KEEPING ALL STUDENTS SAFE: THE NEED FOR FEDERAL STANDARDS TO PROTECT CHILDREN FROM ABUSIVE RESTRAINT AND SECLUSION IN SCHOOLS

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I. INTRODUCTION

A nine-year-old boy died of asphyxiation when his teacher forcibly restrained him in the "time out" room of a public charter school.[1] A fourteen-year-old boy, along with many of his classmates, was repeatedly restrained in his classroom with methods that have been proven to suffocate and kill children.[2] A seven-year-old girl died after staff members restrained her facedown on a dirty floor for more than thirty minutes.[3] Five first-graders had

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1. U.S. Gov't Accountability Off., *Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers* 6 (May 19, 2009) (available at http://www.gao.gov/new.items/d09719t.pdf) [hereinafter *GAO Report*]. The boy died after he was placed in a "basket hold," a technique in which an adult stands behind a child, holds the child's crossed arms to his or her chest, and takes the child to the floor. *Id.*

2. *T.W. v. Sch. Bd. of Seminole Co., Fla.*, 610 F.3d 588, 594–596 (11th Cir. 2010). Testimony from teachers' aides described instances of facedown restraint in the classroom as well as children being locked in a "cool down" room with no lights. *Id; see also M.S. v. Sch. Bd. of Seminole Co.*, 636 F. Supp. 1317, 1319–1321 (M.D. Fla. 2009) (documenting physical abuse by the same teacher on a child "described as a mentally retarded and severely autistic," including restraining the child against a desk with the child's arm twisted behind him); *G.C. v. Sch. Bd. of Seminole Co., Fla.*, 639 F. Supp. 2d 1295 (M.D. Fla. 2007) (explaining how the same teacher restrained a child with autism against a wall); *J.A. ex. rel. Abelove v. Sch. Bd. of Seminole Co.*, 2007 U.S. Dist. LEXIS 98391 (M.D. Fla. Apr. 19, 2007) (documenting a classmate's psychological abuse from watching the same teacher slam a child on the desk and press her large frame against the child until the child turned purple and eyes began to bulge); *A.B. v. Sch. Bd. of Seminole Co.*, 2005 U.S. Dist. LEXIS 36722 at *2–3 (M.D. Fla. Aug. 31, 2005) (showing that A.B. was subjected to abuse, including being restrained, and witnessed similar abuse). These cases all describe children being physically restrained or locked in dark rooms daily by one special education teacher who had been transferred to the school after allegations of abuse surfaced at her previous school. *M.S.*, 636 F. Supp. at 1318.

3. Coalition Against Institutionalized Child Abuse (CAICA), *The Short Life of Angellika "Angie" Arndt: "Bubbles in My Milk*," http://www.caica.org/ANGELLIKA%20ARNDT

their ankles bound and were taped to chairs and blackboards in their classroom.[4] A nine-year-old boy was placed in a small, dark, and dirty time-out room more than seventy-five times in a six-month period, often for more than an hour at a time, even though the room was only approved for emergency situations.[5] A staff member usually blocked the door, and the boy had developed blisters on his hands from trying to escape.[6]

Unfortunately, these incidents are only a handful of the inappropriate, dangerous, and sometimes fatal uses of physical restraint[7] and seclusion[8] on children in schools. Currently, federal law protects children from restraint and seclusion in hospitals and other inpatient institutions.[9] These federal laws have proven effective in decreasing the number of restraints and seclusions and preventing the need for these techniques through proper training and reporting practices.[10] No such protections extend to

%20BUBBLES%20IN%20MY%20MILK%2012-9-06.htm (Dec. 7, 2006); Aff. John Knappmiller, Chief Investigator for the Medicaid Fraud Control Unit of the Wis. Just. Dept. 4 (Nov. 29, 2006) (available at http://www.caica.org/Affidavit%20John%20Knappmiller.pdf); *see also* Allison Miller, *Homicide Charges Filed in Death of Seven-Year-Old Girl*, http://www.weau.com/home/ headlines/4792836.html (Nov. 30, 2006) (explaining that the child died from a "lack of air while being held down" by an adult employee).

