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HEALTH, EDUCATION, LABOR, AND PENSIONS COMMITTEE
Tom Harkin, Chairman

Dangerous Use of Seclusion and Restraints in Schools Remains Widespread and Difficult to Remedy: A Review of Ten Cases

Majority Committee Staff Report

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Executive Summary

There is no evidence that physically restraining or putting children in unsupervised seclusion in the K-12 school system provides any educational or therapeutic benefit to a child. In fact, use of either seclusion or restraints in non-emergency situations poses significant physical and psychological danger to students. Yet the first round of data collected by the United States Department of Education in 2009-2010 demonstrated that these same practices that are prohibited in other settings were used in U.S. schools *at least* 66,000 times in a single school year. Because fifteen percent of school districts failed to report data, however, this figure likely underestimates use of seclusion and restraints.

Unlike the use of seclusion and restraints in juvenile justice facilities and mental health facilities, there is currently no federal law or regulation specifically addressing appropriate limitations on the use of these practices in the nation's schools. This is true even though Positive Behavioral Interventions and Supports (PBIS), an evidence-based, data-driven framework used in close to twenty percent of U.S. schools, is proven to reduce disciplinary incidents and promote a climate of greater productivity, safety, and learning.

Many teachers and school personnel do an outstanding job of educating students with behavioral challenges, including those with disabilities. Inclusive schooling for children with behavioral challenges can be a positive, academically and socially enriching experience for the students with behavioral challenges and all other students and staff. However, the Senate Health, Education, Labor, and Pensions (HELP) Committee has heard from a number of families whose children have been physically or emotionally harmed by the use of seclusion and restraints.

In an effort to better understand the frequency and severity of the use of seclusion and restraints, and to better understand obstacles facing families with children subjected to these practices, HELP Majority staff undertook an investigation. The investigation sought to better understand the types of seclusion and restraints practices occurring in U.S. schools, and the obstacles faced by families seeking to stop the use of these practices or seeking restitution for harm caused by these practices.

The Committee staff found that, under current law, a family whose child has been injured, experienced trauma, or, in the worst case, has died as a result of the use of seclusion or restraints practices in a school has little or no recourse through school procedures or the courts. In fact, the investigation found that only eighteen states currently require parents be notified about the use of seclusion or restraints. Staff also identified ten cases in different states where children had been significantly injured or had died due to the use of seclusion and restraints in their schools. That review found certain commonalities across cases and states including:

- Families were often not informed of the seclusion and restraints being used with their children. In fact, when parents are told or discover their children have been subjected to these practices, it often explains why they have seen changes in their child's temperament, behavior, or learning.

- Families had difficulty obtaining information or documentation from schools about the frequency, intensity and duration of the practices.

- Current laws and regulations often prevent families from successfully recovering on behalf of their children even in cases of clear abuse. The exhaustion requirements of the Individuals with

Disabilities Education Act (IDEA), which require a family to exhaust all of their due process options under the law before taking a case to court, pose a particular challenge to families of children with disabilities. In light of these requirements, parents are often forced to resort to removing a child from a school as the only means to stop the use of seclusion and/or restraints.

- Proving psychological harm in the absence of physical damage poses additional challenges in a formal court setting.

- Parents have difficulty overcoming the presumption that teachers and schools acted appropriately when secluding and restraining children;

- Even in cases where a family may find relief for their own child, existing laws do not incentivize school districts to change policies and practices.

The cases outlined in this report tell a story of lost opportunity and negative effects that extend far into the future. For the students profiled here, their educational experiences were marred by the use of practices with no educational benefits, often repeatedly for long periods of time over many instructional days that reduced their learning opportunities. Findings of the review included:

- A fourteen-year-old Georgia boy committed suicide after being repeatedly left alone for hours in a room comparable to a prison cell. School logs document that school personnel were aware that the boy had suicidal tendencies when they locked him in the room, but a court found that the actions of the school and staff involved did not constitute "deliberate indifference" to the child's well-being.

- A Minnesota teacher reportedly secluded an 8-year-old girl with communication, attentional, and hyperactivity disorders 44 times in one school year, despite objections from the mother and an independent behavior consultant. The mother transferred the girl to private school and then filed suit against the school for failing to provide a free and appropriate education. The court dismissed the claim in part noting that such a challenge becomes irrelevant once a child transfers to a new district, even if he or she was in an "intolerable situation."

- A Florida teen was diagnosed with post-traumatic stress disorder and placed in a psychiatric facility as a result of a school's use of dangerous restraints and repeated seclusions. However, the court did not find the school's actions to be excessive or egregious.

- The Department of Education's Office of Civil Rights (OCR) found that a North Carolina school repeatedly subjected 18 students to the use of mechanical restraints, in many cases without the knowledge of their parents. Although the school district did develop a training program on restraints in response to OCR's findings, it is no longer compelled to require any of its school personnel to take it.

The investigation documented the inability of some families to effectively address the use of seclusion and restraints and to positively change school practices. By passing legislation to permit the use of restraints only in emergency situations and to eliminate the use of seclusion, Congress and states can help schools to implement interventions that promote positive learning environments, promote better academic outcomes, and prevent behaviors that put children and personnel in danger. Lessons learned from these

cases should speed the adoption of positive approaches to working with families and the implementation of positive preventative behavior practices in schools.

Recommendations include:

- Passing legislation that would limit the use of restraints to emergency situations only, when there is an imminent threat of serious harm to students themselves or to others, and would discontinue all use of unsupervised and unmonitored seclusion.

- Annual collecting of data that documents the frequency, duration and intensity of the use of seclusion and restraints in schools, reported at the local, state and federal levels with the ability to disaggregate the information at the school level.

- Training programs to ensure all teachers, administrators and other school personnel know how to implement preventative programming and positive interventions.

- Requiring notification of a child's parents within 24 hours when seclusion or restraints are used against a child.

- Eliminating the use of seclusion and restraints, which have been shown to have no educational benefit, as an educational or therapeutic component of a student's individualized education plan (IEP).

- Amending IDEA to allow families to file civil actions to stop the practice of seclusion and/or restraints in court before exhausting remedies available under IDEA.

Introduction

> This past August, an Arizona teacher used duct tape to restrain a second grader to a chair because she was getting up to sharpen her pencil too frequently.[1] In December 2011, a Kentucky school district restrained a nine year-old child with autism in a duffel bag as punishment. The child's mother witnessed him struggling inside the bag while a teacher's aide stood by and did nothing.[2] In Indiana, a teen was repeatedly left secluded in an unmonitored room for hours at a time during January 2011. On one occasion, he was prevented from using the bathroom and urinated on the floor. As punishment for urinating, he was secluded again in the same room the following day, where he screamed and banged on the door to be let out. When no one came to his aid, he attempted suicide by hanging himself.[3] Thankfully, he survived. A sixteen-year-old boy with disabilities in New York did not. He died in April 2012, after being restrained face-down by at least four school staff members for allegedly refusing to leave a basketball court.[4]

These are just a few of the hundreds of recent stories about the use of seclusion and restraints in schools across the country. While many organizations and agencies have adopted varying definitions of the terms "seclusion" and "restraints," this report uses the definitions published by the Department of Education's (Education) Office of Civil Rights (OCR).[5] OCR divides restraints into two categories: physical and mechanical. The former is defined as "personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely." The latter is defined as the use of any device or equipment to restrict a student's freedom of movement. OCR defines seclusion as the involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving. It does *not* include a timeout, which is a behavior management technique that is part of an approved program, involves the *monitored* separation of the student in a non-locked setting, and is implemented for the purpose of calming.

Many teachers and school personnel do an outstanding job in what can be a challenging environment. Having children with challenging behaviors in a classroom, including those with disabilities, can be a rewarding, positive experience for all students and need not be an insurmountable task, given appropriate training on the particular needs of individual students and adequate classroom supports. Experts agree that neither seclusion nor restraint has any educational value and should be used only in emergency situations

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[1] Associated Press, *Maria Vasquez Accuses Tucson Schoolteacher Of Taping Daughter To Chair*, HUFFINGTON POST (Aug. 21, 2013, 6:29PM), http://www.huffingtonpost.com/2013/08/21/arizona-school-investigat_0_n_3792587.html.

[2] Adam Wasler, *Mother tells horrors of son being left in bag to WHAS11 News*, WHAS11 NEWS (Dec. 28, 2011, 7:02 PM), http://www.whas11.com/home/Mother-tells-horrors-of-son-being-left-in-bag-to-WHAS11-News-136343173.html.

[3] NAT'L DISABILITY RIGHTS NETWORK, SCHOOL IS NOT SUPPOSED TO HURT 11 (2012), *available at* http://www.ndrn.org/images/Documents/Resources/Publications/Reports/School_is_Not_Supposed_to_Hurt_3_v7.pdf [hereinafter NDRN].

[4] Angela M. Hill, et al., *Mom Sues School Over Special-Needs Son's Death*, ABC NEWS (Dec. 6, 2012), http://abcnews.go.com/Blotter/mom-sues-school-sons-death/story?id=17892985&singlePage=true.

[5] RESTRAINT AND SECLUSIONS RESOURCE DOCUMENT, U.S. DEP'T OF EDUC. (May 2012), *available at* https://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf [hereinafter RESOURCE DOCUMENT].

posing an imminent danger to physical safety.[6] Even then, these practices should not be used if less restrictive measures can resolve the problem. Nonetheless, seclusion and restraints are used tens of thousands of times every year in schools in order to address behavioral concerns of students with and without disabilities.[7]

Unlike the use of seclusion and restraints in juvenile justice facilities and mental health facilities, there is currently no federal law or regulation specifically addressing the use of restraint and seclusion in the nation's schools. When seclusion or restraints are used, even over the objection of parents, families are frequently left with little recourse. Parents must rely on a patchwork of state laws, and research has shown that in recent years parents have increasingly chosen to resort to litigation to challenge seclusion and restraints used in school settings.[8]

In an effort to better understand the frequency and severity of the use of seclusion and restraints and to better understand obstacles facing families with children subjected to these ineffective practices, the majority staff of the Senate HELP Committee undertook an investigation of the use of seclusion and restraints in schools. This review suggests that even when children have died or suffered physical harm or psychological trauma, the lack of a clear federal law regarding appropriate interventions results in families failing to prevail in court and failing to bring about changes in policy.[9]

This review suggests that even when children have died or suffered physical harm or psychological trauma, the lack of a clear federal law regarding appropriate interventions results in families failing to prevail in court and failing to bring about changes in policy.

To conduct this work, Committee staff examined the facts and circumstances surrounding ten cases from ten different states in which parents and attorneys challenged the use of seclusion and restraints through criminal, civil, and/or administrative complaints. For this review, the staff focused on cases that have been resolved during the past five years as the result of court proceedings, administrative actions, or investigative findings, although the actual incident of seclusion or restraint may have occurred longer ago. Cases were selected from the following states in an effort to seek geographic diversity: Connecticut, Florida, Georgia, Iowa, Louisiana, Minnesota, New York, North Carolina, Pennsylvania, and Tennessee. For each case, Committee staff interviewed knowledgeable advocacy groups and reviewed related cases, changes to state law since the original case, and other relevant media reports and documents. To the extent possible, staff conducted interviews with parents of the victims and their attorneys.

Staff also notified the school superintendents or school board in each case to give them an opportunity to comment on the facts and provide information about any subsequent changes to school policy, though only Pennsylvania and Georgia school officials chose to do so. Pennsylvania school officials sent a letter

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[6] *COPAA Declaration of Principles Opposing the Use of Restraints, Seclusion, and Other Aversive Interventions Upon Children with Disabilities*, COPAA (June 2008), *available at* http://c.ymcdn.com/sites/www.copaa.org/resource/resmgr/copaa_declaration_of_princip.pdf.

[7] *Data Collection*, OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., http://ocrdata.ed.gov [hereinafter *Data Collection*].

[8] Perry A. Zirkel & Caitlin A. Lyons, *Restraining the Use of Restraints for Students with Disabilities: an Empirical Analysis of the Case Law*, 10 CONN. PUB. INT. L. J. 323, 349 (2011).

[9] *Id.* at 348.

to Chairman Harkin, reprinted in Appendix 2, affirming their commitment to providing a free and appropriate education for all students with disabilities through the use of positive behavior interventions and supports. The director of the regional educational service agency associated with the Georgia case noted that the state now bans the use of seclusion in public education settings and also requires schools to set specific guidelines on the use of physical restraint. The director also enclosed a copy of the school's restraint policy, which provides in part that restraint should only be used as a last resort when there is a threat of immediate danger and that parental notification should occur within one day.

Finally, Committee staff met with representatives from the American Association of School Administrators and the National Association of School Boards to review the themes from the findings of this investigation. Both groups emphasized their desire to hear positive instances of cases where districts responded to concerns of parents whose children were being secluded or restrained. Both expressed concerns that examples of negative responses from schools do not reflect how most districts respond to parental complaints.

It is important to note that a case review of this nature is by definition anecdotal and the results cannot be generalized to all seclusion and restraints cases nationwide. Moreover, the opinions expressed by parents and attorneys should not be treated as confirmed facts or proof of wrongdoing on the part of schools or school personnel. However, in the absence of reliable data on the prevalence of seclusion and restraints in schools, a review of the allegations in individual cases remains one of the only tools available to analyze the continuing use of these ineffective, harmful, and outdated practices.

Regulation and Use of Seclusion and Restraints

Schoolchildren, with and without disabilities, have been restrained and secluded in the United States since at least the 1950s.[10] In the past, the effects of these practices have not been systematically documented; however, over the last decade, the physical and psychological damage caused by the use of seclusion and restraints have become better understood. In 2005, the Alliance to Prevent Restraint, Aversive Interventions, and Seclusion issued a report detailing the risks associated with the use of these practices and providing guidance to parents about how to protect their children from abuse.[11] In 2009, the National Disability Rights Network[12] issued the first of three reports chronicling the wide variety of injuries and deaths that have occurred as a result of the use of seclusion and restraints, followed by similar efforts from the Council of Parent Attorneys and Advocates,[13] and the Council for Children with Behavioral Disorders.[14] Even if children suffer no physical harm as the result of the use of seclusion and restraints, studies have shown they remain severely traumatized and may even experience post-traumatic stress disorder.[15] As a result of their experiences, children who have been restrained have reported nightmares, anxiety, and mistrust of adults in authority.[16] Students who are forced into unmonitored seclusion may

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[10] Joseph B. Ryan & Reece L. Peterson, *Physical Restraint in School*, 29 J. COUNS. FOR CHILD. BEHAV. DISORDERS 154, 158 (2004).

[11] TASH AND THE ALLIANCE TO PREVENT RESTRAINT, AVERSIVE INTERVENTIONS, AND SECLUSION, IN THE NAME OF TREATMENT: A PARENT'S GUIDE TO PROTECTING YOUR CHILD FROM THE USE OF RESTRAINT, AVERSIVE INTERVENTIONS, AND SECLUSION (2nd ed. 2008), *available at* http://66.147.244.209/~tashorg/wp-content/uploads/2011/01/APRAIS_In-the-Name-of-Treatmentfinal.pdf [hereinafter TASH].

[12] The National Disability Rights Network is the national membership association for the Protection and Advocacy (P&A) System, the nationwide network of congressionally-mandated agencies that advocate on behalf of persons with disabilities in every state, the District of Columbia, Puerto Rico, U.S. territories (American Samoa, Guam, U.S. Virgin Islands, and the Northern Marianas Islands), and for Native Americans in the Four Corners region. Collectively, the P&A agencies are the largest provider of legally-based advocacy services for persons with disabilities in the United States.

[13] The Council of Parent Attorneys and Advocates (COPAA) is an independent, nonprofit organization of attorneys, advocates, parents, and related professionals who work to protect the civil rights of students with disabilities.

[14] The Council for Children with Behavioral Disorders (CCBD) is an international community of educators which advocates for a vision of special education for children and youth with or at risk of emotional and behavioral disorders. Note that in addition to the National Disability Rights Network and Council of Parent Attorneys and Advocates reports, other examples include: TASH, *supra* note 11; NDRN, *supra* note 3; JESSICA BUTLER, COUNCIL OF PARENT ATTORNEYS & ADVOCATES, UNSAFE IN THE: ABUSE OF CHILDREN WITH DISABILITIES (2009), *available at* http://c.ymcdn.com/sites/www.copaa.org/resource/collection/662B1866-952D-41FA-B7F3-D3CF68639918/UnsafeCOPAAMay_27_2009.pdf; Council for Children with Behavioral Disorders, *Position Summary on the Use of Physical Restraint Procedures in School Settings*, 34 BEHAV. DISORDERS 223 (2009) [hereinafter CCBD]; Council for Children with Behavioral Disorders, *Position Summary on the Use of Seclusion in School Settings*, 34 BEHAV. DISORDERS 235 (2009).

[15] CCBD, *supra* note 14; *see also* NDRN, *supra* note 3 (compiling research on harmful effects of seclusion and restraint).

[16] David M. Day, *Review of the Literature on Restraints and Seclusion with Children and Youth: Toward the Development of a Perspective in Practice* (2000).

also suffer psychological harm, including feelings of anger, depression, humiliation, despair, and delusion.[17]

Despite such adverse consequences, some school administrators advocate the use of seclusion and restraints in schools. The National School Boards Association has asserted that local school boards need maximum flexibility to implement seclusion and restraints, noting that prohibiting the use of these practices "would fail to recognize the need to be able to respond to certain unanticipated circumstances that threaten the safety and welfare of others."[18] In March 2012, the American Association of School Administrators (AASA) issued a report asserting the use of seclusion and restraints protects students and school personnel.[19] Specifically, the AASA report states "the use of seclusion and restraint has enabled many students with serious emotional or behavioral conditions to be educated not only within our public schools, but also in the least restrictive and safest environments possible."

