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

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Summary

Seclusion and restraint have been used in various situations to deal with violent or noncompliant behavior. Because of congressional interest in the use of seclusion and restraint in schools, including passage of H.R. 4247 and the introduction of S. 2860, 111th Congress, first session, this report focuses on the legal issues concerning the use of these techniques in schools, including their application both to children covered by the Individuals with Disabilities Education Act (IDEA) and to those not covered by IDEA.

Several reports have documented instances of deaths and injuries resulting from the use of seclusion or restraints in schools but, until the Department of Education (ED) issued reporting requirements in March 2010, there was no general reporting requirement. On May 19, 2009, in conjunction with a hearing by the House Education and Labor Committee, the Government Accountability Office (GAO) released a study examining the use of seclusion and restraint in the education setting, finding hundreds of cases of alleged abuse and death due to the use of seclusion and restraint. On July 31, 2009, the Secretary of Education sent letters to Chief State School Officers noting the problems identified by the GAO report and in the May 19 congressional hearing, encouraging each state to review its current policies, and stating that the Chief State School Officers would be contacted by ED by August 15, 2009, to discuss relevant state laws, regulations, policies, and guidance. The results of these discussions are posted on ED's website.

Federal law does not contain general provisions relating to the use of seclusion and restraints, and there are no specific federal laws concerning the use of seclusion and restraint in public schools. The Individuals with Disabilities Education Act requires a free appropriate public education for children with disabilities, and an argument could be made that some uses of seclusion and restraint would violate this requirement. In addition, certain procedures may violate constitutional rights or state laws. Although there are some judicial cases, they do not provide clear guidance on when, if ever, seclusion and restraint may be used in schools. H.R. 4247, and S. 2860, 111th Congress, first session, and S. 3895, 111th Congress, second session, would establish minimum safety standards in schools to prevent and reduce the inappropriate use of restraint and seclusion. H.R. 4247 was passed by the House on March 3, 2010.

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Introduction

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

Background

Several reports have documented instances of deaths and injuries resulting from the use of seclusion or restraints in schools[6] but until the Department of Education (ED) issued reporting requirements in March 2010, there was no general reporting requirement.[7] On May 19, 2009, the Government Accountability Office (GAO), in conjunction with a hearing in the House Education and Labor Committee,[8] released a study examining the use of seclusion and restraint in the education setting, finding hundreds of cases of alleged abuse and death due to the use of seclusion and restraint.[9] GAO also examined state laws and noted that it "could not find a single Web site, federal agency, or other entity that collects information on the use of these methods or the extent of their alleged abuse."[10] On March 16, 2010, the Office of Civil Rights of the Department of Education added seclusion and restraint data to its collection of educational information.[11]

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

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

[3] National Disability Rights Network, School is not Supposed to Hurt: Investigative Report on Abusive Restraint and Seclusion in Schools (January 2009) http://www.napas.org/sr/SR-Report.pdf; National Disability Rights Network, School is not Supposed to Hurt: Update on Progress in 2009 to Prevent and Reduce Restraint and Seclusion in Schools (January 2010) http://napas.org/sr/srjan10/Schoo-%20is-Not-Supposed-to-Hurt-(NDRN).pdf.

[4] H.R. 4247 and S. 2860, 111th Cong., 1st Sess.; *Examining the Abusive and Deadly Use of Seclusion and Restraint in Schools: Hearings Before the House Comm. on Education and Labor*,111th Cong. (2009), http://edlabor.house.gov/hearings/2009/05/examining-the-abusive-and-dead.shtml.

[5] 20 U.S.C. §1400 et seq.

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

[7] http://www2.ed.gov/about/offices/list/ocr/whatsnew.html.

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

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

[10] *Id.*

[11] http://www2.ed.gov/about/offices/list/ocr/whatsnew.html.