4. Jean-Paul Renaud, *Teacher, Aide Arrested on Child-Abuse Charges*, Fla. Sun-Sentinel (Ft. Lauderdale) (Oct. 10, 2003) (available at http://articles.sun-sentinel.com/2003-10-10/news/0310100018_1_nieves-s-attorney-miami-dade-school school-system).

5. *GAO Report*, *supra* n. 1, at 27–28. Reasons given for the confinement of the boy included non-aggressive behaviors such as whistling, slouching, and hand-waving. *Id.*

6. *Id.* at 28.

7. Restraint is defined as "[a]ny manual method, physical or mechanical device, material, or equipment that immobilizes or reduces [a person's ability] to move his or her arms, legs, body, or head freely." 42 C.F.R. § 482.13(e)(1)(i)(A) (2012).

8. Seclusion is defined as "the involuntary confinement of a [student] alone in a room or area from which [he or she] is physically prevented from leaving." *Id.* at § 482.13(e)(1)(ii). Seclusion is distinguished from a time-out, which is defined as a temporary exclusion of a student from classroom activity to provide the student with an opportunity to calm down, but does not involve isolation in an area from which the child cannot escape. George Miller, *Preventing Harmful Restraint and Seclusion in Schools Act*, H.R. Rpt. 111-417 at 17–18 (Feb. 23, 2010).

9. 42 U.S.C. § 290jj (2006). Known as the Children's Health Act of 2000, this law amended Title V of the Public Health Service Act and was passed in response to studies that indicated a staggering number of deaths caused by restraint in psychiatric and mental health facilities. *See* U.S. Gen. Accounting Off., *Mental Health: Improper Restraint or Seclusion Use Places People at Risk* 6–7 (Sept. 1999) (available at http://www.gao.gov/archive/1999/he99176.pdf) (describing the dangerous use and effects of restraint and seclusion in mental health facilities and hospitals and showing that children are disproportionately affected).

10. *See* Alisa B. Busch, *Introduction to the Special Section on Seclusion and Restraint*, 56 Psychiatric Servs. 1104 (2005) (providing an overview of a symposium on seclusion and restraint in the field of psychiatry); Andrés Martin et al., *Reduction of Restraint and Seclu-*

children at school,[11] however, despite the numerous reports of restraint and seclusion and the inconsistent and inadequate state laws regarding the use of these techniques in schools.[12] The federal government must take action to address this growing problem and protect the rights of children in schools to be free from dangerous practices that may ultimately result in their deaths.

Restraint and seclusion can impact all students, but reports and studies indicate that children with disabilities, such as developmental disorders and autism, suffer disproportionately from these practices.[13] Educational experiences for children with disabilities have dramatically improved since the enactment of the Education of All Handicapped Children Act of 1975 (EAHCA)[14] and the Individuals with Disabilities Education Act (IDEA).[15] Both of these laws have allowed more disabled children to learn alongside their non-disabled peers and participate more in the traditional learning process, depending on the severity of each

sion through Collaborative Problem Solving: A Five-Year Prospective Inpatient Study, 59 Psychiatric Servs. 1406 (2008) (describing the success of a program implemented to decrease the number of restraints and change the culture surrounding its use in a mental institution).

11. *GAO Report*, *supra* n. 1, at 3.

12. *Id.* at 4. Currently, nineteen states have no laws whatsoever regarding the use of restraint and seclusion in school, and many of the remaining states' laws address this problem wholly ineffectually. *See id.* at 45. Despite well-publicized deaths and injuries, most states are either unwilling or unable to regulate restraint and seclusion effectively, leaving the vast majority of children unprotected from these dangerous techniques. *Id.*; *see also* 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* (Feb. 2010) (available at http://www.ed.gov/policy/seclusion/seclusion-state-summary.html) (providing a comprehensive list of state laws and policies regarding restraint and seclusion).