Students who are forced into unmonitored seclusion may also suffer psychological harm, including feelings of anger, depression, humiliation, despair, and delusion.

Professional Shift to Positive Behavior Interventions and Supports: Notwithstanding these policy positions, there has been a clear shift away from attempting to control students' behavior with aversive techniques in favor of teaching students replacement behaviors through positive behavioral interventions and supports (PBIS).[20] PBIS is an evidence-based, data-driven framework proven to reduce disciplinary incidents, increase a school's sense of safety, and support improved academic outcomes for all students. More than 19,000 of the approximately 100,000 U.S. public schools are implementing PBIS and saving countless instructional hours otherwise lost to discipline. In the U.S. Department of Education's January 2014 document titled *Guiding Principles of Reform to Improve School Climate and Discipline*, the Department states explicitly that "restraint and seclusion should *never* be used for punishment or discipline."[21] Further, the Department's guidance emphasizes the planning, implementation, and monitoring of preventative measures that create positive academic learning environments, are able to address the individual needs of students, and provide teachers and other school personnel with the skills and knowledge to identify the variable that will reduce challenging behaviors in students.

The premise of PBIS is that engaging instruction, combined with acknowledgement or feedback of positive student behavior, reduces the need for unnecessary discipline and promotes a climate of greater

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[17] Linda M. Finke, *The Use of Seclusion is Not Evidence-Based Practice*, 14 J. OF CHILD AND ADOLESCENT PSYCHIATRIC NURSING 186 (2001).

[18] *Beyond Seclusion and Restraint: Creating Positive Learning Environments for All Students: Hearing Before the S. Comm. on Health, Education, Labor & Pensions*, 112th Cong. (2012) (statement of Michael A. Resnick, Associate Executive Director, National School Boards Association).

[19] SASHA PUDELESKI, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, KEEPING SCHOOLS SAFE: HOW SECLUSION AND RESTRAINT PROTECTS STUDENTS AND SCHOOL PERSONNEL (2012), http://www.aasa.org/uploadedFiles/Resources/Tool_Kits/AASA-Keeping-Schools-Safe.pdf.

[20] Julie B. Fogt & Christine M. D. Piripavel, *Positive School-Wide Interventions for Eliminating Physical Restraint and Exclusion*, 10 RECLAIMING CHILDREN AND YOUTH 227 (2002).

[21] U.S. DEP'T OF EDUC., GUIDING PRINCIPLES OF REFORM TO IMPROVE SCHOOL CLIMATE AND DISCIPLINE (2014), *available at* http://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf.

productivity, safety, and learning. [22] PBIS schools apply a multi-tiered approach to prevention, using disciplinary data and principles of behavior analysis to develop school-wide, targeted and individualized interventions and supports to improve school climate for all students. The PBIS framework has been extremely successful. One Virginia public school coordinator has noted that if positive intervention to reverse a negative behavior pattern occurs before third grade, the chances that the student will go on to successful participation in future grades without requiring extensive support improve dramatically. This means that a student who needs a highly individualized daily routine and many special modifications to make it through the day in first grade often requires no support by middle school.[23] Similarly, the director of a school in Pennsylvania for children with significant behavior challenges reported using PBIS to reduce the use of physical restraint from approximately 1,000 incidents per year in 1998 to only three incidents total in 2012.[24]

In addition to reducing the incidence of challenging behavior events in schools, PBIS also increases the engagement of all students in the academic environment. The emphasis on improving the classroom climate to positively involve all students increases student academic achievement and reduces emergency behavioral interventions with students, yielding increased instructional time for all students. It has also proven to increase the ability of a school or district to use inclusive instructional practices for students with disabilities, thus reducing the need for segregated classes.

Federal regulations govern the use of seclusion and restraints in virtually every type of institution, including hospitals, nursing homes, and psychiatric facilities, but none apply to schools.

Current Federal and State Laws: While most advocates and behavior specialists have denounced the use of seclusion and restraints, the law has been slow to catch up. In fact, federal regulations govern the use of seclusion and restraints in virtually every type of institution, including hospitals, nursing homes, and psychiatric facilities, but none apply to schools. In particular, the Centers for Medicare & Medicaid Services (CMS) has issued regulations regarding the use of seclusion and restraints on patients of hospitals and other treatment facilities that participate in the Medicare and Medicaid programs.[25] For example, regulations governing psychiatric residential treatment facilities providing inpatient services for individuals under age twenty-one specifically state that each resident has the right to be free from restraint or seclusion, of any form, used as a means of coercion, discipline, convenience, or retaliation. In addition to CMS's regulations, the Children's Health Act of 2000[26] amended Title V of the Public Health Service Act to regulate the use of seclusion and restraints on residents of certain hospitals and health care facilities that receive any type of federal funds, as well as on

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[22] *National Technical Assistance Center on Positive Behavioral Interventions and Supports*, OFFICE OF SPECIAL EDUCATION PROGRAMS, U.S. DEP'T OF ED., http://www.pbis.org/.

[23] *Beyond Seclusion and Restraint: Creating Positive Learning Environments for All Students: Hearing Before the S. Comm. on Health, Education, Labor & Pensions*, 112th Cong. (2012) (statement of Cyndi Pitonyak, Coordinator, Positive Behavior Interventions and Supports, Montgomery County Public Schools).

[24] *Beyond Seclusion and Restraint: Creating Positive Learning Environments for All Students: Hearing Before the S. Comm. on Health, Education, Labor & Pensions*, 112th Cong. (2012) (statement of Michael George, Director, Centennial School of Lehigh University).

[25] 71 Fed. Reg. 71,368 (Dec. 8, 2006) (to be codified at 42 C.F.R. pt. 482), *available at* http://www.ndrn.org/images/Documents/Issues/Restraint_and_Seclusions/NDRN_Final_Rule.pdf.

[26] Children's Health Act, Pub. L. 106-310, 114 Stat. 1101 (2000).

children in certain residential, non-medical, community-based facilities that receive funds under the Public Health Service Act. Many states also restrict the use of seclusion and restraints on children incarcerated in juvenile justice facilities.[27]

Only eighteen states require schools to notify parents about the use of seclusion and restraints.

Section 504 of the Rehabilitation Act of 1973[28] and the Americans with Disabilities Act (ADA) of 1990[29] broadly prohibit discrimination against individuals with disabilities. The Individuals with Disabilities Education Act (IDEA) requires that children with disabilities receive a free appropriate public education (FAPE) in the least restrictive environment.[30] IDEA also mandates that students in special education have an Individualized Education Program (IEP), a written document that, in part, explains the educational goals of the student and the types of services to be provided. IDEA specifically states that, in development of an IEP for "a child whose behavior impedes the child's learning or that of others," the IEP team is to consider "the use of positive behavioral interventions and supports, and other strategies."

Development of an IEP is a joint process between school personnel and the child's family, with both family and school personnel agreeing to services and supports to address the student's needs to meet academic goals. The services and supports identified are typically therapies such as speech-language intervention or specialized instruction. While some states allow for the mention of seclusion or restraints in a child's IEP (e.g., North Carolina), seclusion and restraints are not considered pedagogical strategies or instructional approaches. As outlined by the U.S. Department of Education in their 2012 publication, *Restraint and Seclusion: Resource Document*,[31] restraint and seclusion "should not be implemented except in situations where a child's behavior poses imminent danger of serious physical harm to self or others and not as a routine strategy implemented to address instructional problems or inappropriate behavior." The document emphasizes that seclusion and restraints should not be used "as a means of coercion or retaliation." Thus, seclusion and restraints are not instructional procedures and should only be used in emergency situations, making them inappropriate for inclusion in educational plans.

At the state level, laws and regulations vary widely. As of January 2013, nineteen states have laws providing meaningful protections against restraint and seclusion for all children, while thirty-two have such laws for children with disabilities.[32] But even among states with meaningful laws, requirements are

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[27] U.S. DEP'T OF EDUC., SUMMARY OF SECLUSION AND RESTRAINT STATUTES, REGULATIONS, POLICIES AND GUIDANCE, BY STATE AND TERRITORY: INFORMATION AS REPORTED TO THE REGIONAL COMPREHENSIVE CENTERS AND GATHERED FROM OTHER SOURCES, *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCYQFjAA&url=http%3A%2F%2Fwww2.ed.gov%2Fpolicy%2Fseclusion%2Fsummary-by-state.doc&ei=mnjmUsj0HI7jsASnwIKoAg&usg=AFQjCNG2OY5piio1U35orUmypi992PCkZg&bvm=bv.59930103,d.cWc.

[28] Rehabilitation Act, Pub. L. 93-112 § 504, 87 Stat. 355 (1973).

[29] Americans with Disabilities Act, Pub. L. 101-336, 104 Stat. 327 (1990).

[30] 20 U.S.C. §1400 et seq. (1990).

[31] RESOURCE DOCUMENT, *supra* note *5*.

[32] *See* JESSICA BUTLER, HOW SAFE IS THE SCHOOLHOUSE? AN ANALYSIS OF STATE SECLUSION AND RESTRAINT LAWS AND POLICIES 1 (2014), *available at* http://autcom.org/pdf/HowSafeSchoolhouse.pdf [hereinafter

inconsistent. For example, only thirteen states limit the use of restraint for all children to emergencies threatening physical harm. Only eleven states provide that unmonitored seclusion may only occur in an emergency situation. Restraints that impede breathing are forbidden for use on all children by law in only twenty states. Perhaps most disturbing, only eighteen states require schools to notify parents about the use of seclusion and restraints.

Congressional and Federal Action: In May 2009, the U.S. Government Accountability Office (GAO) testified at the request of the United States House of Representatives Committee on Education and the Workforce on the results of its investigation of ten seclusion and restraints cases in which there was a criminal conviction, a finding of civil or administrative liability, or a large financial settlement against a school or teacher. GAO identified the following main issues related to the use of seclusion and restraints in schools: (1) seclusion and restraints were typically used on children with disabilities, often in cases where they were not physically aggressive and their parents did not give consent; (2) restraints that block air to the lungs can be deadly; (3) teachers and staff were often not trained on the use of seclusion and restraints; and (4) despite convictions and findings of liability, teachers and staff held responsible for inappropriate use of seclusion and restraints continued to be employed at schools. GAO also found there was no single entity responsible for collecting nationwide data on the use of restraints and seclusion.

As a result this hearing, Secretary of Education Arne Duncan sent letters to Chief State School Officers encouraging each state to review its current policies regarding the use of seclusions and restraints in schools and, if appropriate, to develop or revise the policies prior to the start of the 2009 to 2010 school year. In addition, Education's OCR for the first time required school districts to begin collecting and reporting data on the use of seclusion and restraints for all students at the school and district level. OCR released the first round of data in September 2011 and March 2012, which showed that almost 40,000 incidents of physical restraint and a little over 25,000 incidents of seclusion occurred in schools nationwide during the 2009-2010 school year.[33] Seventy percent of those restraint incidents involved children with disabilities.[34] The OCR data also showed a disproportionate use of restraint and seclusion by schools with students of color.[35]

While Education's national data collection effort is an important first step, advocates note that seclusion and restraints issues are chronically underreported and that the data that is collected is not standardized. For example, multiple incidents involving the same child may be reported separately, making it is difficult to compare incident rates. Moreover, while the total number of incidents of seclusion and restraints appears to be relatively small given that there are around 55 million schoolchildren in the U.S., fifteen percent of school districts failed to report any information at all on the use of these practices. In fact, three of the largest school districts in the nation, Los Angeles, New York, and Miami, reported no incidents of seclusion or restraints, despite a combined enrollment of 1.9 million students. Additionally, the data obtained appears inconsistent. For example, Connecticut, whose student population totals about 563,000, reported to OCR about 6,000 uses of seclusion or restraints for the 2009-2010 school year. However, data

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SCHOOLHOUSE] (showing comprehensive assessment of laws and regulations in all 50 states and the District of Columbia).

[33] *Transformed Civil Rights Data Collection (CRDC)*, OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf.

[34] Nirvi Shah, *Feds Share Largest Collection of Student Restraint, Seclusion Data*, EDUC. WEEK, (March 7, 2012, 9:04 AM), http://blogs.edweek.org/edweek/speced/2012/03/education_department_shares_la.html.

[35] *Data Collection*, *supra* note 7.

collected by Connecticut's own Department of Education found 18,000 incidents of seclusion and restraints during the same time period. Furthermore, California, whose school population is greater than six million students, reported 21,000 incidents—only about 3,000 more than reported by the Connecticut Department of Education.[36]

In its 2012 resource document, the Department of Education, in collaboration with the Substance Abuse and Mental Health Services Administration (SAMHSA), also issued fifteen principles for schools to consider when developing policies related to the use of restraint and seclusion. Among these are the following:

- every effort should be made to prevent the need for the use of restraint and seclusion;
- restraint or seclusion should never be used as punishment;
- restraint or seclusion should not be used except in situations where the child's behavior poses imminent danger of serious physical harm to self or others;
- behavioral strategies to address dangerous behavior that results in the use of restraint or seclusion should address the underlying cause or purpose of the dangerous behavior;
- every instance in which restraint or seclusion is used should be carefully, continuously and visually monitored;
- teachers and other personnel should be trained regularly on the appropriate use of effective alternatives to physical restraint and seclusion, such as positive behavioral interventions and supports; and
- parents should be notified as soon as possible following each instance in which restraint or seclusion is used with their child.[37]

Following the issuance of the guidance, in July 2012, Chairman Harkin convened a hearing titled *Beyond Seclusion and Restraint: Creating Positive Learning Environments for All Students* to examine important positive behavioral support programs that had greatly reduced the use of seclusion and restraints. The panel of witnesses emphasized the use of strategies, interventions and instructional techniques that reduced or eliminated challenging behaviors and prevented situations where seclusion or restraints might be used in emergencies.

Proposed Legislation: In December 2009, following the GAO testimony before the House Committee on Education and the Workforce, Congressman George Miller and Senator Chris Dodd introduced the first national seclusion and restraints bill, ultimately named the Keeping All Students Safe Act.[38] The Act passed the House on March 3, 2010, with a vote of 262 to 153, but did not pass the Senate. Similar bills were introduced in the 112th Congress by Chairman Harkin and Congressman Miller that sought to (1) prohibit the use of certain types of restraints (mechanical and chemical) and limit the use of the most dangerous type of physical restraint to cases where there is imminent danger of physical injury to the student or others at school; (2) similarly limit—or, in the Senate bill, ban—the use of seclusion; (3)

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[36] Colleen Shaddox, *Use Of Student Restraints, Seclusions Tops 18,000,* C-HIT.ORG (DEC. 6, 2010, 9:55 AM), http://www.ct.gov/opapd/lib/opapd/documents/adobe/testimony_2011/12-7-10student_restraints.pdf.
[37] *See* RESOURCE DOCUMENT, *supra* note 5 (providing complete listing of all 15 principles).
[38] Keeping All Students Safe Act, H.R. 4247, 111th Cong. (2010).

provide parameters for use in emergency situations; (4) promote the use of positive reinforcement and other, less restrictive behavioral interventions in school; and (5) require parental notification, training and the collection of nationwide data.

Overview of Profiled Cases

The Committee's review of cases involving seclusion and restraint practices serious enough for families to bring a court case makes clear that children, especially those with disabilities, are still being secluded and restrained in schools across the nation, despite an increased awareness of the dangers associated with these practices. Although the evidence obtained by conducting these case reviews is largely anecdotal, the information provides an important perspective on the hurdles families encounter when seeking to stop the use of harmful seclusion and restraints or seek redress for practices that have resulted in death, injury, and psychological or emotional harm. Allegations are not the same as proof of wrongdoing. However, if only a fraction of the allegations reported by the families of children who have been secluded or restrained are true, it is clear that there is an ongoing need to prevent and reduce the use of these ineffective practices and to implement preventative strategies and positive interventions.

The review shows that parents and advocates who challenge the use of seclusion and restraints face inconsistent results. In some cases, similar factual situations end up with completely different results, depending on the state in which the case occurs and the underlying legal claims. For example, an Iowa court found the repeated use of a seclusion room constituted a denial of FAPE, while a Georgia court found the similar use of such a room did not constitute "deliberate indifference" to a child's well-being, even though school officials knew the child was suicidal. In other cases, extensive media coverage prompted school districts to offer financial settlements to the families involved and states to take action to ban or limit the use of seclusion and restraints. Further, teachers in two cases faced child abuse charges in criminal courts.

Despite some limited successes, the review makes clear that almost all of the parents and advocates who attempted to challenge the use of seclusion and restraints through administrative complaints or in a civil case did not prevail. Many cases were dismissed at summary judgment, meaning there was no genuine issue of material fact sufficient to justify a trial, i.e., the parents had no chance to argue the merits of their claims. The few parents who did prevail did not necessarily obtain the relief they sought, as few schools admitted wrongdoing or, more critically, changed their policies following the incidents.

Even states that have enacted more stringent laws may still permit seclusion and restraints in situations that do not threaten the safety of students or staff, such as for educational disruptions or damage to physical property. Perhaps most troubling, virtually all of the parents in the examined cases chose to transfer their children to private school to protect them from being subjected to further use of these practices. The fact that the parents were unable to halt the use of these practices directly contradicts IDEA's mandate to provide children with disabilities a free appropriate public education.

As a result of the Committee's review of these cases, five common challenges facing families emerged: (1) the lack of parental notification and limited access to school records and reliable data to document the use of seclusion and restraints, (2) the legal hurdles involved in filing and bringing a case to trial, (3) the difficulty in proving the existence of psychological harm, (4) the deference afforded to school personnel and the tendency for schools to adopt a "code of silence" at the first sign of trouble with a parent, and (5) the failure of existing remedies to offer adequate relief. The following table provides a summary of the ten cases examined; a more detailed narrative on each of the cases and other relevant incidents can be found in Appendix 1.