On July 31, 2009, the Secretary of Education sent letters to Chief State School Officers noting the problems identified by the GAO report and in the May 19 hearing in the House Education and Labor Committee.[12] The Secretary encouraged each state to review its current policies regarding the use of restraints and seclusion in schools and, if appropriate, develop or revise the policies prior to the start of the 2009-2010 school year. He noted the approach used in Illinois, which includes an emphasis on the use of positive behavior intervention and supports, and concluded by stating that the Chief State School Officers would be contacted by ED by August 15, 2009, to discuss relevant state laws, regulations, policies, and guidance. The results of these discussions are posted on ED's website.[13] Generally, the information from the states indicates varied approaches to the use of seclusion and restraint.[14]

Federal law does not contain general provisions relating to the use of seclusion and restraint, and currently there are no specific federal laws concerning the use of seclusion and restraint in public schools. However, certain uses of seclusion and restraint in health care facilities that receive federal funds and in certain non-medical, community-based facilities for children and youth are prohibited by the Children's Health Act of 2000.[15] The Individuals with Disabilities Education Act requires a free appropriate public education for children with disabilities, and an argument could be made that some uses of seclusion and restraint would violate this requirement. In addition, certain procedures may violate constitutional rights or state laws. In the 111th Congress, H.R. 911, a bill that would prohibit some use of seclusion and restraint in certain residential programs for children, passed the House on February 23, 2009.[16] Legislation specifically regarding the use of seclusion and restraint in public and private schools, H.R. 4247, S. 2860, and S. 3895, 111th Congress, has been introduced, and H.R. 4247 passed the House on March 3, 2010.

Definitions

Prior to examining legal principles involved in the use of seclusion and restraint in school, it is helpful to define the terms. The terms have been defined by the Department of Education for the purposes of the 2009-10 Civil Rights Data Collection. Seclusion is defined by ED as:

> [t]he 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.[17]

[12] http://www.ed.gov/policy/elsec/guid/secletter/090731.html.

[13] http://www2.ed.gov/policy/seclusion/seclusion-state-summary.html. The Department of Education also issued a press release discussing the information. See http://www2.ed.gov/news/pressreleases/2010/02/02242010.html.

[14] Representative Miller, the sponsor of H.R. 4247, stated: "The report shows us that while some states have made progress, overall state policies still vary wildly. A divergent patchwork of state and local rules is not adequate when it comes to protecting our kids from abusive uses of restraint and seclusion." http://edlabor.house.gov/newsroom/2010/02/chairman-miller-statement-on-i-1.shtml.

[15] P.L. 106-310, 42 U.S.C. §290ii.

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

[17] http://www2.ed.gov/about/offices/list/ocr/whatsnew.html. The 2009-10 Civil Rights Data Collection survey is in a Word document on this site.

ED defines restraint for the purposes of the 2009-10 Civil Rights Data Collection as including two parts: physical restraints and mechanical restraints. Physical restraints are defined as:

> A personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely. The term physical restraint does not include a physical escort. Physical escort means a temporary touching or holding of the hand, wrist, arm, shoulder or back for the purpose of inducing a student who is acting out to walk to a safe location.[18]

Mechanical restraints are defined as:

> The use of any device or equipment to restrict a student's freedom of movement. The term does not include devices implemented by trained school personnel, or utilized by a student that have been prescribed by an appropriate medical or related services professional and are used for the specific and approved purposes for which such devices were designed, such as:
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> - Adaptive devices or mechanical supports used to achieve proper body position, balance, or alignment to allow greater freedom of mobility than would be possible without the use of such devices or mechanical supports;
> - Vehicle safety restraints when used as intended during the transport of a student in a moving vehicle;
> - Restraints for medical immobilization; or
> - Orthopedically prescribed devices that permit a student to participate in activities without risk of harm.[19]

There is no specific federal statutory definition of the terms as used in school settings, although the terms have been defined in the context of community-based facilities for children and youth under the Children's Health Act of 2000.[20] For community-based facilities, seclusion is defined as the involuntary confinement of an individual alone in a room or an area from which the person is physically prevented from leaving.[21] Restraint is defined as a manual method, physical or mechanical device, material, or equipment, that immobilizes or reduces an individual's freedom of movement.[22]

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[18] *Id.*

[19] *Id.*

[20] P.L. 106-310, 42 U.S.C. §290ii.