13. *GAO Report*, *supra* n. 1, at 7–8; Nat'l Disability Rights Network, *School Is Not Supposed to Hurt: Investigative Report on Abusive Restraint and Seclusion in Schools*, http://www.napas.org/images/Documents/Resources/Publications/Reports/SR-Report2009.pdf (Jan. 2009) [hereinafter *NDRN Report*].

14. Pub. L. No. 94-142, 89 Stat. 773 (1975). The EAHCA was groundbreaking legislation addressing the deplorable state of special education at the time, in which disabled children had been "warehoused" in separate schools and continually mistreated. *See Burlington Sch. Comm. v. Mass. Dep't of Educ.*, 471 U.S. 359, 373 (1985) (describing Congress' concerns about children being relegated to private institutions and neglected). The Act was intended to educate children with disabilities and prepare them for independence as adults. 89 Stat. at 773.

15. 20 U.S.C. § 1400 (2006) (last amended and reauthorized in 2004). The IDEA replaced parts of the EAHCA and updated it to create more specific requirements and procedures for educating children with disabilities. *Id.*

child's disability.[16] While overall this has led to a vast improvement in the education and quality of life for these children, negative consequences have arisen, such as the escalating problem of dangerous and sometimes deadly physical restraint, as well as seclusion in small, dark spaces.

Although there is a disproportionate use of restraint and seclusion on children with disabilities, reports have also focused on the fact that this is not solely a disability issue, and the absence of documentation and reporting makes an accurate estimate of who is being restrained and secluded impossible.[17] Generally, restraint is divided into three categories: (1) mechanical, in which some type of device or object is used to restrain a person;[18] (2) physical or manual, in which one or more persons holds or physically manipulates another person to restrict movement;[19] and (3) chemical, in which medication or drugs are used to control behavior.[20] This Article focuses on the first two categories of restraint, as well as seclusion, because those techniques are more frequently used in classroom settings and therefore affect students more significantly than chemical restraints, which typically are not used in a school environment.[21]

Members of Congress took notice of studies conducted by advocacy groups[22] and articles published in newspapers[23] regard-

16. For example, children with attention deficit hyperactivity disorder can often participate fully in a traditional classroom with reasonable accommodations, while children with autism may require more assistance from specialists and more individualized treatment away from students without such disabilities. K12 Academics, *Inclusion*, http://www.k12academics.com/educational-philosophy/inclusion (accessed Feb. 5, 2013).

17. H.R. Educ. & Lab. Comm., *Examining the Abusive and Deadly Use of Seclusion and Restraint in Schools*, 111th Cong. (May 19, 2009) (testimony of Reece L. Peterson, Ph.D., Prof. of Special Educ., U. of Neb.).

18. 42 U.S.C. § 290jj(d)(1).

19. *Id.* at § 290jj(d)(3).

20. H.R. 4247, 111th Cong. § 4(1) (Feb. 23, 2010).

21. Craig Goodmark, *A Tragic Void: Georgia's Failure to Regulate Restraint and Seclusion in Schools*, 3 John Marshall L.J. 249, 253–254 (2010).

22. *E.g. NDRN Report*, *supra* n. 13, at 13–26 (detailing incidents where children were tied to chairs and wheelchairs; locked in dark, small rooms; and killed by asphyxiation while being restrained facedown); Alliance to Prevent Restraint, Aversive Interventions, and Seclusion (APRAIS), *In the Name of Treatment: A Parent's Guide to Protecting Your Child from Restraint, Aversive Interventions, and Seclusion* (2005) (available at http://tash.org/publications/parentguide/inthenameoftreatment.pdf) (explaining the dangers of restraint and seclusion and its prevalence in classrooms).