Table: Summary of Cases

Location and Victim	Description of Incident	Outcome and Other Developments
• Connecticut public school • Multiple grade-school children with disabilities	• Teachers isolated "disruptive" children closet-sized "scream rooms" with concrete walls. • Other children complained of hearing loud noises and cries coming from the rooms. • Building custodians reported having to clean up blood and urine from the floors and walls.	• Media coverage prompted various investigations by state agencies and a new state law. The school took corrective actions as a result. • State law still allows schools to use seclusion for any reason. Subsequent to enactment of the state law, a parent told the Committee staff she sent her daughter to private school after a public school repeatedly secluded her daughter in a cell-like room.
• Florida public school • 12-year-old boy with developmental disabilities	• Teachers restrained the child at least 89 times over the course of 14 months, including 27 face-down restraints. • Parents maintain the school did not notify them about the incidents.	• Court dismissed the parents' case against the school district, in part because it did not find that the school's actions showed sufficient indifference to the child's right to an education. • Parents moved child to a private school.
• Georgia "psychoeducational" school • 13-year-old boy with depression and ADHD	• After repeatedly being left alone for hours in a room that looked like a prison cell, and stating his intention to harm himself on two separate occasions, the boy committed suicide by hanging himself with a rope that a teacher gave him to hold up his pants. • Parents maintain they were never made aware that their son had made suicidal comments, or even that he was secluded.	• Court found that the actions of the school and staff involved did not constitute "deliberate indifference" to the child's well-being, even though evidence showed they knew he had made previous threats to harm himself. • Media coverage prompted state to ban use of seclusion for all children.
• Iowa public school • 8-year-old girl with autism and other disabilities	• The child was sent to a converted storage area under a staircase to calm aggression about 100 times between September and December 2005, as many as 5 times in a single day. • At other times, multiple adults forcibly restrained the child to quiet her. • The school district claimed that it had used "established educational principles" to address the child's disabilities.	• An administrative law judge found that as a result of extensive use of seclusion, the school failed to provide the child with FAPE, but the school district was not required to change its policies. • A new state law was subsequently enacted but Iowa still allows seclusion for educational disruptions. Thus, tantrums like the type exhibited by this child might still result in seclusion.
• Louisiana charter school • 7-year-old boy, with PTSD and ADHD	• Child was called to principal's office for an unspecified behavior issue and in response the principal and assistant principal attempted to lock him in closet. • Principal called the police, who held the boy down with excessive force and handcuffed him.	• The mother's claims were dismissed on the grounds of state sovereign immunity and qualified immunity. • Mother transferred child to a different school.

Location and Victim	Description of Incident	Outcome and Other Developments
• Minnesota public school • 8-year-old girl with communication, attentional, and hyperactivity disorders	• Teacher reportedly secluded girl 44 times in one school year, despite objections from the mother and an independent behavior consultant. • During one incident, the teacher forced the girl into a seclusion room while she was on her way to the bathroom, causing the child to urinate on herself.	• Administrative law judge dismissed claim because parent failed to exhaust IDEA's administrative hearing process when she removed the child to a private school. • Eighth Circuit upheld that decision, effectively ruling that children must remain in the environment where seclusion and restraints are being practiced in order to successfully demonstrate that they are being denied FAPE.
• New York public school • 15-year-old boy with multiple developmental disabilities	• Child was repeatedly confined in a padded 5 by 6 foot chamber • Although parents sharply dispute that they ever agreed to the use of such a practice, school records indicated that they had been informed.	• District court dismissed most of the parents' claims, finding qualified immunity, a lack of evidence, and a failure to show that remedies received through the administrative process were inadequate. • Parents transferred child to a private school.
• North Carolina public school • 18 elementary school children with disabilities	• Mother of one of the children agreed to restraint only if her 5-year-old daughter became aggressive. • She discovered her daughter strapped to a chair even she was not showing signs of aggression. • Mother believes the girl was restrained over ninety percent of the time at school.	• Education's Office of Civil Rights found multiple violations including incomplete or insufficient IEPs and lack of parental notification. • School district agreed to train its employees on the use of restraints and proper documentation requirements, but did not admit to any improper use of restraints. • Although school developed training, it is no longer compelled to require any of the school personnel to take it.
• Pennsylvania public school • Seven children with disabilities, ages 5-11	• A special education teacher subjected students to a range of abuse, from hitting them and pulling their hair to strapping them to chairs with duct tape and bungee cords. • School administrators had been warned on multiple occasions about the teacher's conduct, but took no action.	• Parents won a $5 million settlement against the school district although the school made no admission of wrongdoing. • District court dismissed parents' civil claims, finding in part that they had not exhausted their administrative burden and that the school administrators' actions didn't amount to negligence.
• Tennessee public school • Multiple elementary school children with disabilities	• A special education teacher allegedly committed a number of abusive acts against children in her special education class, including strapping the children to toilets, restraining them with weighted blankets, and force feeding them until they vomited. • Parents of several families filed separate lawsuits against school district and teacher.	• Teacher pled no contest to child abuse charges, received six years of probation, and lost her teaching license. • Parents' civil claims were dismissed. In part, courts found the teacher's actions were not "brutal and inhumane." • Courts ruled in favor of school and teacher in all subsequent litigation, citing lack of evidence and deficient filings. Parents were also sanctioned for filing frivolous claims.

Lack of Parental Notification and Limited Access to School Records and Reliable Data

Perhaps the most significant challenge parents face in successfully resolving the use of seclusion and restraints practices is the lack of notification and access to reliable records about the practices. Long before parents consider bringing a case to court, the first step in challenging the use of seclusion and restraints in schools is gathering evidence to show that a problem exists. However, the children involved in these cases frequently cannot communicate their pain and suffering due to their age, their emotional distress, or their disabilities. While eighteen states now have mandatory parental notification requirements with regard to the use of both seclusion and restraints for all children, this notification does not always occur. [39] Beginning in 2009, the Department of Education also requires school districts to collect and report data on the use of seclusion and restraints for all students at the school and district level. Even with this new focus on reporting, data is often not available or reliable. As a result, parents and advocates have difficulty determining whether school districts are exhibiting a pattern of inappropriate use, indicating a systemic problem.

A common theme that emerged in the profiled cases was that the children involved were not able to clearly explain how they were being treated at school. Compounding this problem is the fact that parents believe they were not properly notified and the incidents were not adequately documented. By the time parents became fully aware of what was going on in their child's classroom, it was difficult to prove they didn't consent to the practices. The following examples from the profiled cases show the difficulties parents face:

- A teen in Florida was repeatedly secluded and restrained using dangerous, painful, face-down restraints but could not tell his parents because of his disabilities and limited ability to communicate. His parents stated that the school never notified them about these incidents and that they only discovered what had occurred when his emotional outbursts became so debilitating that he had to be removed from the school. When the parents sought the logs that the school used to document seclusion and restraints, the logs were incomplete or missing entirely. The parents' attorney believes that without full documentation of all the incidents, it was impossible to substantiate the parents' claims that the school had been indifferent to their child's suffering.

- In New York, parents discovered their fifteen-year-old son alone and crying in a locked seclusion room at his school. The teen had extensive developmental disabilities, including impaired language and communication skills. His only way of telling his parents that something was wrong was to repeatedly say "no blue room," which they later realized was a reference to the seclusion room's blue padded walls. Even though court documents show the parents sharply dispute that they ever agreed to the use of such a practice, school records indicated that they had been informed. Further, the parents believed that their son was secluded many more times than acknowledged by the school, but no documentation was found to support that assertion.

- A Connecticut school secluded a seven-year-old with limited speech in a cinderblock room on multiple occasions over several months. The girl's mother never consented to this practice and

[39] Specifically, thirty states lack laws requiring that parents of all children be informed of restraint and/or seclusion; nineteen lack them for children with disabilities. *See* SCHOOLHOUSE, *supra* note 32.

was shocked to find that use of the room was mentioned in her daughter's IEP. She stated that while she may have agreed to try brief "time-outs," nobody showed her or her husband the seclusion room to be used or explained the kind of open-ended isolation that the school used. The mother reports that the school continued to seclude the girl after she complained, claiming that it was beneficial for her daughter's condition. Connecticut advocates reported that many parents in the state report being left out of IEP discussions, despite the fact that IDEA requires parents to be part of the IEP team.

- In North Carolina, the mother of a five-year-old girl with autism and other developmental disabilities agreed to the use of restraints only in the event that her daughter became aggressive. However, after a visit with teachers, she discovered that her daughter had been left alone and strapped to chair, even though she had shown no signs of aggressive behavior. Although the mother believed her daughter was restrained over ninety percent of the time she was at school, the school denied restraining the child on a regular basis. The school eventually released records showing that the IEPs of multiple special education students did not accurately discuss the types of interventions being used or were otherwise incomplete. Representatives from Disability Rights North Carolina stated that parents cannot regularly access schools' seclusion and restraints records.

The difficulties parents face in accessing school records are the symptom of a larger problem: the lack of reliable data on the use of seclusion and restraints at the district level. The Department of Education has noted collecting data helps teachers and administrators to determine the frequency of use of seclusion and restraints and to implement alternative practices, such as PBIS, when needed.[40] The Department has also stated each incident of the use of restraint and of the use of seclusion should be properly documented for the main purposes of preventing future need for the use of restraint or seclusion and creating a record for consideration when developing a plan to address the student's needs and staff training needs. Advocates and experts strongly agree and call for access to better data so they can look systematically for problems across school districts. However, despite the Department's mandatory reporting requirements, advocates note that seclusion and restraints issues are chronically underreported. For example, three of the largest school districts in the nation—Los Angeles, New York, and Miami—reported no incidents of seclusion or restraints, despite a combined enrollment of 1.9 million students. Advocates also report the data they do get is not standardized so it is difficult to compare. At the state level, there are eighteen states with some laws requiring annual data collection, but since laws governing the use of the practices vary so widely there is little consistency across states in collecting data.

There is evidence to suggest the existence of reliable data spurs states to limit or prohibit the use of seclusion and restraints.

There is evidence to suggest the existence of reliable data spurs states to limit or prohibit the use of seclusion and restraints. For example, Connecticut's Department of Education reported that their 2010 seclusion and restraints incident numbers "sparked a change in guidelines" regarding the proper reporting of incidents of seclusion and restraints.[41] In reaction to the number of incidents, officials also sought a $5

[40] RESOURCE DOCUMENT, *supra* note 5.
[41] Jordan Fenster, *Connecticut Education Department data shows 18,000 instances of restraint or seclusion in 2009-10*, NEW HAVEN REGISTER (Jan. 26, 2012, 12:00 AM), http://www.nhregister.com/general-

million PBIS allocation and formed an advisory council to develop additional behavioral support training for school personnel.

Furthermore, Florida's Orange County school district eliminated the use of seclusion and reduced the use of restraint as a result of analyzing 2010 state data.[42] Florida advocates said this data collection requirement is leading to changes throughout the state because the state Department of Education posts data about restraint usage on a website and these postings have caused other counties to reevaluate their policies. Advocates also note the state department solicits feedback from students in conjunction with the data collection, instead of relying entirely on teachers and school district officials to report incidents. Finally, a state advisory committee meets twice per year so the department can provide an analysis of its data collection efforts.

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news/20120126/connecticut-education-department-data-shows-18000-instances-of-restraint-or-seclusion-in-2009-10.

[42] SCHOOLHOUSE, *supra* note 32 (citing Lauren Roth, *Orange County Schools Still Restrain the Most Students*, ORLANDO SENTINEL (Aug. 26, 2012, 2:33 PM), *available at* http://articles.orlandosentinel.com/2012-08-26/news/os-orange-florida-restraint-seclusion-20120825_1_restraint-and-seclusion-orange-schools-superintendent-barbara-jenkins).

Legal Hurdles

Parents typically try to resolve seclusion and restraint issues by attempting to work directly with teachers, behavior specialists, and school administrators. The parents contacted by the Committee staff, all of whom filed lawsuits, initially sought only to stop the practices being used on their child. When parents cannot resolve the use of these practices themselves, parents may contact the protection and advocacy (P&A)[43] agency in their state or another nonprofit group for assistance. In many instances, P&A staff report being able to negotiate successful outcomes for parents, especially if they have a positive relationship with the school district.

However, when parents are forced to use the legal system to attempt to stop the use of these practices, move the child to a different school, or seek redress for physical and emotional damage resulting from the use of these practices, they have no clear path under current law. The cases reviewed by Committee staff indicate that if school officials are not receptive, parents are left with few options other than legal action. Parents who pursue civil suits find the legal system itself presents a variety of obstacles. First, they must overcome procedural requirements and, even then, courts may not offer relief if the court views the teacher's actions as "reasonable," and the child is perceived to receive some educational benefit. Many courts require that the use of seclusion and restraints "shock the conscience" to be considered violations of Constitutional rights, a standard that is highly subjective and often insurmountable.

In general, parents challenge seclusion and restraints cases in civil court by alleging a combination of violations, including denial of free appropriate public education under IDEA, discrimination on the basis of disability in violation of the Rehabilitation Act and the Americans with Disabilities Act, interference with Constitutionally protected rights, and breach of state tort laws such as negligence or false imprisonment.[44] The limitations associated with each of these claims are discussed as follows:

Individuals with Disabilities Education Act (IDEA): To claim a violation of FAPE, parents must file a due process complaint with the local school district or other appropriate educational agency. If no resolution is reached, the case is set for a hearing before an administrative law judge (ALJ).[45] Once this

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[43] P&A agencies have the authority to provide legal representation and other advocacy services to all people with disabilities.

[44] KRISTINE L. SULLIVAN, COUNCIL OF PARENT ATTORNEYS & ADVOCATES, THE RIGHT TO BE SAFE IN SCHOOL (2011) (compiling complete overview of litigation strategies).

[45] *Id*. ("There are two general systems that states use for due process hearings. Some states, such as Delaware, Idaho and South Dakota, are known as 'one-tier states.' Other states, such as Colorado and North Carolina, are known as 'two-tier states.' Each tier represents a level of review. If a student requests a due process hearing in a one-tier state, a hearing officer will review the case. The hearing officer must be an independent officer who is paid by but does not work for the state educational agency. The hearing officer may be an administrative law judge who works for the state's administrative court. The assigned hearing officer will review the case and determine whether the student's rights have been violated. If the student disagrees with the hearing officer's decision, he/she may appeal the decision to state or federal court. The school district may do the same if it disagrees with the decision.

If a student requests a due process hearing in a two-tier state, however, there is a second mandatory level of review that must be used before the student may appeal to state or federal court. If either party disagrees with the hearing officer's decision, it may appeal the decision. The appeal will be reviewed by a state review officer. The review officer is an independent officer who is paid by but does not work for the state educational agency. The review officer must 'conduct an impartial review of the findings and the decision appealed.' The review officer will determine whether the hearing officer's decision was correct.").

process is fully exhausted, the losing party may appeal to a state or federal district court for relief. If parents fail to complete this process, their claims under IDEA may be dismissed even if they have compelling evidence their child was denied FAPE. For example, children in a series of Pennsylvania cases were repeatedly strapped to chairs for hours, prevented from communicating freely, and physically assaulted by their teacher. Though these children were arguably denied FAPE, the court dismissed the parents' IDEA claims for failure to exhaust.[46] If parents have not fully exhausted their IDEA claim, other civil rights claims will also fail.

Decisions from the Eighth Circuit are especially problematic. For example, in the Minnesota case, the mother of a child who was repeatedly secluded could not obtain relief because she removed her child from a school district before requesting an administrative hearing to challenge the use of seclusion and restraints.[47] The mother argued that a teacher had repeatedly restrained and abused her child and that she needed to the remove the girl from the school to protect her. However, the court interpreted the state statute implementing IDEA as requiring the administrative process to occur in the school system that allegedly denied FAPE. The district court dismissed the mother's IDEA claim and the Eighth Circuit Court of Appeals upheld the decision, citing a precedent that a FAPE-based challenge becomes irrelevant once a child transfers to a new district, even if he or she was in an "intolerable situation." In other words, in the Eighth Circuit, a child must remain in an abusive environment to prevail in an IDEA lawsuit against a school. This ruling led the parents' attorney to comment that, with regard to protecting children, "all of the systems that are supposed to be in place, at least in Minnesota, are broken."

In other words, in the Eighth Circuit, a child must remain in an abusive environment to prevail in an IDEA lawsuit against a school.

Even if parents can meet IDEA's administrative requirements, many ALJs and federal district court judges have found that seclusion and restraint do not constitute a denial of FAPE, especially if the use is seen as "reasonable" and the child continues to receive *some* educational (academic) benefit. For example, in a 2003 case, a court held 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.[48]

Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 (ADA): Congress enacted Section 504 of the Rehabilitation Act and the ADA to protect the civil rights of individuals with disabilities.[49] Section 504 prohibits recipients of federal funding, including local school

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[46] Vicky M. and Darin M. v. Ne. Educ. Intermediate Unit 19, 486 F.Supp.2d 437 (M.D. Pa. 2007); Joseph M. v. Ne. Educ. Intermediate Unit 19, 516 F.Supp.2d 424 (M.D. Pa. 2007); Kimberly F. v. Ne. Educ. Intermediate Unit 19, 2007 U.S. Dist. LEXIS 35778 (M.D. Pa. May 15, 2007); Eva L. v. Ne. Educ. Intermediate Unit 19, 2007 U.S. Dist. LEXIS 35787 (M.D. Pa. May 15, 2007); John G. and Gloria G. v. Ne. Educ. Intermediate Unit 19, 2007 U.S. Dist. LEXIS 35786 (M.D. Pa. May 15, 2007); Sanford D. v. Ne. Educ. Intermediate Unit 19, 2007 U.S. Dist. LEXIS 35776 (M.D. Pa. May 15, 2007); Thomas R. v. Ne. Educ. Intermediate Unit 19, 2007 U.S. Dist. LEXIS 8017 (M.D. Pa. May 15, 2007); NANCY LEE JONES & JODY FEDER, CONG. RESEARCH SERV., THE USE OF SECLUSION AND RESTRAINT IN PUBLIC SCHOOLS: THE LEGAL ISSUES (2009), *available at* http://www.spannj.org/information/CRS_Report_on_Legal_Issues_in_Seclusion_&_Restraints.pdf.