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

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

Constitutional Issues

At times, the use of seclusion and restraint in public schools has been subject to constitutional challenge. Such challenges have primarily been based upon the Fourteenth Amendment's guarantee of due process and the Fourth Amendment's prohibition against unreasonable seizures, although other types of constitutional claims have been asserted at times.[23]

The Due Process clause of the Fourteenth Amendment prohibits the government from depriving an individual of his liberty without due process of the law.[24] Although the Supreme Court has not directly considered whether the use of seclusion and restraint in public schools violates the Due Process Clause, the Court has considered a related case involving restraint of a mentally retarded adult confined to a state hospital. In *Youngberg v. Romeo*,[25] the Court applied a reasonableness standard, holding that there is a constitutionally protected liberty interest in reasonably safe conditions of confinement and freedom from unreasonable bodily restraint. However, in order to determine what is reasonable, courts must defer to the judgment of qualified professionals.

In the public school setting, due process challenges to the use of seclusion and restraint have generally been rejected if such tactics are deemed to be reasonable, especially if such use constitutes a routine disciplinary technique. For example, in *Wallace by Wallace v. Bryant School District*, the court held that the plaintiff's isolation in a music room for three class periods was not a due process violation,[26] and in *Dickens v. Johnson County Board of Education*,[27] the court similarly rejected a due process challenge to a brief "timeout" imposed on a student because his seclusion "was not unduly harsh or grossly disproportionate."

In some cases, however, the use of seclusion and restraint may be actionable under the Due Process Clause if it is found to be unreasonable.[28] Courts are even more likely to find the use of seclusion and restraint to be unreasonable if such use is so extreme that it "shocks the conscience." Although many of these cases involve more extreme disciplinary methods, such as corporal punishment,[29] there have been some cases that involve seclusion and restraint. In *Orange v. County of Grundy*,[30] the court declined to dismiss a substantive due process claim, ruling that "placing school children in isolation [in a storage closet] for an entire school day without access to lunch or a toilet facility 'shocks the conscience.'" Indeed, the court emphasized that the use of seclusion must be reasonable, and school officials bear the responsibility to supervise students who are in isolation. Ultimately, however, the due process inquiry, and the reasonableness standard upon which it relies, are subjective and highly dependent on the facts in a given case,

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

[24] U.S. Const. amend. XIV, § 1.

[25] 457 U.S. 307 (1982).

[26] 46 F. Supp. 2d 863, 867 (E.D. Ark. 1999).

[27] 661 F. Supp. 155 (E.D. Tenn. 1987).

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

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

[30] 950 F. Supp. 1365 (E.D. Tenn. 1996).

thus making it difficult to predict the outcome of a due process challenge to the use of seclusion and restraint in public schools.

Meanwhile, some plaintiffs have also claimed that the use of seclusion and restraint violates the Fourth Amendment, which prohibits the government from subjecting individuals to "unreasonable searches and seizures."[31] As with due process claims, courts assess such Fourth Amendment claims using a reasonableness standard.[32] For example, in *Rasmus v. Arizona*,[33] the court refused to dismiss a student's claim that his brief seclusion in a locked closet constituted a seizure in violation of the Fourth Amendment, reasoning that the seizure could be considered unreasonable because it violated the fire code and behavior management guidelines. In contrast, the court in *Couture v. Board of Education of the Albuquerque Public Schools* found that the use of supervised timeouts for a student who engaged in disruptive and threatening behavior was reasonable, particularly in light of the fact that the use of timeouts was authorized by the student's Individualized Education Plan (IEP).[34] Ultimately, like due process cases, the resolution of Fourth Amendment claims involving the use of seclusion and restraint generally depends on the facts of a given case, with a violation unlikely to be found except in cases involving excessive or unreasonable uses of such tactics.

Finally, it is important to note that constitutional claims have, in some cases, been limited by courts that may be reluctant to find constitutional violations for actions that could ordinarily be remedied under state tort law. For example, in *Ingraham v. Wright*, the Supreme Court acknowledged that "corporal punishment in public schools implicates a constitutionally protected liberty interest" under the Due Process Clause, but the Court nevertheless held that "the traditional common-law remedies are fully adequate to afford due process."[35] Thus, remedies for the unlawful use of seclusion and restraint should also be sought under state tort law.[36]

Individuals with Disabilities Education Act

Statutory Provisions

The Individuals with Disabilities Education Act (IDEA)[37] is the major federal statute for the education of children with disabilities. IDEA both authorizes federal funding for special education and related services[38] and, for states that accept these funds,[39] sets out principles under

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

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

[33] 939 F. Supp. 709 (D. Ariz. 1996).

[34] 535 F.3d 1243 (10th Cir. N.M. 2008).