23. *E.g.* Meg Kissinger, *Restraints Still Used after Girl's Death: Treatment of Mentally Ill Children Denounced*, Milwaukee Journal-Sentinel, http://www.jsonline.com/news/wisconsin/35780274.html (Dec. 8, 2008) (explaining that state regulations and policies

ing inappropriate and dangerous restraint and seclusion.[24] Congress directed the United States Government Accountability Office (GAO) to conduct a comprehensive study that included an overview of laws and standards related to restraint and seclusion in public schools, verification that the use is widespread and that children have died, and an examination of cases in which a student has died or suffered abuse as a result of being restrained or secluded.[25]

The GAO discovered hundreds of allegations of death and abuse from restraint and seclusion at public and private schools across the United States and verified that at least twenty of those allegations resulted in a child's death.[26] The study noted that the cases shared common themes: (1) the cases involved both disabled and nondisabled children, but those with disabilities faced restraint and seclusion more frequently, typically when the children were not physically aggressive and there was no parental consent for the restraint and seclusion; (2) restraints that constrain breathing can cause death; and (3) teachers and staff members were not trained on the use of restraint and seclusion.[27] The study also noted that only two states require any reporting of restraint and seclusion; therefore, it was impossible to know the true extent of the problem and difficult to enforce any laws and policies because many cases were not documented.[28]

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regarding facedown restraint have remained unchanged since a seven-year-old child's death in 2006); *see infra* pt. IV (discussing an investigation, a series of articles uncovering abusive restraint and seclusion in hospitals and mental health facilities, and eventual federal legislation regarding restraint and seclusion in those facilities).

24. *See* H.R. Educ. & Lab. Comm., *supra* n. 17, at 1.

25. *GAO Report*, *supra* n. 1, at 2. The investigation included a search of all federal and state laws relating to restraint and seclusion; interviews of experts and state officials; caselaw searches; and a review of all official documents related to cases, such as court documents, police reports, and settlement reports. *Id.*

26. *Id.* at 8; *see also* Coalition against Institutionalized Child Abuse, *List of Restraint Deaths*, http://caica.org/RESTRAINTS%20Death%20List.htm (accessed Feb. 5, 2013) (listing seventy-five children's deaths from restraint or seclusion in schools and treatment centers from 1988–2006 and providing links to each case).

27. *GAO Report*, *supra* n. 1, at 7. The study also noted that many of the staff and teachers who employed restraint that led to a child's death were still teaching. *Id.* Further, other studies have noted that a lack of reporting and documentation of these incidents also led to the use of restraint and seclusion in nonemergency circumstances. *E.g. NDRN Report*, *supra* n. 13, at 10, 33.

28. Only Texas and California collect information on restraint and seclusion and reported over 33,000 instances of restraint and seclusion during the 2007–2008 academic year. H.R. Rpt. 111-417 at 13. Additionally, previous government reports have explained that data on restraint and seclusion is likely to be understated because of the lack of

This Article analyzes the problems that exist with restraint and seclusion in public and private schools and explains why federal standards are necessary and must be enacted immediately to protect the rights, health, and safety of all children. Part II of this Article discusses the specific harms to both students and teachers affected by restraint and seclusion, along with the states' failure to protect the students and teachers from these harms. Part III addresses the nearly insurmountable legal barriers families face in enforcing their federal rights against bodily restraint and injury at the hands of a state actor and the inherent inadequacy of an adjudicatory process to effect prospective change in the current abuse of students through restraint and seclusion. Part IV explains why restraint and seclusion of children in schools is a federal issue necessitating comprehensive federal legislation and analyzes Congress' recent attempts to enact such legislation. Part IV also proposes a comprehensive federal solution to the national problem of restraint and seclusion in schools.

