that the child "sat on the floor kicking and screaming, struck other students, spit at and grabbed the breast of a teacher, refused to go to class, and once had to be chased by her aide after running out of the school building."[40] In this situation, the school's use of a time-out area in an unused office where her aide and others would give her work and encourage her to go to class did not violate IDEA since it did not change the child's placement and was within normal procedures for dealing with children who were endangering themselves or others. Similarly, the Eighth Circuit in *CJN v. Minneapolis Public Schools*[41] held that a third grade child with brain lesions and a history of psychiatric illness received FAPE despite extensive use of seclusion since he was progressing academically and the school had made efforts to tailor his IEP to address his behavior. A strong dissent was filed, noting the child seemed to be trapped in an increasingly punitive approach to discipline,[42] and stating, "[w]e are essentially telling school districts that it's copacetic to deal with students with behavioral disabilities by punishing them for their disability, rather than finding an approach that addresses the problem. We also tacitly approve the District's resort to police intervention for the behavioral problems it helped create by failing to address CJN's unique behavioral disorder."[43]

Courts have examined whether the administrative exhaustion requirements of IDEA apply in situations involving the use of seclusion and restraint. In *C.N. v. Willmar Public Schools,*[44] the child's IEP and behavior intervention plan allowed for the use of seclusion and restraint procedures when the child was a danger to herself or others. The court required administrative exhaustion, finding that if the parent was dissatisfied with the child's education, she must follow the IDEA due process procedures and file for a due process hearing. Since the parent had not done so, the court dismissed the parent's complaint.[45] In a series of cases involving a special education teacher in Pennsylvania who allegedly hit, pinched, dragged, and restrained autistic students in Rifton chairs with bungee cords and/or duct tape, the district court originally did not require the exhaustion of administrative remedies.[46] However, the court later held that, due to a

(...continued)

Wisconsin Coalition for Advocacy, Inc. v. State of Wisconsin Department of Public Instruction, 407F.Supp.2d 988 (W.D. Wisc. 2005).

[39] 183 Fed. Appx. 184 (3d Cir. 2006).

[40] *Id.* at 188.

[41] 323 F.3d 630 (8th Cir. 2003), cert. denied 540 U.S. 984 (2003).

[42] The dissent noted that the police had been called following an incident where the child pushed and kicked staff and threatened to kill them, and that the child's behaviors seemed to escalate with the increased use of seclusion until the child attempted to kill himself when in the locked seclusion room. The dissent also noted that when the child was placed by his mother in a private school where there was no locked seclusion or police intervention, the child's behavioral problems decreased and he showed an increased interest in learning, friends, and school.

[43] 323 F.3d 630, 649 (8th Cir. 2003).

[44] 2008 U.S .Dist. LEXIS 63673 (August 19, 2008).

[45] See also Doe v. S&S Consolidated I.S.D., 149 F.Supp.2d 274 (E.D. Texas 2001), where the court, in a case that also presented constitutional issues, dismissed the IDEA claims relating to restraints since IDEA's administrative procedures had not been exhausted.

[46] Vicky M. and Darin M. v. Northeastern Educational Intermediate Unit 19, 486 F.Supp.2d 437 (M.D. Pa. 2007); Kimberly F. v. Northeastern Educational Intermediate Unit 19, 2007 U.S. Dist. LEXIS 35778 (M.D. Pa. May 15, 2007); Eva L. v. Northeastern Educational Intermediate Unit 19, 2007 U.S. Dist. LEXIS 35787 (M.D. Pa. May 15, 2007); John G. and Gloria G. v. Northeastern Educational Intermediate Unit 19, 2007 U.S. Dist. LEXIS 35786 (M.D. Pa. May 15, 2007); Sanford D. v. Northeastern Educational Intermediate Unit 19, 2007 U.S. Dist. LEXIS 35776 (M.D. Pa. (May 15, 2007); Joseph M. v. Northeastern Educational Intermediate Unit 19, 516 F.Supp.2d 424 (M.D. Pa. (2007); Thomas R. v. Northeastern Educational Intermediate Unit 19, 2007 U.S. Dist. LEXIS 8017 (M.D. Pa. (May 15, 2007).

subsequent court of appeals decision mandating the use IDEA administrative procedures when a violation of FAPE was alleged, exhaustion was required and the IDEA claim was dismissed. This was despite the argument that the cases differed due to the physical and emotional abuse alleged in the lower court cases.[47]

In *Peters v. Rome City School District*,[48] although the child's mother had consented to the school's IEP which included use of a time-out room, the court found that this consent did not impact on her assertion of constitutional violations. The child's mother testified that she had not known how often the child had been placed in the room; how he was treated while there; and that the room was filthy and lacked ventilation. IDEA issues were not directly addressed in *Peters* since the school district had not objected to the court's failure to instruct the jury about the federal and state laws possibly allowing the use of time-out rooms.