[47] CJN v. Minneapolis Pub. Sch., 323 F.3d 630 (8th Cir. 2003), *cert. denied* 540 U.S. 984 (2003).

[48] *Id.* at 634.

[49] Rehabilitation Act, Pub. L. 93-112 § 504, 87 Stat. 355 (1973).

districts, from engaging in discrimination, and Title II of the ADA similarly prohibits all state and local entities from discriminating against individuals with disabilities. IDEA expressly allows students to bring a civil action against the school districts not only for violations of IDEA but also for violations of civil rights under Section 504 and the ADA, provided students first exhaust their IDEA remedies before filing their civil actions in court. The parents in the profiled Minnesota, Pennsylvania, and Tennessee cases had their Section 504 or ADA claim dismissed for this reason. Some circuit courts have developed an exception to this rule: parents do not have to fully exhaust their IDEA claim if the relief they are seeking is not available under IDEA.

Constitutional Claims: Parents and attorneys seeking to address the use of seclusion and restraints by school personnel have based challenges on the Fourteenth Amendment's guarantee of due process and the Fourth Amendment's prohibition against unreasonable seizures.[50] The Fourteenth Amendment prohibits the government from depriving an individual of liberty without due process of law. In the public school setting, due process challenges to the use of seclusion and restraints have generally been rejected if such tactics are deemed reasonable, and ironically, reasonableness has often turned on whether the use of these practices constitutes a routine disciplinary technique. Courts are more likely to find the use of seclusion and restraints to be unreasonable if the use of the practices is so extreme that that it "shocks the conscience." For example, in 1996, a district court permitted a due process claim when a school placed children in a storage closet for an entire day without access to lunch or a toilet facility.[51]

However, this standard is both subjective and often insurmountable. More recently, in the Florida case reviewed by Committee staff, the parents' substantive due process claim was dismissed when the court found the school's repeated use of prone restraints and seclusion without parental consent did not meet the "conscience-shocking" standard. The parents of a fourteen-year-old boy in a Georgia case failed to sustain Fourteenth Amendment claims. The court found that the school had not been "deliberately indifferent" even though the student was left in an unsupervised, locked seclusion room for hours with a rope staff had provided him to use as a belt, and logs showed that he had threatened to harm himself on at least two occasions when he had been forced into the seclusion room. The student then hanged himself in the seclusion room.

Parents have also filed claims based on the Fourth Amendment protection against unreasonable searches and seizures. Although courts have generally recognized that the Fourth Amendment applies to the use of seclusion and restraints, most of these claims have been unsuccessful. When parents bring such claims, they must first show their child's freedom of movement was restricted by force or show of authority and the child reasonably believed that he or she was not free to move. The courts will then consider the reasonableness of the seclusion or restraints. However, demonstrating a seclusion or restraint is an unreasonable seizure has proven very difficult, particularly if the practices are authorized in an IEP. For example, in the Minnesota case, the teacher forced the child to sit at a "thinking desk" and secluded her to prevent her from using the bathroom, but the court found these actions were reasonable given the IEP authorized the use of seclusion and restraints when she exhibited certain behaviors. Although the mother

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[50] C.N. v. Willmar Pub. Sch. Dist., 591 F.3d 624, 627 (8th Cir. 2010) ("As relevant to this appeal, C.N. asserted federal claims under the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act and 42 U.S.C. § 1983 for violations of the Fourth and Fourteenth Amendments.").

[51] Orange v. County of Grundy, 950 F. Supp. 1365 (E.D. Tenn. 1996) ("The court is of the opinion that placing school children in isolation for an entire school day without access to lunch or a toilet facility 'shocks the conscience.'"(Rochin v. California, 342 U.S. 165, 172 (1952)).

consistently maintains that she requested in writing the teacher stop using these practices, the court found the teacher did not substantially depart from accepted professional judgment.

Few state laws or regulations provide parents with an effective enforcement mechanism regarding the use of seclusion and restraints.

State Laws: Many states now have laws or regulations governing the use of seclusion and restraints, but these laws have not had a discernable impact on resolution of these cases to date. Few state laws or regulations provide parents with an effective enforcement mechanism regarding the use of seclusion and restraints. Although parents can bring tort claims, such as negligence and false imprisonment, against schools in state courts, parents in the cases we reviewed typically added tort claims to their federal court suits. If a court elects to dismiss all federal claims in a lawsuit, it may then decline to exercise jurisdiction over any remaining state claims. Some courts have also required that the family have exhausted the IDEA administrative process even when the case alleges a violation of tort law.

The Proof Problem

While each of the children in the profiled cases suffered emotional scars as a result of being secluded and restrained, these types of injuries are not as readily apparent as bruises and broken bones. Consequently, the psychological trauma these children endure is hard to quantify and makes it difficult to prevail in court. This in turn makes it challenging for parents to persuade prosecutors or private attorneys to argue their claims. To convincingly prove that their children have been harmed, parents must typically have multiple points in their favor, including highly egregious allegations, expert witnesses, physical evidence, a pattern of abuse, and extensive media coverage.

Almost all of the advocates interviewed by the Committee reported that courts, in both criminal and civil cases, do not take evidence of psychological trauma as seriously as evidence of physical injury. For example:

- In the case of the Florida teen, the child was eventually diagnosed with post-traumatic stress disorder and, according to court documents, placed in a psychiatric facility as a result of the school's use of dangerous restraints and repeated seclusion. However, the court did not find the school's actions to be excessive or egregious. The attorney that represented the parents stated that he believed it is virtually impossible to prove harm suffered by the use of seclusion and restraints in the Florida courts.

- In Tennessee, multiple parents alleged that a prekindergarten special education teacher strapped children to toilets, restrained them with weighted blankets, force fed them until they vomited, and shoved them into furniture. In dismissing a lawsuit filed by a family whose child was bruised after being grabbed and restrained by the teacher, a court noted that psychological injuries would have to be "severe" to form the basis of a successful lawsuit and that in this case, even though the effect on the child was "regrettable," the teacher had "a clear pedagogical objective" in her actions. Parents were later sanctioned for filing frivolous claims. The attorney that represented the parents said that he was extremely frustrated by the fact that the law has not evolved to cover psychological injury, especially for those who do not have the ability to speak for themselves.

- A fourteen-year-old Georgia boy committed suicide after being repeatedly left alone for hours in a room comparable to a prison cell. Although school logs document that school personnel were aware that the boy had suicidal tendencies when they locked him in the room after providing him with a piece of rope to use as a belt, the court did not find the school was indifferent to his well-being in part because he had been evaluated by a school psychologist who determined that he made the suicidal threats because he was bored and wanted to get out of going to class. The attorney representing the parents believes that this holding shows the court lacked a sufficient understanding of the psychological suffering that the child endured, noting "because it was suicide, the assumption was that it was [the boy's] fault, nobody else's."

The difficulty of proving injury in seclusion and restraints cases, coupled with the inability of the children to testify, means that prosecutors are sometimes unwilling to bring criminal charges. Moreover, prosecutors must prove guilt beyond a reasonable doubt, which is a higher burden than is required for civil cases. In some instances, private attorneys may advise parents not to press forward with civil litigation because of the time and expense involved, in part because a case can take over a decade to fully

work its way through the legal system and will require parents to pay for expert witnesses as well as attorney's fees. For example, the mother of the five-year-old North Carolina girl who was repeatedly strapped to a chair reported that she wanted to press forward with litigation to make the school admit that it denied her daughter FAPE, but she was advised by the attorney that she consulted that it "wasn't worth it." The Connecticut parent of the seven-year-old girl who was secluded in a cinderblock room told a similar tale: she only had resources to either move forward with a lawsuit or to place her daughter in a private school to remove her from the threat of repeated seclusion. For the sake of her daughter's well-being, she chose the latter.

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In some states and areas, there may be very few attorneys able to represent parents in special education cases, thereby giving parents limited options in pursuing redress for their child. Although the state protection and advocacy groups (and other nonprofit organizations) are an excellent resource for parents, they have no dedicated funding for legal advocacy for students with disabilities and must therefore carefully weigh their responsibilities to other issues and populations versus providing representation to the large number of parents looking for assistance in special education issues.

Given these challenges, what constitutes "convincing" evidence to substantiate allegations of psychological harm? Advocates stated that parents must have a number of factors on their side. For example, in the Pennsylvania case reviewed by the Committee, eleven families obtained a $5 million settlement against a school district after a special education teacher hit her students, pulled their hair, stomped on their feet, and strapped them to chairs with duct tape and bungee cords. The parents' attorney said he had an excellent expert witness, a physician specializing in post-traumatic stress disorder, who was able to explain how the children had suffered even though they had few physical scars. The teacher in the case was also convicted on a child abuse charges before the family pursued their civil claims, which allowed the attorney to gain access to physical evidence collected by the police, including the chairs used to restrain the children with the duct tape and bungee cords still attached. The attorney also noted the teacher had engaged in a pattern of abusive activity for years and there were classroom aides willing to testify about what they had witnessed. In addition, school officials had made a number of damaging statements acknowledging that they knew about the abuse and did nothing to address the issue. Finally, the attorney noted that the disparaging media coverage of the case most likely prompted the school to settle even after a court dismissed most of the parents' civil claims.

Attorneys in other cases cited similar factors. For example, the parents of the eight-year-old girl who was repeatedly confined in a closet-like storage room in an Iowa school successfully claimed a denial of FAPE, in part, because the parents had video evidence showing their daughter screaming and banging her head against the walls of her seclusion room. The parents were also able to pay for a well-known and respected expert who explained the psychological harm inflicted on their daughter by the use of this room.

The Halo Effect and the Code of Silence

Even if there is strong evidence of psychological injury, many parents and advocates reported difficulty in overcoming the cultural bias in favor of teachers and school systems. In many parts of the country, teachers are viewed as beyond reproach, much like doctors, police officers, or clergy. In particular, parents and advocates commented that special education teachers are perceived to be experts at handling "problem" children and, therefore, are rarely challenged about their classroom conduct. In some cases, this means that actions that would be considered criminal if committed by a parent remain unchallenged by law enforcement if they occur in a school setting. In fact, federal regulations govern the use of seclusion and restraints in virtually every type of institution, including hospitals, nursing homes, and psychiatric facilities, but none that apply to schools. Compounding this problem is the perception that schools adopt a "code of silence" at the first sign of trouble with a parent. Multiple advocates reported encountering school officials that obstructed seclusion and restraints investigations.

Parents in the profiled cases had problems overcoming the bias towards school personnel even in cases where a teacher's actions were especially abusive. Parents also report deferring to a teacher's judgment about the use of seclusion and restraints, only to find out later that the practices were being used in ways that had never been discussed. Moreover, many advocates reported that when restraints are used, the presumption is often that the teacher acted appropriately. For example:

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- According to media reports, the teacher in Pennsylvania who hit, kicked, and used bungee cords and duct tape to restrain children was known in the community as a "super qualified" special education teacher who "could do no wrong" even after her abusive conduct came to light.

- In the North Carolina case, one mother reported to Committee staff that she initially trusted her daughter's teachers and therefore consented to the use of seclusion and restraints in emergency situations. However, after alleging that she discovered her daughter being restrained to a chair for no apparent reason, she now describes herself as "underinformed" and "naïve" for having simply acquiesced to the school's recommendations.

- A mother of a child in the Tennessee case reported to Committee staff that the teacher in question was supposedly a "super star," even though she pled no contest to child abuse charges, received six years of probation, and lost her teaching license.

- A behavior analyst in Connecticut recommended brief time-outs for an eight-year-old girl with autism and other disabilities. However, when the girl's mother realized that the time-outs had escalated to repeated seclusion in a small cinderblock room, she requested that the school discontinue their use. The behavior analyst opted to continue the seclusion and the school supported this decision. The mother said that she felt "powerless" to stop them.

Additional reports also suggest that parents find law enforcement officials and prosecutors are reluctant to intervene in school matters, making it difficult to file criminal charges in these cases. In fact, many

children with disabilities are treated as criminals. A representative from the Tennessee Disability Law and Advocacy Center recounted troubling instances of children with disabilities being referred to the juvenile justice system for behavior arising from their disabilities. Although advocates in Louisiana recommend that parents file allegations related to the use of seclusion and restraints with their local police department, they acknowledge that officers will most likely not get involved. Advocates in Connecticut and Tennessee reported similar experiences and stated this reluctance stems from a belief in the law enforcement community that teachers are "embattled" and need to use restraint in order control their unruly classrooms despite the overwhelming educational research pointing to the ability of positive behavioral interventions to reduce, and in many cases essentially eliminate, challenging behaviors in school settings that serve students with the most significant emotional and behavioral needs. Even the most compelling allegations don't seem to make any difference. For example:

- Advocates in North Carolina reported to Committee staff that parents who complained about their children being restrained to chairs were told by a local magistrate, "I'm not going to charge a teacher."

- In Minnesota, a mother reported to Committee staff that a prosecutor said he was simply not interested in pursuing charges against a teacher, even though the state Department of Education had concluded the teacher mistreated her daughter by secluding her when the child had to use the restroom. The mother also alleges that the police told her the "school district was the heart of the community" and they didn't want to spend their time degrading it.

- The parents of the Georgia teen who killed himself in a seclusion room reported that police laughed at them when they tried to have the death of their child investigated.

The examined cases and interviews also suggest that schools and state education agencies routinely seek to avoid investigation and litigation. Cracking this code of silence becomes virtually impossible for parents trying to challenge the use of seclusion and restraints. For example:

- Florida advocates reported instances where schools have not been honest about the nature of the restraint used, telling parents that a teacher was just "holding a child's arm" or some other harmless type of touching when in reality the child was restrained. Advocates also said that some Florida schools have denied that restraints ever took place at all, despite significant evidence to the contrary.

- In the Minnesota case, classroom aides reported a teacher's alleged inappropriate use of restraint and other abuse to the school principal, but no action was taken. Six months later, the aides reported the incidents to the superintendent, but the school district still took no action to investigate.

- In the case of the Pennsylvania teacher who used bungee cords and duct tape to restrain children, the school district had received numerous complaints from parents, but never investigated or reprimanded the teacher. The parents' attorney reported that school officials actually congratulated one teacher for "keeping her mouth shut" during a deposition. According to interviews given at the time, the detective who investigated the case commented "we've done internal affairs investigations for police departments, and people talk about the blue wall, that cops don't testify against each other. I have never…done an investigation where people covered for

each other and people didn't want to get involved like this case… I thought cops were bad, until I investigated a teacher."

When parents attempt to seek help from state agencies, the experience can be equally frustrating. For example, advocates in Louisiana commented that the state Department of Education takes a hands-off approach with New Orleans charter schools to allow the schools autonomy and avoid interference. In addition, high turnover at the department means that it is easy for parents to get bounced around from person to person before being able to properly file a complaint. Advocates in North Carolina reported similar problems. A Connecticut attorney also discussed the lack of accountability in that state, noting that investigations conducted by individual school districts are just "window dressing" and the results simply rubber stamp the school's actions. She also noted that Connecticut's Department of Children and Families doesn't always follow through on complaints, or will send in people with no expertise as investigators.

Other reports suggest school staff may be made to feel as though their jobs are in jeopardy if they challenge teachers or administrators:

- The Connecticut mother whose daughter was secluded in a cinderblock cell said she discovered that school aides working with her daughter had resigned their positions and moved to other schools because they disagreed with how the girl was being treated, but they were too afraid of retaliation by the school district to come forward at the time. A Connecticut attorney also said that she hears frequently from aides who have no whistleblower protections and are therefore afraid to come forward for fear of losing their jobs.

- Classroom aides in the Pennsylvania case waited two years before reporting the teacher for improperly restraining, hitting, and physically and verbally abusing all eleven special education children in her classroom. They said they waited so long because they were afraid that "nobody would believe them over a teacher." And they had a right to be concerned—after the aides came forward, teachers at the elementary school reportedly refused to allow the aides into their classrooms.

Insufficient Remedies

Perhaps most critically, even when parents file lawsuits as a last resort, remedies are sometimes nominal and do not lead to changes in policy. The remedies ordered by courts or state departments of education are often minimal and not enforced, leaving parents to wonder whether it was worth it to challenge the actions in the first place or if other students will be treated differently in the future. Furthermore, while state seclusion and restraints laws have evolved as a result of parents' challenges, including a prohibition on seclusion that was enacted in Georgia as a result of the case reviewed by the Committee, there are still significant loopholes in many states that prevent children from being protected while at school.

Parents who challenge the use of seclusion and restraints do so because they are looking for relief, such as a change in school policy or monetary damages to cover the cost of their children's medical bills. Although some parents may eventually obtain financial settlements from school districts, such an outcome is rare and typically achieved through state tort claims. When a school district settles, it typically does not admit to any wrongdoing as part the agreement. This is in part due to the fact that some school leaders characterize egregious seclusion and restraints cases as isolated incidents committed by a single teacher and do not assess whether there is a more pervasive pattern of use within their school system. Further, relief obtained under IDEA is usually injunctive—the statute is meant to provide educational services to students rather than compensate them for a particular harm. But that relief may be as simple as a training memo to staff, and actual changes to a school's policy may not occur. The following examples highlight the experiences of parents and advocates.