II. CHILDREN ARE SUFFERING ABUSIVE RESTRAINT AND SECLUSION IN THEIR SCHOOLS, AND STATES HAVE FAILED TO PROTECT THEM

First and foremost, the use of restraint and seclusion in schools is dangerous, life-threatening, and not isolated.[29] Numerous reports have surfaced revealing injury and death to children subjected to these techniques, and law enforcement, advocacy groups, and the Government Accountability Office have verified many such injuries and deaths.[30] Yet, even though states are aware of this danger, their approaches to regulating restraint and

reporting requirements. Sen. Fin. Comm., *Examining the Use of Seclusion and Restraints in Mental Hospitals*, 106th Cong. 11 (Oct. 26, 1999).

29. *GAO Report*, *supra* n. 1, at 5, 13–28 (discovering "hundreds" of allegations of death and abuse resulting from restraint and seclusion, verifying more than twenty deaths, and conducting detailed studies on ten of the allegations); Coalition against Institutionalized Child Abuse, *supra* n. 26 (listing seventy-five children who died as a result of restraint at various facilities, including traditional schools and residential-treatment centers).

30. *GAO Report*, *supra* n. 1; *NDRN Report*, *supra* n. 13; Kevin Harter, *Wisconsin Clinic Fined $100,000 in Girl's Death; Employee Gets 60 Days Jail*, http://www.caica.org/Wisconsin_clinic_fined_$100,000_in_girl's_death_3-12-07.htm (Mar. 12, 2007).

seclusion are inconsistent and inadequate, with nineteen states[31] having no laws or standards regarding restraint and seclusion, other states having major deficiencies in such laws,[32] and only a handful of states having effective and comprehensive laws in place.[33]

Only eight states[34] currently prohibit prone restraint, which is the most deadly form of restraint and involves the extended restraint of an individual in a facedown position.[35] Studies have established that prone restraint can cause death by positional asphyxia, defined as an "insufficient intake of oxygen as a result of body position that interferes with one's ability to breathe."[36] When a child is restrained facedown, his or her respirations are compromised as the chest cavity is crushed, causing a lack of oxygen to the brain and other vital organs, ultimately leading to death by asphyxiation.[37] Some states have recognized the dangers of prone restraint and are moving toward outlawing it;[38] however,

31. Arizona, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, New Jersey, North Dakota, Oklahoma, South Carolina, South Dakota, Vermont, Wisconsin, and Wyoming. *Dep't of Educ. Report*, *supra* n. 12.

32. For example, Alaska, Colorado, Hawaii, Michigan, Ohio, Utah, and Virginia place some restrictions on restraint but do not regulate seclusion. *GAO Report*, *supra* n. 1, at 4. Thirty-one states do not require parents to be notified if restraint is used, and only two states require annual reporting of restraint and seclusion. *Id.*

33. Illinois has detailed regulations prohibiting restraint and seclusion except for emergency situations, requiring specific procedures to be followed, and mandating implementation of evidence-based training programs for teachers, administrators, and staff to prevent situations that require restraint. 105 Ill. Comp. Stat. 5/10-20.33 (2005); Ill. Admin. Code tit. 28, §§ 1.280, 1.285 (2002).

34. Colorado, Connecticut, Iowa, Massachusetts, Pennsylvania, Rhode Island, Tennessee, and Washington. *GAO Report*, *supra* n. 1, at 4.

35. Crisis Prevention Inst., *Risks of Restraints: Understanding Restraint-Related Positional Asphyxia* (2006) (available at http://www.crisisprevention.com/CPI/media/Media/Resources/ebooks/riskofrestraints.pdf); Protec. & Advoc., Inc., *The Lethal Hazard of Prone Restraint: Positional Asphyxiation* 7 (Apr. 2002) (available at http://www.disabilityrightsca.org/pubs/701801.pdf).

36. Charly D. Miller, *Restraint Asphyxia: Silent Killer*, 2 Residential Group Care Q. 1, 8 (2001); Protec. & Advoc., Inc., *supra* n. 35, at 5.