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

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

[37] 20 U.S.C. §1400 et seq. For a more detailed discussion of IDEA see CRS Report R40690, *The Individuals with Disabilities Education Act (IDEA): Statutory Provisions and Recent Legal Issues*, by (name redacted).

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

which special education and related services are to be provided. The requirements are detailed, especially when the regulatory interpretations are considered. The major principles include the following requirements:

- States and school districts make available a free appropriate public education (FAPE)[40] to all children with disabilities, generally between the ages of 3 and 21. States and school districts identify, locate, and evaluate all children with disabilities, regardless of the severity of their disability, to determine which children are eligible for special education and related services.
- Each child receiving services has an individual education program (IEP) spelling out the specific special education and related services to be provided to meet his or her needs. The parent must be a partner in planning and overseeing the child's special education and related services as a member of the IEP team.
- "To the maximum extent appropriate," children with disabilities must be educated with children who are not disabled; and states and school districts provide procedural safeguards to children with disabilities and their parents, including a right to a due process hearing, the right to appeal to federal district court, and, in some cases, the right to receive attorneys' fees.

IDEA provides that when the behavior of a child with a disability impedes the child's learning or the learning of others, the IEP team must consider "the use of positive behavioral interventions and supports, and other strategies, to address that behavior."[41] Nothing in IDEA specifically addresses the use of seclusion and restraints, and the Department of Education has stated that "[w]hile IDEA emphasizes the use of positive behavioral interventions and supports to address behavior that impedes learning, IDEA does not flatly prohibit the use of mechanical restraints or other aversive behavioral techniques for children with disabilities.[42] The Department also noted that state law may address whether restraints may be used and, if restraints are allowed, the "critical inquiry is whether the use of such restraints or techniques can be implemented consistent with the child's IEP and the requirement that IEP Teams consider the use of positive behavioral interventions and supports when the child's behavior impedes the child's learning or that of others."[43]

(...continued)

[39] Currently, all states receive IDEA funding.

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

[41] 20 U.S.C. §1414(d)(3)(B).

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

[43] Letter to Anonymous, 50 IDELR 228 (OSEP March 17, 2008). The National Disability Rights Network has called for a revision of the letter to state that the use of mechanical restraints or other aversive behavior techniques could be a violation of FAPE. National Disability Rights Network, School is not Supposed to Hurt: Update on Progress in 2009 to Prevent and Reduce Restraint and Seclusion in Schools p. 18 (January 2010) http://napas.org/sr/srjan10/Schoo-%20is-Not-Supposed-to-Hurt-(NDRN).pdf.

IDEA Judicial Decisions Involving Seclusion and Restraints

The Supreme Court has not specifically addressed the use of seclusion or restraints under IDEA; however, in *Honig v. Doe*,[44] the Court examined IDEA's requirements for children who exhibited violent or inappropriate behavior, and held that a suspension longer than 10 days violated IDEA's "stay-put" provision.[45] In *Honig*, the Court observed that this decision "does not leave educators hamstrung" and that educators may utilize "normal procedures" which "may include the use of study carrels, timeouts, detention, or the restriction of privileges" as well as a 10-day suspension.[46]

Despite the lack of specific language in IDEA regarding the use of restraints and seclusion, cases have been brought alleging that their use violates a child's right to a free appropriate public education.[47] In *Melissa S. v. School District of Pittsburgh*,[48] the Third Circuit addressed allegations of IDEA violations involving a school's response to the child's serious behavior problems. The court noted that the child "sat on the floor kicking and screaming, struck other students, spit at and grabbed the breast of a teacher, refused to go to class, and once had to be chased by her aide after running out of the school building."[49] In this situation, the school's use of a time-out area in an unused office where her aide and others would give her work and encourage her to go to class did not violate IDEA since it did not change the child's placement and was within normal procedures for dealing with children who were endangering themselves or others.[50] Similarly, the Eighth Circuit in *CJN v. Minneapolis Public Schools*[51] held that a third grade child with brain lesions and a history of psychiatric illness received FAPE despite extensive use of seclusion since he was progressing academically and the school had made efforts to tailor his IEP to address his behavior. A strong dissent was filed, noting the child seemed to be trapped in an increasingly punitive approach to discipline,[52] and stating, "[w]e are essentially telling school districts that it's copacetic to deal with students with behavioral disabilities by punishing them for their disability, rather than finding an approach that addresses the problem. We also tacitly

[44] 484 U.S. 305 (1988).