- The Department of Education's Office of Civil Rights (OCR) found that a North Carolina school subjected 18 students to the use of mechanical restraints, in many cases without the knowledge of their parents. Despite these findings, a representative of the school district told the media the district did not accept any responsibility for improper use of restraint, and characterized the OCR report as solely focused on problems with the school's documentation procedures. Although the school district did develop a training program in response to OCR's findings, representatives from Disability Rights North Carolina s stated the district is no longer compelled to require any of its school personnel to take it now that OCR has closed its monitoring of the case.

- In the Connecticut case, parents complained to a school board about the use of "scream rooms" to isolate "misbehaving" students. Advocates speculate that the intense media coverage surrounding the incident prompted the school board to take immediate action to limit the use of such rooms. However, advocates report an ongoing lack of accountability on the part of state agencies. For example, the Connecticut Office of Protection and Advocacy (OPA) found troubling evidence of inappropriate use of seclusion and restraints in another Connecticut school system. Despite issuing a comprehensive report documenting the actions, along with detailed recommendations, OPA said that the school district simply ignored its findings.

- In Louisiana, parents were awarded a multimillion dollar settlement against a school board after their child suffocated to death while being strapped to a chair. Nevertheless, the board did not address the quality of special education services in the school system, calling the girl's death an "isolated incident with unique circumstances."

- An ALJ in the Iowa case found the school district had not tried hard enough to educate an eight-year-old girl with autism in a regular classroom and used "highly intrusive" practices that were not beneficial to her. These practices included leaving her alone for hours in a converted storage area under a staircase. The judge also ordered the school to seek outside experts and develop a new education plan for her. At the time, the school district commented that the use of such seclusion rooms was a "pretty common practice" and that it had used "established educational principles" in addressing the child's problems." Although a district court upheld the decision of the ALJ, the order only applied to the eight-year-old girl in question and not to any other students at the school. The family subsequently moved out of state and as a result the school district was not required to make any changes to the way it used seclusion rooms or trained staff. In addition, the teachers and other staff involved in the incident remained at the school.

- As a result of complaints made by classroom aides, the Minnesota Department of Education (MDE) Maltreatment of Minors Division investigated a teacher for committing a variety of abusive acts against children in her special education classroom, including repeatedly secluding an eight-year-old girl and refusing her access to the bathroom. The MDE concluded the teacher violated the child's rights. The school district conducted its own investigation and also concluded the teacher improperly denied the child access to the restroom, though it simply attributed the denial to a lapse in judgment and did not discipline the teacher. The district allowed the teacher to return to the school, though she left shortly thereafter. The mother reported that she repeatedly contacted the district superintendent asking to be notified if the teacher returned to school again, but was told by the superintendent that he had no obligation to provide her with that information. Years later, the teacher appealed the MDE's determination of maltreatment and the decision was reversed. Minnesota advocates noted that teachers and schools typically appeal to lengthen the process and limit parents' access to remedies, thus creating an incentive for parents to avoid bringing cases in the first place.

Advocates note that problems continue to exist even in states with meaningful protections.

Although some of the cases examined by the Committee staff have contributed to changes in state laws, the protections are far from ideal. For example, Florida law still allows the use of restraints in schools, including the use of prone restraint, even though health and juvenile justice facilities strictly limit or ban such techniques. Connecticut law allows schools to use seclusion in an unsupervised scream room for any reason as long as the use of the practice is mentioned in the IEP. Minnesota permits seclusion for threats to physical property and Iowa, New York, and North Carolina continue to allow the use of seclusion and restraints for class disruption or destruction of property. Advocates in North Carolina said schools in their state have interpreted this law to allow the use of restraints in cases of threats to property where the property in question is a broken pencil. Thus, the behaviors displayed by some of the children in the cases we reviewed might still result in the same type of seclusion and restraints challenged by their parents. Moreover, advocates note that problems continue to exist even in states with meaningful protections. For example, even though Georgia banned seclusion rooms as a result of the teen that committed suicide, the Georgia Advocacy Office reports that it still receives "numerous" complaints related to seclusions. The Disability Law and Advocacy Center of Tennessee similarly reports receiving complaints about the use of prone restraints, even though the state has banned the use of restraints that restrict breathing.

Recommendations

The Committee offers seven recommendations to protect the nation's children from injury and death, reduce and eliminate the use of ineffective practices, and replace those practices with preventative strategies and positive interventions:

- In order to better understand the frequency, duration and intensity of the use of restraints and seclusion in schools, a nationwide requirement to collect incident events should be in place and reported at the local, state and federal levels annually. This dataset should be able to be disaggregated to the district and school level in order to provide school leaders with the ability to analyze the data and use it to track the impact of training, policies and interventions to reduce the incidents of seclusion and restraints. The dataset should also be able to link to student academic outcome data at the district and school levels in order to be able to determine the impact of incidents of seclusion and restraints on academic achievement.

- Through the use of federal title II funds, IDEA funds, and local and state funds, programs to implement systems of positive behavioral interventions and supports should be implemented school and district-wide. All teachers and school personnel should be trained on the use of techniques that do not rely on seclusion or restraints to reduce challenging behaviors in emergency situations. Finally, all schools should have a team of personnel trained to be able to respond to emergency situations. The systemic, school- and district-wide implementation of positive behavioral supports and interventions should be required in each school setting.

- The use of restraints must be limited to emergency situations only, when there is a threat of serious harm to the student or others and school personnel who are trained in the use of such restraints should be the only school personnel to implement allowable restraints in emergency situations.

- The unsupervised and unmonitored seclusion should be discontinued and all seclusion facilities should be removed from schools.

- All schools must inform a child's parents when restraints or seclusion are used with their children. Notification must take place within 24 hours of the use of the restraint or seclusion, and include information about the type of seclusion and/or restraint that took place, the circumstances that lead to the use of seclusion and/or restraint, and the duration of their use.

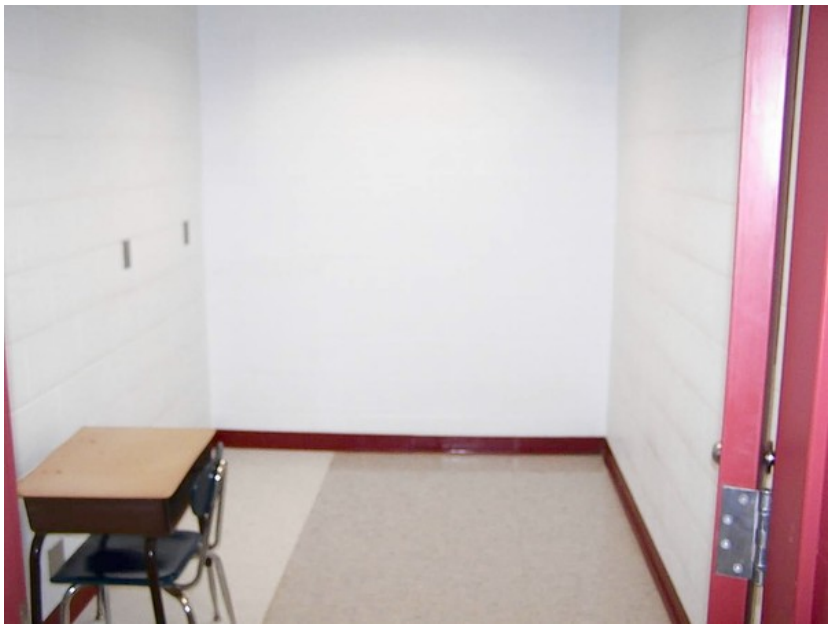
- Because the use of seclusion should be discontinued and because the use of restraints should only occur during emergencies, and because both have been shown to have no educational benefit, prohibit the inclusion of seclusion and restraints as an educational or therapeutic component of a student's individualized education plan (IEP).

- Because of the lack of ability of families to have an impact on the use of seclusion and restraints practices with their own children, sometimes based on provisions of special education law, the Individuals with Disabilities Education Act should be amended to allow families to file civil actions in court before exhausting their IDEA remedies.

Appendix 1: Case Studies

For this review, Committee staff focused on cases that have been resolved during the past five years as the result of court proceedings, administrative actions, or investigative findings, although the actual incident of seclusion or restraints may have occurred longer ago. Cases were selected from the following states in an effort to seek geographic diversity: Connecticut, Florida, Georgia, Iowa, Louisiana, Minnesota, New York, North Carolina, Pennsylvania, and Tennessee. For each case, Committee staff reviewed related cases, changes to state law since the case, and other relevant media reports and documents. To the extent possible, staff conducted interviews with parents of the victims and their attorneys. Committee staff also notified cognizant school superintendents and administrators about the inclusion of the cases in this report and offered them an opportunity to comment, though only Pennsylvania and Georgia school officials chose to do so.

Connecticut: In January 2012, parents of regular education students in Middletown, Connecticut, complained to the Board of Education about the way the town's Farm Hill Elementary School was dealing with "misbehaving" students. Teachers and staff put the children, including those with disabilities, into what one parent described as "scream closets, where kids bang their heads off of concrete walls."[52] The same parent also noted that "the building custodians had to go in and clean blood off the walls and clean urination off the floors."[53] Another parent witnessed two staff members holding a door shut from one of these rooms, shown below, with a child on the other side who kicked and screamed uncontrollably.[54]



Source: Middletown Press.

[52] NBCConnecticut.com, *School Puts Troubled Kids in Scream Room*, NBC NEWS (Jan. 11, 2012, 8:47 AM), http://usnews.nbcnews.com/_news/2012/01/11/10113042-school-puts-troubled-kids-in-scream-room.
[53] *Id.*
[54] WFSB Staff, *Middletown school officials discuss scream rooms*, WFSB (Feb. 8, 2012, 7:36 AM), http://www.wfsb.com/story/16490795/middletown.

Connecticut advocates for children with disabilities subsequently filed a complaint with the Department of Education's Office of Civil Rights (OCR). The complaint acknowledged that it was understandable that parents of regular education students were horrified at the use of these rooms, but noted that the bigger issue was the "disparate treatment and ongoing abuse of children with disabilities."[55] OCR has not issued any findings related to the incident. However, an investigation from the Connecticut Department of Education, and a joint investigation from the Office of Protection and Advocacy (OPA) and the Office of the Child Advocate (OCA) concluded that Farm Hill had did not adequately train staff, provide special education students with proper IEPs, or notify parents about incidents of seclusion.[56] OPA reported that the school board has instituted corrective measures as a result of these findings, but it also noted that Middletown is not the only Connecticut school district that has used seclusion as a behavior management technique and that similar problems may exist elsewhere in the state.[57]

The publicity surrounding the Middletown incident prompted a mother from another Connecticut town to advocate for reform before the state legislature, where she testified that the use of seclusion as an educational tool is ineffective, dangerous, frightening, humiliating, and degrading. Over a seven month period in the 2007 to 2008 school year, her seven-year-old daughter was repeatedly secluded in a small cinderblock room, sometimes up to *several hours per day*. During an interview with Committee staff, the mother said that although she agreed to try brief "time-outs" to manage some of her daughter's more challenging behaviors, no one showed her the room or explained the kind of open-ended seclusion that was to be used. She vehemently denied giving permission for her daughter to be secluded in this way and was shocked to find that use of the room was mentioned in her daughter's IEP.

Over the course of the school year, the mother noticed that the use of the seclusion room actually escalated her daughter's tantrums instead of diffusing them. Although she repeatedly requested a number of positive behavior interventions, her daughter's behavior analyst continued to insist that seclusion was an effective intervention. As a result, although the mother and her husband were both attorneys, they "felt powerless" to stop the seclusion. Months later, the mother discovered that school aides working with her daughter had resigned their positions and moved to other schools because they disagreed with how the girl was being treated, though they were too afraid of retaliation by the school district to come forward at the time. The mother said she considered fighting the case in court, but decided that a potentially lengthy and expensive battle would not be in the best interest of her daughter and instead opted to move the child to a private school. The child is now doing well, although her former behavior analyst now works at the same private school.

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[55] Diane Willcutts, *"Scream Rooms" - CT Attorneys and Advocates File OCR Complaint Against Middletown Public Schools*, EDUC. ADVOCACY, LLC (Jan. 15, 2012, 3:00 PM), http://www.educationadvocacyllc.com/blog/screamrooms-ctattorneysandadvocatesfileocrcomplaintagainstmiddletownpublicschools.

[56] James McGaughey & Jamey Bell, *No More "Scream Rooms" in Connecticut Schools*, OFFICE OF PROTECTION AND ADVOCACY FOR PERSONS WITH DISABILITIES AND THE OFFICE OF THE CHILD ADVOCATE (July, 2013), http://www.ct.gov/opapd/lib/opapd/documents/adobe/reports/no_more_scream_rooms_opa-oca_report_7-13_final.pdf [hereinafter McGaughey & Bell]. The state Department of Children and Families cleared the Farm Hill Elementary School principal of any abuse and neglect related to the incidents. Shawn R. Beals, *DCF: Middletown Principal Cleared Of Abuse Or Neglect In 'Scream Room' Usage*, THE COURANT (April 18, 2012), http://articles.courant.com/2012-04-18/community/hc-middletown-scream-room-dcf-20120418_1_abuse-or-neglect-time-out-rooms-dcf

[57] McGaughey & Bell, *supra* note 56.

In 2012, Connecticut passed a law requiring the state Department of Education to collect data and report annually on the use of seclusions and restraints to better understand their use. [58] However, the Department's July 2013 report concluded that data collection efforts were "insufficient to draw any meaningful conclusions."[59] Other measures that would have enlarged seclusion and restraint protections failed to pass. Although the state does limit the use of restraint to threats of physical injury, it still allows schools to use seclusion for any reason when it is included in an IEP.[60]

Representatives from Connecticut's OPA cited an ongoing need for more stringent regulations, noting that educators frequently view seclusions and restraints as tools that they need to control a classroom, which creates an "us versus them" approach to handling parents of children with disabilities. They also commented that many parents are not always fully informed about what techniques are being used and don't have ready access to school records, even though Connecticut law does require notification about the use of restraints.

OPA also noted that some parents are not even given the opportunity to be involved in IEP decisions, as illustrated by the story of the mother the Committee interviewed. Perhaps most troubling, OPA noted a lack of accountability by state school boards. For example, in a 2008 case involving another Connecticut public school system, OPA found troubling evidence of abusive physical restraints, but the school district involved failed to take any action on their recommendations. An attorney interviewed by the Committee also expressed concern about this lack of accountability, noting that investigations conducted by individual school districts are just "window dressing" and the results simply "rubber stamp" a school's actions. She also noted that state agencies don't always follow through on complaints, or will send in people with no knowledge or expertise to investigate.

Florida: In March 2004, staff at a Palm Beach Middle School began using prone restraints, as shown in the illustration,[61] in order to control a sixth grade boy who exhibited self-injurious behavior and physical aggression toward others.[62] The boy had a disability called Cornelia de Lange Syndrome, which affects physical and mental development.[63] He was also diagnosed with obsessive compulsive disorder, social anxiety, sensory disorder, and simple and complex motor and vocal tics.[64] During the seventh grade, the child began showing signs of trauma, including fear of going to school, crying, sleep problems, academic regression, loss of communication, and increased aggression.[65] The boy's disabilities rendered him unable to properly communicate the pain caused by the treatment he was receiving at school. His parents' maintain the school did not notify them about the use of the restraints.

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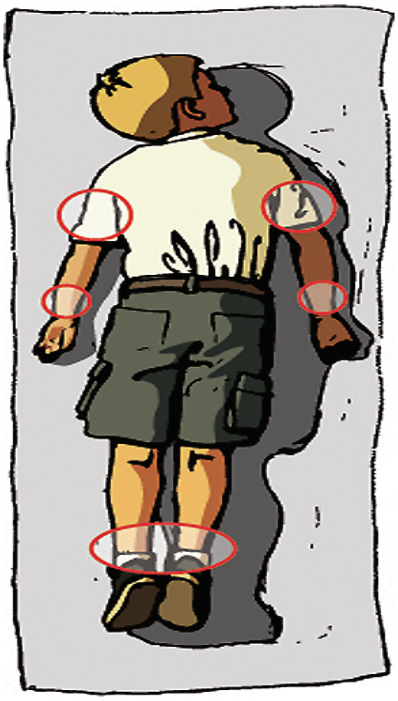
[58] 46a CONN. GEN. STAT. Ann. § 814e-153 (West 2012).
[59] Jacqueline Rabe Thomas, *Watchdogs criticize lack of state oversight of restraints and seclusions in schools*, THE CT MIRROR (July 11, 2013), http://www.ctmirror.org/story/2013/07/11/watchdogs-criticize-lack-state-oversight-restraints-and-seclusions-schools. (The department promised that the 2014 report would "allow for a critical examination of the use of emergency restraint and seclusion.").
[60] 46a CONN. GEN. STAT. Ann. § 814e-152 (West 2012).
[61] Pat Beall & Laura Green, *Pinned Down: Palm Beach County schoolchildren subdued with risky restraint*, PALM BEACH POST (Oct. 10, 2010, 9:05 AM), http://www.palmbeachpost.com/news/news/education/pinned-down-palm-beach-county-schoolchildren-subdu/nMBc2/ (last updated Mar. 29, 2011, 10:34 AM).
[62] J.P.M. v. Palm Beach Cnty. Sch. Bd., 916 F. Supp. 2d 1314, 1316 (S.D. Fla. 2013).
[63] *Id.*
[64] *Id.*
[65] *Id.*at 1314.

In 2006, when the boy was fourteen, his parents complained to the school about his increasing emotional outbursts. The school board sent the boy to be evaluated by an expert, who diagnosed him with post-traumatic stress disorder originating from the use of the restraints.[66] The school district later acknowledged that he was restrained eighty-nine times over the course of fourteen months, including twenty-seven documented prone restraints.[67] His parents then transferred the boy to a private school where he received individualized care without the use of prone restraint. The parents' attorney said the family wanted the boy to be able to stay in the mainstream school system, but they feared that the teachers would retaliate against their son as a result of their complaints.