37. Protec. & Advoc., Inc., *supra* n. 35. Studies indicate several factors that may place an individual at risk of positional asphyxia, including facedown position; prolonged struggle or physical exertion, such as a child trying to escape the restraint; and respiratory syndromes, such as asthma. B. Paterson, D. Leadbetter & A. McComish, *Restraint and Sudden Death from Asphyxia*, Nursing Times 62–64 (Nov. 4, 1998).

38. *E.g. Establishing Restraint Policies, Including a Ban on Prone Restraints*, Ohio Exec. Or. 2009–13S, 2 (Aug. 3, 2009).

many states have ignored this problem,[39] and some states have even removed a ban on prone restraints from proposed legislation.[40] With no state or federal standards, school districts are free to adopt inadequate standards that compromise the safety of children, such as the Chandler, Arizona District's policy allowing items such as weighted vests to hold children to the floor.[41]

Banning prone restraint is the most obvious first step in protecting these children, and by failing to implement a blanket prohibition on even this most extreme form of restraint, forty-two states are leaving children—especially the most vulnerable children—at risk of preventable death and serious injury.[42] Inappropriate restraint and seclusion primarily impacts children with disabilities such as autism, developmental disorders, emotional disturbance, and attention deficit hyperactivity disorder;[43] however, children without such disabilities still feel the effects, whether they are restrained or secluded themselves or witness a classmate suffering such an intervention.[44] Children with disabilities are particularly vulnerable, with many having limited or no verbal communication skills and others with histories of behavioral problems whose accounts and explanations of this abuse may not be believed.[45] The child's increased agitation leads to

39. Idaho, for example, previously had no laws regulating restraint and seclusion and proposed rules that do not include a ban on prone restraints. Idaho State Dep't of Educ., *Proposed Rule IDAPA 08.02.03.160–161—Safe and Supportive Schools* (Aug. 11–12, 2010).

40. In Florida, legislators removed the provision prohibiting prone restraint in schools. Pat Beall & Laura Green, *Pinned Down: Palm Beach County Schoolchildren Subdued with Risky Restraint*, Palm Beach Post, http://www.palmbeachpost.com/news/news/education/pinned-down-palm-beach-county-schoolchildren-subdu/nMBc2/ (Oct. 10, 2010).

41. Kerry Fehr-Snyder, *Chandler District Adopts Restraint, Seclusion Policy*, Ariz. Republic (June 30, 2010) (available at http://www.azcentral.com/news/articles/2010/06/30/20100630chandler-restraint-children-school-district.html).

42. *See supra* n. 32 and accompanying text (explaining that only seven states prohibit prone restraint).

43. H.R. Rpt. 111-417 at 13; *GAO Report*, *supra* n. 1, at 5, 7–8.

44. *See* Protec. & Advoc., Inc., *Restraint & Seclusion in California Schools: A Failing Grade* 1 (2002) (available at http://www.disabilityrightsca.org/pubs/702301.pdf) (explaining that beyond death or serious injury, restraint or seclusion can severely traumatize a child and create lasting adverse psychological effects).

45. *See e.g. T.W.*, 610 F.3d at 594 (explaining that a teacher who used restraint on a special education student stated that the students "were all stupid[,] . . . and they would . . . never go home and tell").

more forceful and longer application of restraint until the child succumbs and sometimes stops breathing.[46]

Clearly, teachers and school districts face severe behavioral challenges and sometimes serious safety issues with students, particularly students with developmental disabilities and emotional disturbance; nevertheless, restraint and seclusion only exacerbate the problem, and even instances that do not cause death may seriously injure a child both physically and psychologically.[47] Researchers have repeatedly concluded that there are no therapeutic benefits from restraint and seclusion, and these techniques lead to increased agitation, higher rates of anxiety and depression, and more disruptive behavior.[48] Additionally, children are not the only ones affected—teachers and staff who physically restrain students are more likely to be injured when they restrain children than if they employed alternative, proactive methods of addressing problematic behavior.[49]