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

[46] 484 U.S. 305, 325 (1988).

[47] In addition to the cases discussed subsequently, at least one case has been brought by a protection and advocacy agency seeking student records concerning the use of a seclusion room. The court denied access to the records. Wisconsin Coalition for Advocacy, Inc. v. State of Wisconsin Department of Public Instruction, 407F.Supp.2d 988 (W.D. Wisc. 2005).

[48] 183 Fed. Appx. 184 (3d Cir. 2006).

[49] *Id.* at 188.

[50] See also B.D. and D.D. v. Puyallup School District, 2009 U.S. Dist. LEXIS 91743 (W.D. Wash. September 10, 2009), where the court held that the use of a quiet room did not violate FAPE since the student could go and leave voluntarily, and the room was not used to discourage undesirable behaviors.

[51] 323 F.3d 630 (8th Cir. 2003), cert. denied 540 U.S. 984 (2003).

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

approve the District's resort to police intervention for the behavioral problems it helped create by failing to address CJN's unique behavioral disorder."[53]

Courts have examined whether the administrative exhaustion requirements of IDEA apply in situations involving the use of seclusion and restraint, generally finding that administrative exhaustion is required. For example, in *C.N. v. Willmar Public Schools*,[54] the child's IEP and behavior intervention plan (BIP) allowed for the use of seclusion and restraint procedures when the child was a danger to herself or others; however, the parents alleged that these procedures were used improperly and excessively. The parents withdrew their daughter from the school and placed her in another school. After her withdrawal, the parents requested a due process hearing, challenging the adequacy of the educational services. The Eighth Circuit affirmed the district court's dismissal of the case, finding that if the parent was dissatisfied with the child's education, she must follow the IDEA due process procedures and file for a due process hearing while the child was still in the school district against which the complaint was made.[55] Similarly, the Ninth Circuit, in *Payne v. Peninsula School District*, held that administrative exhaustion was required since the use of a "safe room" was included in the child's IEP, was a recognized tool under state statute, and the plaintiff did not alleged physical injuries.[56] However, in an earlier Ninth Circuit opinion, distinguished in *Payne*, the court found no administrative exhaustion requirement in an action for damages for physical and emotional abuse.[57]

In a series of cases involving a special education teacher in Pennsylvania who allegedly hit, pinched, dragged, and restrained autistic students in Rifton chairs with bungee cords and/or duct tape, the district court originally did not require the exhaustion of administrative remedies.[58] However, the court later held that, due to a subsequent court of appeals decision mandating the use IDEA administrative procedures when a violation of FAPE was alleged, exhaustion was required and the IDEA claim was dismissed. This was despite the argument that the cases differed due to the physical and emotional abuse alleged in the lower court cases.[59] This series of cases has

[53] 323 F.3d 630, 649 (8th Cir. 2003), cert. denied 540 U.S. 984 (2003).

[54] 591 F.3d 624 (8th Cir. 2010).

[55] See also Doe v. S&S Consolidated I.S.D., 149 F.Supp.2d 274 (E.D. Texas 2001), aff'd 309 F.3d 307 (5th Cir. 2002), where the court, in a case that also presented constitutional issues, dismissed the IDEA claims relating to restraints since IDEA's administrative procedures had not been exhausted.

[56] 598 F.3d 1123 (9th Cir. 2010).

[57] Witt v. Clark County School District, 197 F.3d 1271 (9th Cir. 1999). In Witt, a student with Tourette's Syndrome sought damages for physical and emotional abuse arising from being force-fed food he was allergic to, denied food, strangled, subjected to physical "take-downs", and being forced to walk and run despite physical disabilities.

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

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

not yet ended as the plaintiffs have alleged constitutional violations, violations of Section 1983,[60] and Section 504 of the Rehabilitation Act,[61] as well as state tort claims.[62]

In *Peters v. Rome City School District*,[63] although the child's mother had consented to the school's IEP which included use of a time-out room, the court found that this consent did not impact on her assertion of constitutional violations. The child's mother testified that she had not known how often the child had been placed in the room; how he was treated while there; and that the room was filthy and lacked ventilation. IDEA issues were not directly addressed in *Peters* since the school district had not objected to the court's failure to instruct the jury about the federal and state laws possibly allowing the use of time-out rooms.