The parents subsequently sued the Palm Beach County School District, claiming violations of the Rehabilitation Act, IDEA, and Constitutional law. In particular, they alleged that the school had a duty to protect the child's individual needs and ignored that duty. The parents also made it clear that they were not only concerned about the well-being of their own son–the lawsuit also sought an injunction barring the District from restraining any student without notifying his or her parents.[68] The Palm Beach County School Board declined to respond publically to the accusations, only saying that the school employees are trained and follow the school district's rules.[69] In January 2013, a district court dismissed the parents' federal claims against the school district, in part because it did not find that the school's actions showed sufficient indifference to the child's right to an education. [70] The parents then went forward with state tort claims. The resolution of that litigation is not public.

During an interview with Committee staff, the attorney who represented the parents said that he believed the child had been restrained many more times than admitted by the school, but he was unable to obtain full versions of the logs the school used to document the use of restraints. According to the attorney, these logs are the most complete record of what happened to the child, but a full year of these records went missing around the time the case began. He believes that the logs that did exist were incomplete, and did not list the reason for the restraint, the teacher that performed the restraint, or the type of restraint used.

The attorney also noted that the overall standard of proof in a case like this has become so difficult to surmount that most parents won't be able to win in Florida courts. In particular, he noted that the court relied on a precedent set in a 2010 Eleventh Circuit case where the court ruled the use of restraint must "shock the conscience" in order to be actionable. In the case, a teacher repeatedly used physical force to

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[66] *Id.*
[67] *Id.*at 1319.
[68] *Id.*at 1317.
[69] Jane Musgrave, *Palm Beach school district hit with lawsuit claiming autistic son was restrained*, SUN SENTINEL (April 7, 2010), http://articles.sun-sentinel.com/2010-04-07/news/fl-school-restraint-lawsuit-20100407_1_disabled-students-school-district-autistic-son.
[70] *J.P.M.*, 916 F. Supp. 2d at 1321.

restrain a Florida student with autism/pervasive developmental disorder; the teacher was eventually suspended and later convicted of criminal charges of child abuse against two of the students. While the court viewed the teacher's conduct as troubling and stated it could not "condone the use of force against a vulnerable student," it found "no reasonable jury could conclude that [the teacher's] use of force was obviously excessive in the constitutional sense."[71]

Florida law still allows the use of restraints in schools, including the use of prone restraint, even though health facilities and juvenile justice facilities strictly limit or ban such techniques.[72] The use of restraints is not limited to only emergency situations, and could be interpreted to allow restraints to be used for any reason in schools. Although parents are supposed to be notified on the same day restraints are used, with a full report made available within three days, advocates cite instances where the schools are denying that restraints ever were used. In other cases, schools are not honest about the nature of the restraint used, telling parents that a teacher was just "holding a child's arm" or some other harmless type of touching.

Disability Rights Florida noted that the reluctance to limit the use of restraints stems from the fact that many people in the community believe that restraints are a normal practice and do not understand the dangers. Because of this perceived "norm," parents are made to believe that if they do not allow the use of restraint techniques, the children will be unwelcome in the school and may even be referred to the juvenile justice system instead of receiving an education tailored to their disabilities. And when restraints are used, the presumption is that the teacher acted appropriately.

In 2010, Florida began requiring school districts to collect data on the use of seclusions and restraints; the state subsequently recorded 9,751 restraint and 4,245 seclusion episodes from 2011 to 2012. [73] As a result of analyzing this data, Florida's Orange County school district banned the use of seclusion and reduced the use of restraint.[74] Disability Rights Florida said this requirement is leading to similar changes throughout the state because the state Department of Education posts data about restraint usage on a website, county by county, and these postings have caused other counties to reevaluate policies. Advocates also note the department solicits feedback from students in conjunction with the data collection, instead of relying entirely on teachers and school district officials to report incidents. Finally, a state advisory committee meets twice per year so the Department can provide an analysis of its data collection efforts.

Georgia: In 2004, a thirteen-year-old boy was repeatedly secluded in an eight by eight foot cell-like room at the Gainesville Alpine Psychoeducational Program, a school for students who are autistic or who have behavior disorders or brain injuries.[75] The room did not contain furniture and had a door that could be locked from the outside, with just one window covered by a metal grate, as pictured.

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[71] T.W. *ex rel*. Wilson v. Sch. Bd. of Seminole Cnty., Fla, 610 F.3d 588, 602 (11th Cir. 2012).
[72] FLA. STAT. ANN. §1003.573 (2011).
[73] SCHOOLHOUSE, *supra* note 32.
[74] SCHOOLHOUSE, *supra* note 32.
[75] King v. Pioneer Reg'l Educ. Serv. Agency, 688 S.E.2d 7, 11-12 (Ga. App. 2009).

Source: CNN

Over a period of twenty-nine days that fall, the boy was placed in the seclusion room nineteen times. His average confinement lasted about ninety-four minutes.[76] The boy was diagnosed with attention deficit hyperactivity disorder, but had no functional behavioral assessment or behavioral intervention plan, as required by IDEA.

In October 2004, the boy was disruptive during a day of standardized testing, and was confined in the seclusion room for most of the next two days. On both days, he made threats to commit suicide while in the room, which the staff recorded on incident logs. The school contends that they reported these incidents to his mother at the end of the day, though she vehemently denies that this occurred.[77] In November 2004, the boy picked a fight with another student in the classroom. After physically restraining the child, two aides, one a substitute, took him into the seclusion room. The child was using a rope around his waist as a belt; his teacher had given him the rope because he had come to school wearing loose pants, as was his habit.[78] According to logs maintained by the school, the child cursed, asked to be let out, and repeatedly hit the door during his first fifteen minutes in the room. After thirty-five minutes, the boy became quiet. When the aide opened the door, he found the boy, hanging by the rope belt from the metal grate on the window.[79]

The boy's parents filed claims against Alpine, the regional educational service agency, and the Georgia Department of Education, including violations of the Fourteenth Amendment and IDEA. In November 2009, the Georgia Court of Appeals upheld a county judge's decision to dismiss the lawsuit. The parents had tried to argue in part that, under the Fourteenth Amendment, the seclusion constituted a restraint on the child's liberty, analogous to that of a prisoner, and this special relationship between the child and the school imposed a duty on the school and the state to protect him. However, the court ruled even if it

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[76] *Id.*
[77] *Id.*
[78] Alan Judd, *Death highlights lack of regulation at 'psychoeducational' schools*, THE ATLANTA JOURNAL-CONSTITUTION (July 27, 2009, 6:30 AM) http://www.ajc.com/news/news/local/death-highlights-lack-of-regulation-at-psychoeduca/nQJKQ/ (last updated July 27, 2009, 10:26 AM) [hereinafter Judd].
[79] *King*, 688 S.E.2d at 11-12.

accepted the analogy to that of an incarcerated inmate, to establish liability for a prisoner's suicide a plaintiff must show that the jail official displayed "deliberate indifference" to the prisoner's taking of his own life." [80] The court found the aides were the only two individuals responsible for the seclusion, and they were not deliberately indifferent to the risk of the child committing suicide because they were actually not made aware the child had made suicidal comments.[81] According to one of the attorneys that represented the parents, this case is indicative of the "impossibly high bar" for meeting the deliberate indifference standard, particularly in the Eleventh Circuit. The parents subsequently appealed to the Georgia Supreme Court and the Supreme Court of the United States, but both courts declined to hear the case. In an interview with Committee staff, the parents noted that they spoke with the police to urge them to pursue criminal charges, but reported that the police laughed and turned them away.

The current director of the regional educational service agency responsible for Alpine declined to comment on the specific facts of the case, but noted that Georgia now bans the use of seclusion in public education settings[82] and also requires schools to set specific guidelines on the use of physical restraint. The director also enclosed a copy of the school's restraint policy, which provides in part that restraint should only be used as a last resort when there is a threat of immediate danger and that parental notification should occur within one day.

Georgia is currently the only state that outlaws seclusion completely.[83] Georgia also forbids prone restraints, mechanical restraints, and chemical restraints.[84] However, according to the Georgia Advocacy Office, a key safeguard that is missing is a reporting requirement for incidents of restraint. Data collection and analysis are lacking, meaning it is difficult to pinpoint which schools or districts need additional support. Further, students with disabilities remain segregated in antiquated "psychoeducational" programs and schools. The programs, which are sometimes in separate schools altogether or are sometimes "schools within schools," have been renamed the Georgia Network for Educational and Therapeutic Support (GNETS). The Georgia Advocacy Office reported that around twenty to twenty-five cases of seclusion and restraint are filed per year, most of which come from GNETS. One advocate described these GNETS as "archaic," "lawless," and "unaccountable" and said rural school districts ship troubled students to the GNETS to avoid responsibility for their education. Most often, those sent to GNETS are boys who have been labeled "disruptive" or "violent." Georgia continues to educate about 5,600 students with disabilities through its network of 24 GNETS.[85]

Iowa: In 2004, an eight-year-old girl began school in the Waukee School District outside Des Moines. Along with autism, her disabilities included mild developmental disabilities, diminished motor skills, and a serious speech impediment. As problems in the classroom occurred, including inappropriate touching and grabbing, incidents of hair pulling and yelling at teachers, the school put together a formal education plan for the girl that called for close adult supervision and breaks to let her calm down.[86] The plan involved moving her out of the classroom into a "time out room," a converted storage area under a

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[80] *Id.* at 15.
[81] *Id.*
[82] GA. COMP. R. & REGS. 160-5-1-.35 (2010).
[83] SCHOOLHOUSE, *supra* note 32.
[84] GA. COMP. R. & REGS. 160-5-1-.35 (2010).
[85] Judd, *supra* note 78.
[86] Robert Tomsho, *When Discipline Starts a Fight*, WALL ST. J. (July 9, 2007, 11:59 PM), http://online.wsj.com/news/articles/SB118375070827459396 [hereinafter Tomsho].

staircase. Although her parents stated that they initially protested this plan, saying that it made it impossible for the child to get an appropriate education, they eventually agreed.[87]

Reports indicate that the room consisted of concrete-block walls, gray linoleum floor, and a door with a small window. If the girl became agitated, teachers would remove her desk, chair and all other materials and the door would be closed. According to later interviews given by the child's father, the school required that before the child could be released, she must sit on the floor with her legs crossed without moving a muscle for at least five minutes.[88] If she moved or even made a face at school personnel, they would restart the clock. At one point, after failing to finish a reading assignment and becoming increasingly agitated, she was left alone in the room so long that she wet herself before she was finally allowed to leave. At another point, the child's mother arrived at school to find a male guidance counselor trying to silence the screaming child by wrapping his arms around her in a restraint hold.

As part of an agreement with the parents, the school district sought assistance from the University of Iowa's Center for Disability and Development who had worked with the family.[89] The Center requested that the school videotape the child. When the parents viewed that videotape, it revealed that the child was confined to the isolation room for over three hours, sometimes banging her head or dropping to the floor. School records later obtained documented that the child was in the room for *up to five hours a day*, where she screamed, spit, and once pulled out a chunk of her own hair.

The parents and the school engaged in state-sponsored mediation efforts. When those failed, the parents pulled the child out of the school. In August 2006, the parents filed an administrative case against the district under IDEA, seeking a less restrictive education for their child at a different school. The ALJ found that the school district had used "highly intrusive" practices that were not beneficial, and ordered the school to seek outside experts and develop a new education plan for her. The judge specifically noted the failure of the school to focus on positive behavior supports rather than punitive techniques such as restraint, or extended isolation.

The school district appealed the ruling to the U.S. District Court, noting that it had used "established educational principles" in addressing the child's problems, and made adjustments when its discipline wasn't working. The superintendent also noted at the time that the use of seclusion rooms was a "pretty common practice" and that the district had complied with the state's guidelines for such rooms. In 2008, the district court upheld the decision of the ALJ.[90] The school district received no penalty, but would have been required to develop a new educational plan for the child had the family not moved to another state. Teachers and other staff involved in the incident remained at the school and there is no indication that additional training in positive behavioral supports was instituted at that time.

The parents then filed a civil suit against the district. Although many of the claims were dismissed, the court allowed the parents to pursue tort claims as well as claims under the Rehabilitation Act including that the school district failed to adequately train and/or negligently trained school personnel and that the

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[87] *Id.*
[88] Michael J. Crumb, *Benefit of time-out rooms is questioned*, THE LOS ANGELES TIMES (Nov. 2, 2008), http://articles.latimes.com/2008/nov/02/news/adna-timeout2.
[89] Tomsho, *supra* note 86.
[90] Waukee Comm. Sch. Dist. v. D.L., No. 4:07-cv-00278-REL-CFB (S.D. Iowa Aug.7, 2008) (order affirming decision of ALJ).

school district intentionally deprived their child of the benefits of a federally-funded program, based upon her disability. [91] The resolution of that litigation is not public.

An attorney for the parents interviewed by Committee staff noted that the ALJ in the case was a former special education instructor and that her knowledge of appropriate positive behavioral supports likely played a role in her decision. The attorney noted that in previous cases, judges typically held that the requirements of IDEA were met so long as a student received *some* educational benefit. Thus, the attorney felt that a case involving child who functioned at a higher level and was able to obtain some educational benefit could have led to a different result, even with this level of excessive isolation.

The attorney also credited the ability of the family to pay for an excellent expert witness, who apparently convinced the expert hired by the school district that the practices used on this child were detrimental to her well-being. However, the school district itself reportedly remained committed to the seclusion and restraint philosophy even when presented with evidence that positive behavior interventions are more beneficial.

In 2008, subsequent to the events in this case, Iowa limited the use of seclusion and restraint to cases involving threats of physical harm, property destruction, or educational disruption.[92] The state also required that seclusion and restraint should only be used for "reasonable" periods of time and that parents should be notified. However, even under the new regulations behavior like the type exhibited by the child in this case could still result in seclusion.

More troubling still, children living in state owned juvenile homes are exempt from the regulations. As a result of efforts by Disability Rights Iowa, the governor established a Task Force to look into practices at the juvenile home. The Task Force found that as recently as 2012 students were being confined in small isolation cells for months at a time – in one case, for almost a full year. Two girls spent two months living in the unfurnished, concrete-block isolation cells at the home. A third girl in her mid-teens spent almost all of 2012 in an unfurnished, 10-foot-by-12-foot concrete-block cell. The Task Force recommended significant changes, including closing down the isolation cells. The state Department of Education also conducted a targeted site visit and concluded that the home was understaffed and has repeatedly failed to offer children an adequate education.[93]

Louisiana: In April 2011, school administrators at the Recovery School District's (RSD) Fannie C. Williams Charter School in New Orleans sought to lock a seven-year-old boy with post-traumatic stress disorder in a closet because he wouldn't behave. His mother described the boy as weighing less than sixty pounds and frightened when touched. According to court documents, the boy did not try to resist and "was never violent, nor a threat" to the principal and assistant principal.[94] However, he did run away to try to escape the closet and in the process knocked papers off the principal's desk. In response, the assistant principal struck the child with a fly swatter, shoved him to the floor, and called school security and police officers. The officers held the child down and handcuffed him, even though RSD previously

[91] D.L. v. Waukee Comm. Sch. Dist, 578 F. Supp. 2d 1178 (S.D. Iowa 2008).
[92] IOWA ADMIN. CODE r. 281-103.1-281-103.6 (2008).
[93] DIVISION OF LEARNING AND RESULTS, IOWA DEP'T OF EDUC., TARGETED SPECIAL EDUC. COMPLIANCE REVIEW, HERBERT HOOVER HIGH SCHOOL (2013).
[94] Thomas v. City of New Orleans, 883 F.Supp.2d 669, 675 (E.D. La. 2012).

banned the use of handcuffs and fixed restraints as a result of a 2010 settlement with a parent whose child had been shackled to chairs by security guards.[95]

The boy's mother filed constitutional claims against the school district, principals, and police officers, as well as various state law tort claims for negligence, false imprisonment, and intentional infliction of emotional distress. In August 2012, the court dismissed the claims against the school district on the grounds that the Eleventh Amendment entitles state entities to immunity in federal court from suits brought by private parties. The court also granted the school officials and police officers qualified immunity. The mother subsequently placed her son in private school, though he has since returned to public school. She is currently a plaintiff in a class action lawsuit alleging violations of the disciplinary safeguards of IDEA (among other claims including discrimination) in the New Orleans charter school system.

Attorneys interviewed by the Committee acknowledge that it is very difficult for parents to prevail in these types of claims. However, in October 2013, a jury awarded a $4.5 million settlement against the Parish school board for negligence in the death of a five-year-old student with disabilities who suffocated while being strapped to a chair during nap time at her elementary school in 2010.[96] The jury also found that the school board discriminated against the child under Section 504 of the Rehabilitation Act. Despite these findings, Parish representatives refused to acknowledge that there may be a problem with the quality of special education services in the school system, calling the girl's death an "isolated incident with unique circumstances." Representatives from Louisiana's Advocacy Center are not surprised by this reaction. Even though untrained and inexperienced teachers are a pervasive problem, many school boards in these situations contend that one teacher's negligent use of restraints and seclusion is the "exception to the rule" with regard to school policies.