In contrast, IDEA has been used by parents in an attempt to enjoin enforcement of a New York state regulation that banned the use of "aversive interventions."[49] Parents argued in part that "some students' IEP's were being revised without parental consent or simply not revised for the new school year, the effect of which was to deprive those students of aversive therapies."[50] The Second Circuit vacated the district court's injunction against the regulation and remanded for further findings, noting, "We are confident that, especially given the harms that could result if the student plaintiffs' behavioral treatments are interrupted, the deficiencies in the district court's order may be expeditiously remedied."[51]

State Laws and Policies

Several recent studies have examined state law and policies regarding seclusion and restraints in schools, and generally have found little uniformity in coverage. In a May 2009 study, GAO found that 19 states have no laws or regulations relating to the use of seclusion or restraints in schools, and that the states that have laws or regulations vary widely in their coverage.[52] For example, GAO found that 7 states have provisions restricting the use of restraints but do not regulate seclusion,[53] and 17 states require training prior to the administration of restraints.[54] A 2007 study

[47] Vicky M. and Darin M. v. Northeastern Educational Intermediate Unit 19, 2007 U.S. Dist. LEXIS 71406 (M.D. Pa. September 26, 2007); Kimberly F. v. Northeastern Educational Intermediate Unit 19, 2007 U.S. Dist. LEXIS 71394 (M.D. Pa. September 26, 2007); Eva L. v. Northeastern Educational Intermediate Unit 19, 2007 U.S. Dist. LEXIS 71425 (M.D. Pa. September 26, 2007); John G. and Gloria G. v. Northeastern Educational Intermediate Unit 19, 2007 U.S. Dist. LEXIS 71365 (M.D. Pa. September 26, 2007); Sanford D. v. Northeastern Educational Intermediate Unit 19, 2007 U.S. Dist. LEXIS 71413 (M.D. Pa. (September 26, 2007); Joseph M. v. Northeastern Educational Intermediate Unit 19, 2007 U.S. Dist. LEXIS 71410 (M.D. Pa. September 26, 2007); Thomas R. v. Northeastern Educational Intermediate Unit 19, 2007 U.S. Dist. LEXIS 71416 (M.D. Pa. September 26, 2007).

[48] 747 N.Y.S.2d 867 (NYSC 2002).

[49] Alleyne v. New York State Education Department, 516 F.3d 96 (2d Cir. 2008). Aversive interventions were defined as including "skin shocks, 'contingent' food programs, and physical restraints." *Id.* at 98.

[50] *Id.* at 99.

[51] *Id.* at 102.

[52] Government Accountability Office, *Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers,* GAO-09-719T (May 19, 2009), http://www.gao.gov/new.items/d09719t.pdf. GAO identified these states as Arizona, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, New Jersey, North Dakota, Oklahoma, South Carolina, South Dakota, Vermont, Wisconsin, and Wyoming.

[53] *Id.* GAO identified the states that place restrictions on the use of restraints but not seclusions as Alaska, Colorado, (continued...)

which surveyed state educational agencies found that 24 states had an established policy or provided guidelines concerning the use of time-out procedures.[55] A January 2009 survey by the National Disability Rights Network examined the laws and policies of 56 states and territories and found that 41% had no laws or policies concerning restraint and seclusion, almost 90% allowed prone restraints,[56] and 45% required or recommended that schools notify parents or guardians of the use of restraints or seclusion.[57]

Author Contact Information

Nancy Lee Jones
Legislative Attorney
njones@crs.loc.gov, 7-6976

Jody Feder
Legislative Attorney
jfeder@crs.loc.gov, 7-8088

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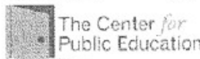
Hawaii, Michigan, Ohio, Utah, and Virginia.

[54] *Id.* GAO identified the states that require training as California, Colorado, Connecticut, Illinois, Iowa , Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Texas, and Virginia.

[55] Joseph B. Ryan, Reece L. Peterson, and Michael Rozalski, "State Policies Concerning the Use of Seclusion Timeout in Schools," 30 Education and Treatment of Children 215 (2007).

[56] Prone restraint is considered to have serious potential risks, including suffocation. See Protection and Advocacy, Inc., "The Lethal Hazard of Prone Restraint: Positional Asphyxiation" (April 2002) http://www.pai-ca.org/pubs/701801.pdf.