In contrast, IDEA has been used by parents in an attempt to enjoin enforcement of a New York state regulation that banned the use of "aversive interventions."[64] Parents argued in part that "some students' IEP's were being revised without parental consent or simply not revised for the new school year, the effect of which was to deprive those students of aversive therapies."[65] The Second Circuit vacated the district court's injunction against the regulation and remanded for further findings, noting, "We are confident that, especially given the harms that could result if the student plaintiffs' behavioral treatments are interrupted, the deficiencies in the district court's order may be expeditiously remedied."[66] On remand, the district court upheld the regulations finding that they represented "an informed, rational choice between two opposing schools of thought on the use of aversives."[67]

State Laws and Policies

Several recent studies have examined state law and policies regarding seclusion and restraints in schools, and generally have found little uniformity in coverage. The Department of Education released the results of its review of state restraint policies on February 24, 2010. This review includes references to state statutes and regulations as well as information on any planned changes.[68]

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[60] 42 U.S.C §1983.

[61] 29 U.S.C. §794.

[62] Vicky M. v. Northeastern Educational Intermediate Unit, 2009 U.S. Dist. LEXIS 85026 (M.D. Pa. September 16, 2009). The Section 1983 claim was dismissed on a motion for summary judgment (Vicky M. v. Northeastern Educational Intermediate Unit, 2009 U.S. Dist. LEXIS 71406 (M.D. Pa. September 26, 2009) but the other claims survived the motion for summary judgment. See also Vicky M. v. Northeastern Educational Intermediate Unit, 2009 U.S. Dist. LEXIS 108666 (M.D. Pa. November 20, 2009), which denied a motion to reconsider the dismissal of defendants' motion for summary judgment, and Vicky M. v. Northeastern Educational Intermediate Unit, 2010 U.S. Dist. LEXIS 9733 (Feb. 4, 2010), which granted a motion to consolidate.

[63] 747 N.Y.S.2d 867 (NYSC 2002).

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

[65] *Id.* at 99.

[66] *Id.* at 102.

[67] Alleyne v. New York State Education Department, 2010 U.S. Dist. LEXIS 16460 (N.D.N.Y. Feb. 24, 2010). Another attempt to challenge the New York state regulations by seeking a preliminary injunction resulted in the court's granting of the defendants' motion to dismiss. Bryant v. New York State Education Department, 2010 U.S. Dist. LEXIS 88652 (Aug. 26, 2010).

[68] http://www2.ed.gov/policy/seclusion/summary-by-state.pdf.

In a May 2009 study, GAO found that 19 states have no laws or regulations relating to the use of seclusion or restraints in schools, and that the states that have laws or regulations vary widely in their coverage.[69] For example, GAO found that 7 states have provisions restricting the use of restraints but do not regulate seclusion,[70] and 17 states require training prior to the administration of restraints.[71] A 2007 study which surveyed state educational agencies found that 24 states had an established policy or provided guidelines concerning the use of time-out procedures.[72] A January 2009 survey by the National Disability Rights Network examined the laws and policies of 56 states and territories and found that 41% had no laws or policies concerning restraint and seclusion, almost 90% allowed prone restraints,[73] and 45% required or recommended that schools notify parents or guardians of the use of restraints or seclusion.[74] The 2010 update to this report indicated that two state legislatures and six state departments of education strengthened their protections.[75]

Federal Legislation

On December 9, 2009, legislation establishing minimum safety standards in schools to prevent and reduce the inappropriate use of restraint and seclusion was introduced in the House, H.R. 4247, and the Senate, S. 2860. The House Committee on Education and Labor reported H.R. 4247 out of the Committee on February 4, 2010, by a vote of 34 to 10.[76] On March 3, 2010, the House passed H.R. 4247, the "Keeping all Students Safe Act," by a vote of 262-153. On September 29, 2010, Senator Dodd with Senator Burr introduced S. 3895. The three bills are similar in their general provisions requiring the Secretary of Education to promulgate regulations but differ in some important respects. Most significantly, S. 3895, unlike H.R. 4247 and S. 2860,

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

[70] *Id.* GAO identified the states that place restrictions on the use of restraints but not seclusions as Alaska, Colorado, Hawaii, Michigan, Ohio, Utah, and Virginia.