Louisiana currently has protections against restraint and seclusions. State law permits the use of the practices only "for behaviors that involve an imminent risk of harm or as a last resort when de-escalation attempts have failed and the student continues to pose an imminent threat to self or others."[97] The law also requires reporting, documentation, and parental notification measures. However, attorneys the Committee interviewed noted that although this law has been hailed as a victory, it is not always well enforced. They commented that oversight and accountability are a problem in Louisiana, particularly in the New Orleans charter school system, where eighty to ninety percent of the children attend school. The state takes a "hands off approach," and is often reluctant to dictate policy to these schools. Furthermore, charter schools change operators quickly and use this turnover as a defense to allegations of abuse by claiming the school or school officials who committed the abusive acts are no longer there. The Louisiana Department of Education also has frequent staff turnover and parents seeking to file complaints get bounced around with "no single point of entry." The attorneys recommend that parents file allegations related to the use of seclusion and restraint with their local police department in order to create a record, even though officers are reluctant to get involved in school matters.

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[95] *Lawsuit Changes New Orleans Schools Security Policies*, SOUTHERN POVERTY LAW CENTER (Nov. 10, 2010), http://www.splcenter.org/get-informed/news/lawsuit-changes-new-orleans-schools-security-policies.

[96] Andrea Shaw, *$4.5 Million Judgment Not Indictment of Jefferson Parish Special Education Program, District Says*, THE TIMES-PICAYUNE (Oct. 30, 2013, 6:54 PM), http://www.nola.com/education/index.ssf/2013/10/45_million_judgment_not_indict.html.

[97] LA. REV. STAT. ANN. §17:416.21 (2013).

Minnesota: In January 2004, an eight-year-old girl began attending Jefferson Elementary School in the Willmar Public School District. Her mother described her as a "little girl who loved to go to school," even though the child had been diagnosed with a communication disorder and designated as developmentally delayed with speech and language impairment at age three.[98]

Since kindergarten, the girl's IEP had included a behavioral intervention plan that authorized the use of restraints and seclusions when she exhibited certain behaviors.[99] Eventually, the school district and her mother had the child assessed by an outside evaluator, who did not recommend the use of restraints or seclusions.[100] However, the techniques remained in the girl's behavioral intervention plan during the 2005 to 2006 school year.[101] The mother said she had agreed to the use of seclusion, in an area the school called a "quiet room," only if necessary. However, some reports indicate the girl's teacher secluded her forty-four times in one school year.[102] The girl's mother also said the teacher made the child sit at a "thinking desk" perfectly still for thirty minutes straight and demeaned and belittled the child when she could not hold this posture. If the girl fidgeted or made any noise, her teacher would yell at her and sometimes put her into restraints, including a prone hold.[103] During one incident in April 2006, the teacher forced the girl into the seclusion room while she was on her way to the bathroom, causing the child to urinate on herself.

Aides reported that the teacher's classroom, which was somewhat hidden in the basement of Jefferson, was "more a punishment/torture area than a classroom," and "run very much like a secret room that you are not supposed to talk about."[104] Eventually, an aide reported the teacher to the Minnesota Department of Education's (MDE) Maltreatment of Minors Division. The girl's mother first learned about the allegations against the teacher when the MDE sent her a letter about its investigation in August 2006 and she then filed her own complaint. The school district also conducted its own investigation. The mother also withdrew consent, in writing, to the use of restraints and seclusion.

MDE and the school district both concluded the teacher violated the child's rights by improperly denying the child access to the restroom.[105] Although the teacher was on paid administrative leave during the investigations, she was not disciplined and returned to school in early October 2006. The district had previously investigated the teacher in 2005 and earlier in 2006, but found no misconduct and never notified any parents.[106]

The teacher soon left the school again and the girl's mother repeatedly contacted the District superintendent asking to be notified if the teacher ever returned. The superintendent responded in November that the District had no obligation to provide her with that information. After this letter, the mother realized that the school "was not going to help keep [her] child safe" and removed her daughter from the school. In October 2007, the mother requested an administrative hearing with the MDE,

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[98] C.N. v. Willmar Pub. Sch. Dist., 591 F.3d 624, 627 (8th Cir. 2010).
[99] *Id.* at 627.
[100] *Id.* at 628.
[101] *Id.*
[102] Jeffrey Meitrodt, *Disabled students face dangerous discipline in Minnesota*, STAR TRIBUNE (Apr. 28, 2013, 1:39 PM), http://m.startribune.com/news/?id=205024611.
[103] *Id.*
[104] Brief of Appellants at 10, C.N. v. Willmar Pub. Sch. Dist., 591 F.3d 624, 627 (8th Cir. 2010) (No. 08-3019).
[105] *Willmar*, 591 F.3d at 628.
[106] *Id.*

challenging the school district's educational services under IDEA, the ADA, the Fourth Amendment, and the Fourteenth Amendment. The ALJ granted the school district's motion to dismiss because the child was no longer a student in the district and had not requested a hearing before she transferred out.[107]

The mother appealed the ALJ ruling to the district court, arguing that because the state conducts all IDEA hearings, it is immaterial whether a student requests a due process hearing against an individual district before or after leaving that district. Further, the mother argued that her failure to request a hearing should not bar the claim because an immediate transfer was necessary for her daughter's physical and psychological safety. Nonetheless, the district court found that the administrative remedies had not been exhausted and dismissed the case.[108] The Eighth Circuit Court of Appeals upheld the dismissal, citing its precedent that a FAPE-based IDEA challenge is no longer legally viable once the child transfers to a new district, even if he or she was in an "intolerable situation."[109] Thus, in the Eighth Circuit, a child must continue to attend school in an abusive environment to receive an administrative hearing and prevail in an IDEA suit against the school. This ruling led the parents' attorney to comment that, with regard to protecting children, "all of the systems that are supposed to be in place, at least in Minnesota, are broken."

In 2009, the teacher appealed the MDE's decision and a state court reversed MDE's determination of wrongdoing. The state court of appeals upheld that reversal, finding the MDE did not explain its conclusion that the teacher's decision to address the child behavior issues before taking her to the bathroom constituted a denial of access to toilet facilities.[110]

The Minnesota legislature has attempted to provide protections from dangerous restraints and seclusion for children with disabilities, but the law still has a few loopholes. First, while the statute seeks to limit the use of restraints and seclusion to emergencies only, its definitions of restraints, seclusion, and emergencies are so broad that it could permit more frequent use.[111] Further, prone restraints are being phased out, but are still permitted until August 2015—a time period that has already been extended several times and may be extended again.[112] Representatives from the Minnesota Disability Law Center (MDLC) noted that even with this looming phase-out, the use of prone restraint initially increased and then changed very little. Additionally, MDLC notes that prone restraint is used in a racially disproportionate frequency.[113]

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[107] *Id.*at 629.

[108] *Id.* ("The district court concluded C.N.'s IDEA claim failed as a matter of law *because she did not request a hearing on her claims against the District until after leaving the District*. The court also dismissed C.N.'s remaining federal claims for failure to state a claim and declined to exercise jurisdiction over her state law claims." emphasis added).

[109] Thompson v. Bd. of the Special Sch. Dist. No. 1, 144 F.3d 574 (8th Cir. 1998) (establishing the rule that students lose their rights to IDEA due process hearings upon transferring to a new school district).

[110] Van der Heiden v. Minn. Dep't of Educ., 2009 Minn. App. LEXIS 1255 at *19 (Minn. App. Dec. 1, 2009).

[111] MINN. STAT. ANN. § 125A.0942; NDRN, *supra* note 3.

[112] MINN. STAT. ANN. § 125A.0942; Tom Weber, *Bill would extend Minnesota's prone restraint law until late 2013*, MINNESOTA PUBLIC RADIO (Feb. 23, 2012, 9:06 AM), http://minnesota.publicradio.org/display/web/2012/02/23/daily-circuit-special-ed-restraint.

[113] MINN. DEP'T OF EDUC., THE USE OF PRONE RESTRAINT IN MINNESOTA SCHOOLS: AUGUST 2011 THROUGH JANUARY 2012 (2012), *available at* http://education.state.mn.us/MDE/mdeprod/groups/educ/documents/basic/041371.pdf; MINN. DEP'T OF EDUC., THE

Minnesota continues to have a high rate of seclusion and restraint incidents as compared with other states: 22,000 uses of seclusion and restraint on more than 2,500 special education students were reported in the last year alone.[114] MDLC noted that these numbers show a high rate of repeated use, which means that seclusion and restraint are not addressing or correcting the underlying problems for children with disabilities. MDLC also stated that only around fifteen to twenty due process cases are filed per year. This number has remained constant through the years and reflects overall dissatisfaction with the legal process. Among the cases that are filed, only one or two make it to the trial stage and parents rarely win as a result of the Eighth Circuit holdings. Even when parents do prevail, the school districts will typically appeal to lengthen the process and limit parents' access to remedies.

New York: In 2004, a fourteen-year-old boy with multiple developmental disabilities, including impaired language and communication skills, began attending the Rosemary Kennedy School for children with disabilities.[115] In May 2005, after a routine meeting with teachers, the boy's parents were told that he had been sent to the "timeout room" for failure to cooperate with teachers. The parents then discovered the boy alone and crying in a locked five by six foot room with little to no light and padded with blue gym mats on the walls. The parents then realized their son had been previously trying to communicate his distress by saying "no blue room" and refusing to board the bus to school in the morning.[116] The boy's therapist ultimately reported that he was so traumatized by the use of the room, it would his exacerbate his condition if he returned to the school.[117] His parents subsequently placed him in private school.

According to court documents, the parents were aware that the school was going to use "time-outs," but believed that this referred to being made to sit quietly in the same room as the rest of his class, which was consistent with how they conducted his time-out at home. The parents sharply dispute that they were aware the school had developed a Behavioral Intervention Plan (BIP) for the boy that included the use of such a room when he was physically aggressive towards others. However, the school district claims that they discussed the BIP with the parents.[118] Further, the parents believed that their son was secluded many more times than acknowledged by the school, but no documentation existed to support that assertion. The parents also disputed the school psychologist's claim that he called the parents every time the child was placed in time-out.

The parents filed suit asserting nineteen causes of action against the district, the regional authority running the school, and school officials, including violations of the child's Fourth, Fifth, and Fourteenth Amendment rights, section 504 of the Rehabilitation Act, and Title II of the ADA. The parents also alleged a failure to provide a free and appropriate public education as required by IDEA, and various state tort law claims.[119] Fourteen of the nineteen original claims were dismissed at summary judgment in March 2011, including all federal and state law claims against the individual school officials and all federal and state law claims against the school district, as well as many of the claims against the regional

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USE OF PRONE RESTRAINT IN MINNESOTA SCHOOLS: JANUARY 2012 THROUGH DECEMBER 2012 (2013), *available at* http://education.state.mn.us/MDE/groups/communications/documents/basic/050003.pdf.

[114] Jeffrey Meitrodt, *Continued: Disabled students face dangerous discipline in Minnesota*, STAR TRIBUNE (Oct. 21, 2013, 1:39 PM), http://www.startribune.com/local/205024611.html?page=3&c=y.

[115] Schafer v. Hicksville Union Free Sch. Dist., 2011 WL 1322903, at *1-2 (E.D.N.Y. Mar. 31, 2011).

[116] *Id.* at *4.

[117] *Id.*

[118] *Id.* at *3.

[119] *Id.* at *5.

authority running the school.[120] Among the court's reasons for dismissing the claims were a lack of evidence and governmental immunity. The court permitted state tort claims for false imprisonment, negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress, as well as a Fourth Amendment claim for unreasonable seizure, to proceed against the regional authority running the school. The resolution of that litigation is not public.

Following media coverage of this case and others, in 2009 the New York State Department of Education adopted new regulations restricting the use of seclusion and restraint to situations involving a threat of physical harm, property destruction, or educational disruption.[121] However, the "failure to cooperate with teachers" exhibited by the boy in this case could still constitute educational disruption under these regulations. In addition, the regulation does not ban prone restraint, and a representative of Disability Rights New York reported that the training on the use of such dangerous restraints is often perfunctory and inadequate. Further, the representative stated that many parents remain unaware of what is happening with their children in school, even though current regulations contain reporting requirements. Finally, she said that school districts have little incentive to comply with the new regulations because no single agency is responsible for investigating complaints and because the state Department of Education has not provided sufficient guidance to the state's school districts.

North Carolina: At the end of the 2007 to 2008 school year, a five-year-old girl who was diagnosed with autism began attending Johnston County Schools, where she was repeatedly suspended for "disruption with aggression."[122] After her first suspension, the district proposed a helmet to prevent the child from biting and a special chair with a lap belt and tray. In an interview with Committee staff, the child's mother said that she initially consented to the inclusion of this type of restraint in her daughter's IEP to prevent the child's aggression, but later said she felt "under-informed" and described herself as "naïve" in simply deferring to the school officials' recommendations for improving her child's behavior.

In December 2008, her school placed the girl on a modified schedule that allowed her to attend school for three hours per day until her behavior improved.[123] The child's mother said she wanted her daughter to return to school on a full-time basis, but school officials simply suggested increasingly restrictive measures to combat aggression. In September 2011, the school suspended the child for breaking a chair to which she had been restrained.[124] The mother subsequently visited her daughter's classroom unannounced, hoping that she might be able to suggest strategies to improve the child's behavior. During this visit, she stated she found her daughter restrained to a chair, even though she was not displaying any aggressive behavior. The mother said that she believed her daughter was restrained this way because it was easier than teaching her correct behavior. Although she also believed her daughter was restrained over ninety percent of the time she was at school, the school denied restraining the child on a regular basis.[125]

The school suspended the child again in December 2011. The mother then placed her daughter in a residential school that does not use restraints and reports that she is making much better progress. She

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[120] *Id.* at *20.
[121] 8 N.Y. COMP. CODES R. & REGS. tit. 8 §§ 19.5, 200.22(c) and 200.22(d) (2013).
[122] Kristine Sullivan, *Office of Civil Rights Complaint, Johnston County Schools, NC,* DISABILITY RIGHTS NORTH CAROLINA (Mar. 13, 2012) [hereinafter DRNC].
[123] *Id.*
[124] *Id.*
[125] *Id.*

considered pursuing civil litigation, but the attorney she consulted her discouraged her from doing so. Around this time, the child's mother happened to meet a representative of Disability Rights North Carolina (DRNC) at an autism community event. After hearing the mother's story, DRNC launched an investigation and in March 2012 filed a complaint with the Department of Education's Office of Civil Rights (OCR).[126]

In August 2012, OCR found that Johnston County Schools subjected eighteen students to the use of mechanical restraints, including chairs, belts and even a helmet, in many cases without the knowledge of their parents and in violation of Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990.[127] In particular, OCR found that many of students had no mention of mechanical restraints in their IEPs. In other cases, OCR found that IEPs included insufficient details regarding the amount of time restraint would be used, the specific behaviors to be addressed, and whether less restrictive alternatives had been considered.

As a result of these findings, Johnston County Schools agreed to train its employees on the use of mechanical restraints, as well as the requirements for proper documentation in accordance with state law. Nonetheless, school officials did not acknowledge any responsibility for improper use of restraints and described OCR's findings as solely focused on the school district's incorrect documentation procedures.[128] Although the school district did develop a through training program in response to its agreement with OCR, DRNC stated that the district is no longer compelled to require any of its school personnel to take the training now that OCR has concluded its monitoring of the agreement. The district made no other changes to its policies regarding seclusion and restraint. Moreover, DRNC said that although North Carolina law requires school districts to offer training to staff, districts do not have to compel any staff to attend such training.

In addition, current state law only requires parental notification in cases where restraint caused an injury or when seclusion lasts longer than ten minutes. Thus, parents may not always learn of episodes of restraint and seclusion that cause their children psychological harm or impede their learning. State law also contains loopholes permitting the use of seclusion and restraint if they are included in the child's IEP, as well as in cases of physical harm, property destruction, or educational disruption.[129] A representative from DRNC also told us that schools have used restraints in cases of property damage where the property in question is a broken pencil.

DRNC cited many ongoing problems in achieving a successful resolution of seclusion and restraint cases, including that parents do not have sufficient access to schools' restraint and seclusion records. To resolve challenges to the use of seclusion and restraint, DRNC may be able to negotiate with a school district prior to filing a complaint, but only if they a have pre-existing, positive relationship with school administrators. DRNC also told us that parents in the state are in need a single point of entry with the state Department of Education to file complaints about abusive restraint and seclusion because parents typically get passed from person to person within the system. Perhaps most troubling, when parents who suspect their children are being subjected to abusive seclusion and restraint in school go to the police, they

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[126] *Id.*
[127] Olabisi Okubadejo, *OCR Complaint No. 11-12-1161 Letter of Findings*, U.S. DEP'T OF EDUC. (Aug. 22, 2012).
[128] Bruce Midwurf, *Johnston Schools cited for improperly restraining students*, WRAL.COM (Sept. 14, 2012), http://www.wral.com/news/education/story/11549386/.
[129] N.C. GEN. STAT. § 115C-391.1 (2013).

are frequently turned away. According to DRNC, one magistrate told a family in such a situation, "Well, I'm not going to charge a teacher."

Pennsylvania: From 2001 to 2003, a teacher in the Abington Heights Schools District[130] secluded, restrained, and abused special education students, aged five to eleven, in a windowless basement classroom at Clarks Summit Elementary School. The teacher tied her students to Rifton chairs[131] with bungee cords or duct tape as punishment and left the students restrained even after they overturned their chairs on the floor. She also allegedly gave a six-year-old a bloody lip, crushed students' fingers, squeezed their faces, struck one student over the head, and withheld food from another as punishment. Evidence obtained by the parents' attorney showed that school administrators had been warned for years about the teacher's conduct, but did nothing to stop it.[132] The teacher in this case also had a positive reputation in the community and was viewed by parents and other educators as an extremely qualified teacher "who could do no wrong."[133]

In 2003, after witnessing the abuse for two years, classroom aides reported the teacher to the Director of Special Education at the Northeastern Educational Intermediate Unit (NEIU), which is the agency that contracts with the Pennsylvania Department of Education to provide educational services to schools. The aides described the classroom environment as "chaos," and the teacher as "really aggressive."[134] They said that they waited so long to report the abusive conduct because they were told by the teacher that "nobody would believe them over a teacher." After the aides complained, teachers at Clarks Summit Elementary refused to allow the aides into their classrooms.[135] Reports indicate that NEIU eventually conducted an internal investigation, but never shared the abuse allegations with the police.[136] The aides eventually went to the police after they realized the school district and NEIU were not going to intervene.