[57] National Disability Rights Network, School is not Supposed to Hurt: Investigative Report on Abusive Restraint and Seclusion in Schools (January 2009), http://www.napas.org/sr/SR-Report.pdf. The California legislature passed legislation, S.B. 1515, limiting the use of seclusion and restraint, but this bill was vetoed by the governor on September 29, 2008. It is interesting to note that one recent reported situation indicates that laws prohibiting the use of restraints and seclusion may result in increased police involvement. See Christina E. Sanchez, "Autistic Boy's Arrest at School Fuels Debate on Discipline for Disabled," (March 29, 2009) http://www.tennessean.com/article/20090329/NEWS04/903290370/1006/NEWS01.



Practical information and analysis about public education

GAO finds abuses of restraint and seclusion, Congress holds hearing

The *Contra Costa Times* in California reports that the federal Government Accountability Office (GAO) has unearthed hundreds of confirmed cases and allegations in a report that paints a grim picture of how school officials have misused techniques to restrain or seclude disruptive students—most of them with disabilities. The GAO also found that states vary widely in their regulation of the techniques in schools; that criminal sanctions are rare; and frequently teachers or administrators who abused or even killed children remain in school posts, despite expensive civil judgments against the districts. The report came at the request of the House Education and Labor Committee, which heard testimony this week from parents of abused children, schools officials and experts as it weighs federal legislation for training, reporting and possibly limiting uses of restraint or seclusion. Rep. George Miller, D-Calif., the committee chairman, said just two states—California and Texas—require reporting of restraint or seclusion, and that those two states alone report 30,000 incidents.

Child advocates and lawyers for disabled students say the problem has grown as the number of cases of autism and other disabilities grows and more special education students enter traditional public schools. In January, the National Disability Rights Network (NDRN) issued a report documenting "dozens of cases of students abusively pinned to the floor for hours at a time, handcuffed, locked in closets, and subjected to other traumatizing acts of violence," the GAO report states. Rhoda Benedetti, a Walnut Creek-based lawyer for disabled children, blames school districts that cut corners in crafting state-mandated support plans for special education students, then resorting to harsh discipline when the plan fails. According to the GAO report, 19 states have no laws or regulations related to the use of seclusion or restraint in schools. Seven place some restrictions on use of restraints but do not regulate seclusions.

California sets limits on emergency interventions for special education students. Parents must be notified within a day and the school must file a report. Also, no technique can be used that is "designed or likely to cause physical pain" or denies sleep, food, water or bathroom access to the student. The student cannot be locked in seclusion. Last year, Gov. Arnold Schwarzenegger vetoed a bill that would have tightly restricted use of restraint in schools and phased out seclusion by 2012, arguing that the bill could place more students at risk by tying the hands of school employees. Bruce Hunter of the American Association of School Administrators cautioned that outlawing such techniques outright could endanger students and teachers. "If that were to happen and there were a dangerous situation where somebody was being attacked, we would have to call the cops and sit there and wait," said Hunter. "That's unreasonable."

Source: Contra Costa Times, 5/20/09, By Jon Simerman

[Legal Clips *Editor's Note: The GAO report is below. Background information on the issue, including the NDRN report, is available starting at the NSBA link. The* Washington Post *reports that U.S. Secretary of Education Arne Duncan subsequently told federal lawmakers that "he will ask state school chiefs to develop plans to help ensure that such techniques are used safely and sparingly." The* Post *also reports that a Virginia teacher has been placed on paid administrative leave while school district officials review information highlighted in the GAO report and in the congressional hearing about the death of student in her Texas classroom seven years ago when she lay on him after he refused to stay in his seat. Background checks had not revealed the information when the teacher was hired with good references from a D.C. private school. Meanwhile, according to the* Fond du Lac Reporter, *a similar policy discussion is underway in Wisconsin, where state legislation is being introduced. That story notes the publication of another recent report on the subject, this one by Disability Rights Wisconsin (DRW), and reports on the use of seclusion rooms in one school district.*

In 2005 North Carolina enacted legislation, available below, known as the "Deborah Greenblatt Act," which had been painstakingly developed by a broad coalition of educational and disability rights advocacy groups including the North Carolina School Boards Association and Carolina Legal Assistance. The act provides guidance on acceptable restraint and seclusion practices; identifies and prohibits inappropriate practices; requires reporting of incidents; sets forth standards for seclusion rooms; and requires that positive management of disruptive or dangerous student behavior and safe and appropriate use of seclusion and restraint be addressed in state standards for institutions of teacher education, in criteria for lateral entry into the teaching profession, and in local safe school plans.]