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

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

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

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

[75] National Disability Rights Network, School is not Supposed to Hurt: Update on Progress in 2009 to Prevent and Reduce Restraint and Seclusion in Schools, p. 19 (January 2010) http://napas.org/sr/srjan10/Schoo-%20is-Not-Supposed-to-Hurt-(NDRN).pdf.

[76] http://edlabor.house.gov/markups/2010/02/preventing-harmful-restraint-a.shtml.

would allow the use of physical restraint or seclusion to be written into a student's IEP plan under certain conditions. This issue is controversial. Some groups, such as the American Association of School Administrators, argue that, if the IEP cannot include such provisions, communication between schools and parents about a student's needs would be inhibited.[77] However, the prohibition on including seclusion and restraint in an IEP is seen by others as discouraging the use of such practices.[78] In addition, the listing of seclusion and restraint in a student's IEP or behavior intervention plan (BIP) may impact the reasoning in judicial decisions, making it more difficult for parents to argue that the use of seclusion or restraint techniques are inappropriate.[79]

H.R. 4247, introduced by Representative George Miller and Representative Cathy Rodgers, and as passed by the House, would require the Secretary of Education to promulgate regulations "in order to protect each student from physical or mental abuse, aversive behavioral interventions that compromise student health and safety, or any physical restraint or seclusion imposed solely for purposes of discipline or convenience...."[80] These regulations would apply to preschools and public or private schools that receive, or serve students that receive, support from federal education funding. H.R. 4247 would also prohibit the use of physical restraint or seclusion as a planned intervention from being written into the child's IEP plan,[81] and would require state educational agencies (SEAs) to submit state plans to the Secretary of Education providing assurances that the state has in effect state policies and procedures that meet the minimum standards established by the Secretary.[82] The Secretary would also be given authority to award grants to the SEAs to assist in establishing, implementing, and enforcing the state policies and procedures.[83] These grants are to be awarded using competitive procedures based on merit and none of the appropriated funds may be used for a congressional earmark.[84] H.R. 4247 would also clarify that school resource officers may use handcuffs in certain circumstances.[85] The Congressional Budget Office has stated that enacting H.R. 4247 as reported out would not affect direct spending or revenues.[86]

S. 2860, introduced by Senator Dodd, echoes the requirements of H.R. 4247 but is not identical. For example, the Senate bill, but not the House bill, requires notification in writing to the state protection and advocacy system of serious bodily injury or death resulting from the use of seclusion or restraint in schools.[87]

S. 3895, introduced by Senator Dodd and Senator Burr, also would require the Secretary of Education to promulgate regulations to protect each student from any aversive behavioral intervention that compromises student health and safety, or any physical restraint or seclusion imposed solely for purposes of discipline or convenience."[88] Under S. 3895, these regulations

[77] http://www.aasa.org/uploadedFiles/Policy_and_Advocacy/files/HR4247LetterMarch2010.pdf.

[78] "Restraint Bill's IEP Provision is Sticking Point for Some Groups," THE SPECIAL EDUCATOR (September 24, 2010).

[79] See C.N. v. Willmar Public Schools, 591 F.3d 624 (8th Cir. 2010).

[80] H.R. 4247, 111th Cong., 1st Sess., §5.

[81] H.R. 4247, 111th Cong., 1st Sess., §5(a)(4).

[82] H.R. 4247, 111th Cong., 1st Sess., §6.

[83] H.R. 4247, 111th Cong., 1st Sess., §7.

[84] H.R. 4247, 111th Cong., 1st Sess., §§13 and 14.

[85] H.R. 4247, 111th Cong., 1st Sess., §5(c)(3).

[86] http://www.cbo.gov/ftpdocs/112xx/doc11228/hr4247.pdf.

[87] S. 2860, 111th Cong. 1st Sess., §5(a)(7)(B).

[88] S. 3895, 111th Cong., 2d Sess., §102(a).

must be promulgated not later than one year after enactment; H.R. 4247 would require promulgation within 180 days of enactment. In addition, unlike H.R. 4247, S. 3895 does not forbid earmarks. However, as noted previously, the major distinction from H.R. 4247 is that S. 3895 would allow the use of physical restraint or seclusion to be written into a student's IEP plan under certain conditions.

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