Additionally, teachers and staff must be properly trained not only in safely restraining children in an emergency situation, but also in proactive strategies designed to teach appropriate behavioral skills to prevent dangerous behavior from occurring in the first place. Professionals and lawmakers recognize that there are emergency situations when a child must be restrained as a last resort to prevent serious injury to that child or another person,[50] and teachers and staff must know how to restrain the child safely in that situation. This training is only a starting point, however,

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46. Paterson, Leadbetter & McComish, *supra* n. 37, at 62–64; Wanda K. Mohr, *There's No Such Thing As a Safe Restraint*, N.J. Nursing News (Mar. 10, 2008) (available at http://news.nurse.com/apps/pbcs.dll/article?AID=/20080310/NJ02 /80305005).

47. Linda M. Finke, *The Use of Seclusion Is Not an Evidence-Based Practice*, 14 J. Child & Adolescent Psych. Nursing 186, 187, 189 (2001); Wanda K. Mohr, Theodore A. Petti & Brian D. Mohr, *Adverse Effects Associated with Physical Restraint*, 48 Can. J. Psych. 330, 331, 334 (2003).

48. *E.g.* Sandy K. Magee & Janet Ellis, *The Detrimental Effects of Physical Restraint As a Consequence for Inappropriate Classroom Behavior*, 34 J. Applied Behavior Analysis 501, 502–504 (2001); Mohr & Petti, *supra* n. 47, at 331.

49. In 2000, the leading cause of injury to special education teachers and aides involved the restraint of students. H.R. Rpt. 111-417 at 14. In California, a study showed that a program reducing seclusion and restraint by ninety-eight percent had a corresponding sixty-six percent reduction in staff injury. Coleen Peters, *Massive Reduction in Seclusion and Restraints*, http://www.namicalifornia.org/webdocs/SeclusionandRestraintsarticle .pdf (accessed Feb. 5, 2013).

50. H.R. 4247, 111th Cong. at § 3(4); Sen. 3895, 111th Cong. § 102(a)(2) (Sept. 29, 2010).

because proper training in using restraint falls woefully short of ensuring safety and does not teach the child appropriate behavioral skills, as evidenced by numerous accounts of children who died or suffered injury at the hands of individuals who were trained in applying restraint.[51]

Training in evidence-based, proactive systems[52] is a critical component to protecting both students and teachers from the devastating effects of restraint and seclusion. This type of training gives teachers and staff the skills to prevent dangerous behaviors from occurring or from escalating to the point where restraint is necessary.[53] Also, it can give teachers the tools to handle children with difficult behavioral issues without having to resort to restraint or seclusion. Often, children who were victims of restraint and seclusion were not even engaging in dangerous or aggressive behaviors.[54]

In many of these situations, part of the problem is the lack of training both in safe, emergency-only restraint and in positive behavior supports.[55] Outright prohibitions against dangerous restraint and seclusion are necessary, but not sufficient, to protect students—teachers and staff must have a positive, alternative way to handle difficult behavioral issues.[56] Positive behavior

51. *See e.g. GAO Report*, *supra* n. 1, at 13–14 (detailing a fourteen-year-old boy's death by asphyxia, caused when two counselors, who were trained and certified in applying physical restraints, held the boy to the ground face down). Also, children are much more vulnerable physically than adults—a "properly performed" restraint that may be safe when used on an adult can be life-threatening when applied to a child. Kristi D. Aalberg, Student Author, *An Act Concerning Physical Restraints of Persons with Disabilities: A Legislative Note on Connecticut's Recent Ban of the Use of Life-Threatening Restraints on the Mentally Ill*, 4 Quinnipiac Health L.J. 211, 227 (2001).

52. George Sugai & Robert R. Horner, *A Promising Approach for Expanding and Sustaining School-Wide Positive Behavior Support*, 35 Sch. Psych. Rev. 245, 245–246 (2006).