Parents of seven children in the class filed suit in 2005 against NEIU, the teachers, and various school officials,[137] bringing constitutional law claims, as well as claims under IDEA, the Rehabilitation Act, and state tort law. In response to the defendants' motion to dismiss, the court permitted the constitutional claims to go forward, stating that evidence of continuous abuse over a two-year period would likely

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[130] Vicky M. and Darin M., et al. v. Ne. Educ. Intermediate Unit, et al., 689 F.Supp.2d 721, 727 (M.D. Pa. 2009).
[131] Rifton chairs are meant to be used for students with certain behavioral disabilities for support and assistance with stability/seating, but are not meant to be used punitively. Pennsylvania law allows use of the chair only in very limited circumstances, and with the knowledge of the parent and school officials.
[132] Vicky M., 689 F.Supp.2d at 727 (noting an incident in which parent Thomas R. attempted to contact NEIU long before the aides reported that Wzorek backhanded and injured a student; noting an incident in which parent Eva L. contacted Rosetti during the 2001-2002 school year after she saw a student forced into a Rifton chair; noting Rosetti was contacted after a student was forced to remain in urine-soaked clothes for an hour-long drive.; noting Rosetti was contacted by Gloria G. after being told her child could not take a medication during the week.)
[133] *Id.* at 727.
[134] *Id.*
[135] *Id.* at 727-28.
[136] *Id.* at 728.
[137] Vicky M. and Darin M. v. Ne. Educ. Intermediate Unit 19, 486 F.Supp.2d 437 (M.D. Pa. 2007); Joseph M. v. Ne. Educ. Intermediate Unit 19, 516 F.Supp.2d 424 (M.D. Pa. 2007); Kimberly F. v. Ne. Educ. Intermediate Unit 19, 2007 U.S. Dist. LEXIS 35778 (M.D. Pa. May 15, 2007); Eva L. v. Ne. Educ. Intermediate Unit 19, 2007 U.S. Dist. LEXIS 35787 (M.D. Pa. May 15, 2007); John G. and Gloria G. v. Ne. Educ. Intermediate Unit 19, 2007 U.S. Dist. LEXIS 35786 (M.D. Pa. May 15, 2007); Sanford D. v. Ne. Educ. Intermediate Unit 19, 2007 U.S. Dist. LEXIS 35776 (M.D. Pa. May 15, 2007); Thomas R. v. Ne. Educ. Intermediate Unit 19, 2007 U.S. Dist. LEXIS 8017 (M.D. Pa. May 15, 2007).

satisfy a conscience-shocking standard. However, the district court dismissed the IDEA claims, finding that the parents failed to exhaust their administrative remedies.[138] Further, while the court allowed state tort claims against the teacher, it dismissed the claims against all other defendants, providing them with immunity because they acted at worst with deliberate indifference, which did not amount to negligence.[139]

In May 2010, NEIU and the District offered a $5 million settlement to families of all eleven children in the teacher's class[140] but did not admit to any wrongdoing. The teacher also never admitted to any wrongdoing, even though she spent six weeks in prison in 2005 on reckless endangerment charges for her actions. When questioned by the media, the teacher's criminal attorney said that she never intentionally harmed any student and alleged that she was not provided with adequate training, guidance, or support.[141] The teacher no longer has a teaching certificate, and the former executive director of the NEIU has since gone to federal prison on unrelated criminal charges.[142] Although NEIU and Abington Heights did not wish to comment on the specific facts of this case, they sent a letter to Chairman Harkin affirming their commitment to providing a free and appropriate education for all students with disabilities through the use of positive behavior interventions and supports. This letter is reprinted in Appendix 2.

Notably, the detective who investigated the teacher on the criminal charges in this case commented on the school's code of silence, saying "I thought cops were bad before I investigated a teacher."[143] Similarly, the attorney who represented the families in the civil suit said that the biggest obstacle he faced in bringing the suit was that "the school stonewalled the investigation." He believes that the school took no action in response to the many complaints from parents and also made a "concerted, united effort" to oppose the complaints and investigation. He also said that school officials actually congratulated a teacher for "keeping her mouth shut" during a deposition. This attitude made it difficult for the attorney to obtain evidence in the case, especially since there were not many physical marks or bruises on the children, and the children were also non-verbal. The attorney indicated that this absence of evidence would have been a problem had he not waited for the criminal investigation to unfold before pursuing civil action. He was thus able to obtain strong physical evidence from the police: the Rifton chairs with the duct tape and bungee cords still attached to them. This evidence, in addition to having all eleven children in the class joined in the suit, was critical to his success in this case.

Pennsylvania currently has meaningful protections against seclusion and restraints for children with disabilities, but not for all children.[144] Children with disabilities cannot be placed in rooms that they cannot readily exit, whether locked, blocked, or held shut. Pennsylvania also forbids mechanical restraints and restraints that interfere with breathing, including "prone" restraints. Further, restraints cannot be used unless less restrictive, less dangerous interventions have failed. Additionally,

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[138] Vicky M., 689 F.Supp.2d at 735-36.
[139] *Id.* at 741.
[140] Associated Press, *Autistic children abused in Pa. classroom to get $5 million to settle federal lawsuit*, FOX NEWS (May 28, 2010), http://www.foxnews.com/us/2010/05/28/autistic-children-abused-pa-classroom-million-settle-federal-lawsuit/.
[141] *Id.*
[142] Rosetti was convicted of fraud for ordering NEIU staffers to work on his home on taxpayer time and using NEIU funds for personal needs. Dave Bohman, *Federal Case Against Fred Rosetti*, WNEP 16 THE NEWS STATION (May 23, 2012, 5:26 PM), http://wnep.com/2012/05/23/the-feds-case-against-fred-rosetti/ (last updated May 23, 2012, 6:57 PM).
[143] Vicky M., 689 F.Supp.2d at 728.
[144] SCHOOLHOUSE, *supra* note 32.

Pennsylvania now requires immediate reporting online to the Bureau of Special Education after incidents of seclusion and restraint.[145] However, representatives from Disability Rights Network of Pennsylvania (DRNPA) state that underreporting still remains an issue.

The DRNPA representatives also noted that while seclusion and restraint litigation in Pennsylvania is not as "stacked against parents" as it is in other states, parents often can't afford representation and have to take on their child's case by representing themselves, which proves very difficult. Also, Child Protective Services often cannot intervene to help when incidents happen in schools as the definition and subsequent investigation of physical abuse by school personnel requires that a child suffer a serious bodily injury, under current Child Protective Services Law. Finally, DRNPA noted that children with disabilities sometimes end up being treated like criminals. If children resist restraints, school officials may refer them to the police for criminal charges. In one case in which the DRNPA was involved, a ten-year-old student had 169 charges filed against him due to resisting physical restraints, and he was sent to juvenile detention rather than provided with appropriate supports.

Tennessee: Parents of multiple prekindergarten children alleged that a teacher committed a number of abusive acts against children in her special education class, including strapping the children to toilets, restraining them with weighted blankets, and force feeding them until they vomited.[146] The teacher was indicted on charges of child abuse, to which she pled no contest, received six years of probation, and lost her teaching license.[147] The parents claimed their children had suffered psychological harm as a result of the teachers' actions and several families filed separate lawsuits against the school district, school officials, and the teacher for violations of the ADA and the First, Fourth, and Fourteenth Amendments.[148]

In 2011, almost all of the families' claims were dismissed, in part because they had not exhausted their administrative burden and because the court found scant evidence of physical abuse rising to the level of a constitutional claim. However, many of the cases involved allegations of behavior by the teacher that caused only minor physical injuries, but serious psychological ones. For example, in one of the cases, the parents alleged that the teacher bruised their child's arm when she grabbed him and restrained him to stop him from running and "getting wild." They stated that they related this story to school officials, but that the meeting turned towards a discussion of their son's "negative behaviors" and how to "manage" them. In an interview with Committee staff, the mother of another child stated that her daughter told her that the teacher squeezed her face to the point of severe pain and put a blanket over her face. Though she initially assumed her daughter meant a light blanket and asked the teacher not to do so again, she stated that she

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[145] 22 PA. CODE §14.133 (2013).

[146] *Parents Sue Sumner Co. Schools Over Alleged Abuse*, NEWSCHANNEL5.COM (Apr. 10, 2013, 6:40 PM), http://www.newschannel5.com/story/21936756/parents-sue-sumner-co-schools-over-alleged-abuse (last updated Apr. 10, 2013, 7:08 PM); Sara Dorsey, *New Suit Filed Against Special Ed Teacher*, WAFB (Jan. 25, 2010), http://www.wafb.com/story/14780628/new-suit-filed-against-special-ed-teacher-1-25-2010?clienttype=printable.

[147] Long v. Sumner Cnty. Bd. of Educ., 2011 WL 1114245 (M.D.Tenn.); *Sumner Co. teacher charged with violating probation*, WKRN (Oct. 6, 2011, 4:43 PM), http://www.wkrn.com/story/15635529/sumner-co-teacher-charged-with-violating-probation?clienttype=printable.

[148] Sagan v. Sumner Cnty Bd. of Educ., 726 F.Supp.2d 868 (M.D.Tenn. 2010); Jackson v. Sumner Cnty. Bd. of Educ., No. 3:09-cv-1004, slip op. (M.D.Tenn. Jan. 6, 2011); Jackson v. Sumner Cnty. Bd. of Educ., No. 3:09-cv-1005, 2011 WL 42618 (M.D.Tenn. 2011); Williams v. Sumner Cnty. Bd. of Educ., No. 3:09-cv-1012, slip op. (M.D.Tenn. Oct. 22, 2010); Long v. Sumner Cnty. Bd. of Educ., No. 3:09-cv-1013, 2011 WL 1114245 (M.D.Tenn. 2011); Decker v. Sumner Cnty. Bd. of Educ., 3:09-cv-1014, slip. op. (M.D.Tenn. Oct. 22, 2010); Minnis v. Sumner Cnty. Bd. of Educ., 804 F.Supp.2d 641 (M.D.Tenn. 2011).

later discovered that the teacher had placed a heavy weighted blanket over her daughter and other children to prevent them from moving around during nap time. The child's mother stated that four years later, she still expresses anxiety that any new teacher might be "mean" like her old teacher and asks what she should do if a new teacher is mean to the other students. In another case, the parents of a child with spastic cerebral palsy in part alleged that his behavior problems escalated after the teacher began placing her legs on the child's legs to prevent him from flailing about while she fed him.[149] The parents of a female prekindergarten student with Down Syndrome alleged that she had been subjected to verbal abuse and left isolated in another teacher's classroom until she was distraught and crying. This same child had also been forced to smell her own feces after having an accident.

In dismissing the cases, the courts focused on the lack of serious physical injury to the children, noting the teacher's actions did not constitute a "brutal and inhumane" abuse of authority.[150] For example, in the case of the child whose arm was bruised, the court noted that even though the effect on the child was "regrettable," the teacher had "a clear pedagogical objective" in grabbing the child's arm and that none of the incidents the parents described were severe enough to be a conscience-shocking abuse of power.[151] In the case of the child who was held down while the teacher fed him, the court found that there was no indication that this practice was abusive or painful.[152] With regard to the child that was forced to smell her own feces, the court noted that while this was "undoubtedly an unpleasant experience," it also did not rise to the level of shocking the conscience.[153]

The families appealed, but the Sixth Circuit dismissed the cases because it found that the claim filings were so inadequate the judges couldn't thoroughly review the lower court's decision.[154] The Sixth Circuit also ordered the lower court to reassess whether the school board was entitled to attorney fees; in April 2013, the district court found claims by all but one of the families to be frivolous and awarded attorney fees to the school board from the other four families. A number of the families also sued the school board for negligent supervision and negligent training of employees, but in September 2013 a judge again ruled in favor of the school board.[155] Although the judge was "sympathetic" to the concerns raised about the

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[149] *Long*, 2011 WL 1114245.
[150] Jackson v. Sumner Cnty. Bd. of Educ., No. 3:09-cv-1005, 2011 WL 42618 (M.D.Tenn. 2011). Noted in all cases.
[151] *Long*, 2011 WL 1114245.
[152] *Minnis*, 804 F.Supp.2d 641.
[153] Sagan v. Sumner Cnty Bd. of Educ., 726 F.Supp.2d 868, 885 (M.D.Tenn. 2010).
[154] Sagan v. Sumner Cnty Bd. of Educ., 501 Fed.Appx.537, 539 (6th Cir. 2012) ("Counsel repeatedly cites unspecified allegations from the complaints, district court briefs, and responses to defendants' statement of material facts, leaving for the court to discern the origin of the information, which children the information relates to, and whether it has record support. While such lackadaisical citations would be inappropriate for any case, they preclude meaningful review of the voluminous record for these consolidated cases."); Associated Press, *Physical abuse suits against teacher dismissed*, KNOXNEWS.COM (Oct. 9, 2012, 12:16 PM), http://www.knoxnews.com/news/2012/oct/09/physical-abuse-suits-against-teacher-dismissed/ (last updated Oct. 9, 2012, 12:44 PM).
[155] Jackson v. Sumner Cnty. Bd. of Educ., No. 83CC1-2011-cv-492, slip op. (Cir. Ct. of Sumner Cnty. Sept. 16, 2013); Kara Apel, *Court rules in favor of Sumner County Board of Education*, 4HDWSMV.COM (Sept. 20, 2013, 6:38 AM), http://www.wsmv.com/story/23482792/court-rules-in-favor-of-sumner-county-board-of-education (last updated Oct. 4, 2013, 7:10 AM).

teacher, she found the evidence to be insufficient to prove negligence.[156] She also found that rather than being the result of their treatment by the teacher, the children's psychological symptoms were the result of their underlying medical conditions.[157]

In an interview with Committee staff, an attorney that represented the families in the various legal proceedings said that he was extremely frustrated by the outcomes and that he was hampered by a body of state tort law that has not evolved to cover psychological injuries or serve those who cannot speak for themselves, such as children with disabilities. He believes parents' allegations will continue to be dismissed and considered frivolous unless they can show that their children were physically injured. He was also concerned by the shortage of experts within Tennessee that are qualified to testify about these issues, a situation that he feels is exacerbated by the fact that many local experts are employed by or contracted with local school systems. The attorney believes there is a "halo effect" surrounding teachers in the state and that courts defer to the school systems. Finally, the attorney noted that the requirement for families to exhaust their administrative remedies before filing suit is a significant barrier, and one that he feels is not faced by children alleging other types of discrimination.

In 2011, Tennessee passed legislation limiting the use of seclusion and restraint in schools to emergency situations and banning restraint that restricts breathing.[158] However, the Disability Law and Advocacy Center of Tennessee (DLAC) reports that even with this ban on restraint that restricts breathing, they still receive numerous complaints about schools using prone restraint. In addition, they told us they do not have the access authority they need to truly investigate these complaints. One DLAC representative stated that she is particularly concerned about cases where school systems are treating children with disabilities like criminals by referring them to uniformed school security officers, who are not subject to restraint and seclusion laws that govern school employees. She also said DLAC is worried that if the legislative debate is reopened to address such ongoing issues, the situation may only get worse because of the pervasive feeling in the state that these techniques are important tools for teachers who need to control an unruly classroom. Although DLAC frequently tries to negotiate changes to school policy instead of filing complaints, they are often only able to get the school district to agree to some additional training for staff, which is a short-term solution because of the high level of turnover in special education classrooms.

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[156] Jackson v. Sumner Cnty. Bd. of Educ., No. 83CC1-2011-cv-492, slip op. at 14 (Cir. Ct. of Sumner Cnty. Sept. 16, 2013).
[157] *Id.* at 12.
[158] Special Education Behavioral Supports Act, 49 T. C. A. § 10-13 (2011).

Appendix 2: Comments from Abington Heights School District in Pennsylvania

December 6, 2013

Honorable Senator Thomas Harkin
731 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Harkin:

The purpose of this correspondence is to emphasize the commitment of the professionals within our educational organizations to the principles of Schoolwide Positive Behavior Support System (SWPBS). The organizations include the Abington Heights School District and the Northeastern Educational Intermediate Unit (NEIU). Both organizations are public educational entities, located in Northeastern Pennsylvania. This correspondence is prompted by the invitation to provide comment to the Senate Health, Education, Labor and Pension committee, chaired by Senator Thomas Harkin. Although prudence dictates withholding comment in the specific court case reviewed by the committee, we welcome this opportunity to reassert our commitment to providing a free and appropriate education (FAPE) for all students with disabilities through the SWPBS. Therein lies the stated purpose of this document.

Schoolwide Behavior Support Systems is a proactive, research-based approach that promotes appropriate student behavior. Promising educational practices routinely encompass Schoolwide Positive Behavior Supports. Moreover, federal as well as Pennsylvania regulations call for positive behavior support, as opposed to punitive measures. The former offers positive, long lasting alternatives to punitive, reactionary measures. Given the regulatory mandate and research supporting Schoolwide Positive Behavior Supports, as well as the positive benefits for students, we wholeheartedly endorse the effective schoolwide behavior support system within our schools.

Thank you for this opportunity to reaffirm our commitment of Schoolwide Positive Behavior Support and our continued commitment to the principles, embodied by the concept.

Sincerely,

Clarence R. Lamanna, Ed.D.
Executive Director
Northeastern Educational Intermediate Unit #19

Michael Mahon, Ph.D.
Superintendent