GAO report
NSBA School Law pages on restraint and seclusion
Washington Post, 5/20/09, By Maria Glod & Michael Birnbaum
Fond du Lac Reporter, 5/20/09, By Sharon Raznik
DRW report
North Carolina's Deborah Greenblatt Act

OSEP Center on Positive Behavioral Interventions & Supports — Effective Schoolwide Interventions	**Considerations for Seclusion and Restraint Use in School-wide Positive Behavior Supports**[1]

Robert Horner and George Sugai

Co-directors OSEP Technical Assistance Center on Positive Behavioral Interventions and Support

April 29, 2009

Concern

Seclusion and restraint refer to safety procedures in which a student is isolated from others (seclusion) or physically held (restraint) in response to serious problem behavior that places the student or others at risk of injury or harm. Concern exists that these procedures are prone to misapplication and abuse placing students at equal or more risk than their problem behavior. Concerns include the following:

1. Seclusion and restraint procedures are inappropriately selected and implemented as "treatment" or "behavioral intervention," rather than as a safety procedure.
2. Seclusion and restraint are inappropriately used for behaviors that do not place the student or others at risk of harm or injury (e.g., noncompliance, threats, disruption).
3. Students, peers, and/or staff may be physically hurt or injured during attempts to conduct seclusion and restraint procedures.
4. Risk of injury and harm is increased because seclusion and restraint are implemented by staff who are not adequately trained.
5. Use of seclusion and restraint may inadvertently result in reinforcement or strengthening of the problem behavior.
6. Seclusion and restraint are implemented independent of comprehensive, function-based behavioral intervention plans.

Toward Effective Policy

1. The majority of problem behaviors that are used to justify seclusion and restraint could be prevented with early identification and intensive early intervention. The need for seclusion and restraint procedures is in part a result of insufficient investment in prevention efforts.
2. Seclusion and restraint can be included as a safety response, but should not be included in a behavior support plan without a formal functional behavioral assessment (a process used to identify why the problem behavior continues to occur).
3. Seclusion and restraint should only be implemented (a) as safety measures (b) within a comprehensive behavior support plan, (c) by highly trained personnel, and (d) with public, accurate, and continuous data related to (1) fidelity of implementation and (2) impact on behavioral outcomes (both increasing desired and decreasing problem behaviors).

4. School-wide positive behavior support may be an effective approach for (a) decreasing problem behaviors that may otherwise require seclusion and restraint, (b) improving the fidelity with which intensive individual behavior support plans are implemented, and (c) improving the maintenance of behavioral gains achieved through intensive individual support plans.

School-wide Positive Behavior Support

School-wide Positive Behavior Support (SWPBS) is a systems approach to establishing the whole-school social culture and intensive individual behavior supports needed for schools to achieve social and academic gains while minimizing problem behavior for all students. SWPBS is NOT a specific curriculum, intervention, or practice, but a decision making framework that guides selection, integration, and implementation of scientifically-based academic and behavioral practices for improving academic and behavior outcomes for all students. A central feature of SWPBS is implementation of behavioral practices throughout the entire school. SWPBS defines practices that all students experience in all parts of the school and at all times of day.

SWPBS emphasizes four integrated elements: (a) socially valued and measurable outcomes, (b) empirically validated and practical practices, (c) systems that efficiently and effective support implementation of these practices, and (d) continuous collection and use of data for decision-making.

These four elements are operationalized by five guiding principles:

- Invest first in prevention to establish a foundation intervention that is empirically validated to be effective, efficient and sustainable.
- Teach and acknowledge appropriate behavior before relying on negative consequences.
- Use regular "universal screening" to identify students who need more intense support and provide that support as early as possible, and with the intensity needed to meet the student's need.
- Establish a continuum of behavioral and academic interventions for use when students are identified as needing more intense support.
- Use progress monitoring to assess (a) the fidelity with which support is provided and (b) the impact of support on student academic and social outcomes. Use data for continuous improvement of support.

Research Supporting Implementation of School-wide Positive Behavior Support

1. Schools are able to implement SWPBS as evidenced by more than 9000 schools using SWPBS across the nation.
2. Schools that implement SWPBS demonstrate reductions in problem behavior and improved academic outcomes.
3. Preliminary evaluation data indicate that more intensive individual student behavior support is perceived as more effective (and less likely to be needed) when SWPBS is implemented.
4. Evaluation (but not experimental) data indicate that implementation of SWPBS is associated