53. *Id.*

54. H.R. Educ. & Labor Comm., *supra* n. 17, at 9–10 (describing incidents where a seven-year-old girl was restrained and sat on for wiggling a loose tooth while in time-out and for refusing to complete work); *GAO Report*, *supra* n. 1, at 8, 27–28 (explaining incidents where a nine-year-old boy was locked in a seclusion room for hours at a time for offenses such as whistling and slouching).

55. *GAO Report*, *supra* n. 1, at 9. The staff member in one incident who was "responsible for the training of all staff in proper restraint techniques . . . had, himself, never actually received any appropriate training. Rather, the methods [he] taught were self-devised and substandard, including . . . use of the *face-down-on-the-floor-hold*." Aff. John Knappmiller at ¶ 5(f) (emphasis in original).

56. Scott Kirkwood, *Practicing Restraint*, Children's Voice Article, Child Welfare League of Am. (Sept./Oct. 2003) (available at http://www.cwla.org/articles/cv0309restraint.htm).

supports (PBS) involve "research-based method[s] for improving student behavior and creating a safe and productive school climate."[57] At its core, a PBS system is proactive, comprehensive, and data-driven, with a focus on teaching appropriate behaviors and preventing the behaviors that lead to physical restraint and seclusion.[58] Often, with "shrinking resources, multiple competing and overlapping initiatives, fewer qualified personnel, and less time," states and schools have turned away from implementing PBS systems and employed a "traditional 'get-tough' approach to managing problem behavior . . . . Unfortunately, evidence indicates that students with the most severe problem behavior are the least likely to be responsive to these consequences, and the intensity and frequency of their behavior is likely to get worse instead of better."[59]

Illinois has implemented school-wide positive behavior intervention and support (PBIS) as part of prospective legislation, which has received extremely positive results.[60] The law specifically prohibits the use of restraint or seclusion to punish or exclude, reserving such methods only for preserving the safety of the child or others.[61] The law also specifies what types of restraint to use in emergencies and requires staff training in safe restraint,

57. La. School-to-Prison Reform Coalition, *Effective Discipline for Student Success: Reducing Student and Teacher Dropout Rates in Louisiana* 8 (available at http://www.laptic.org/resources/Reducing-Student-and-Teacher-Dropout-Rates-in-LA.pdf).

58. *NDRN Report*, *supra* n. 13, at 35–36; H. Rutherford Turnbull, III et al., *Special Education—IDEA, Positive Behavioral Supports, and School Safety*, 30 J.L. & Educ. 445, 449–456 (2001) (explaining the success of PBS in identifying triggers to dangerous behavior, teaching appropriate behaviors and reactions to triggers, and creating a system to implement PBS on a school-wide basis).

59. Sugai & Horner, *supra* n. 52, at 246.

60. Ill. Pub. Act No. 91-0600, § 14-8.05(b)–(c) (Aug. 14, 1999) (available at Ill. Gen. Assembly, *State of Illinois*, *Public Acts*, *91st General Assembly*, http://www.ilga.gov/legislation/publicacts/pubact91/acts/91-0600.html). The legislation requires the State Board to promulgate rules governing the use of time-out and physical restraint in the public schools. H.R. Educ. & Labor Comm., *supra* n. 17, at 24–37 (Prepared Statement of Elizabeth Hanselman, Assistant Superintendent for Special Education and Support Services, Illinois State Board of Education).

61. Ill. Admin. Code tit. 23, § 1.285 (available at http://www.ilga.gov/commission/jcar/admincode/023/023000010B02850R.html). These regulations developed pursuant to 91-600, and the rules apply to all students in Illinois, regardless of disability status. H.R. Educ. & Labor Comm., *supra* n. 17, at 24 (Prepared Statement of Elizabeth Hanselman, Assistant Superintendent for Special Education and Support Services, Illinois State Board of Education).

documentation of instances of restraint and seclusion, and implementation of PBIS systems in schools.[62]

More than one thousand schools in Illinois have implemented PBIS as part of a statewide network, and data shows "significant reductions in office disciplinary referrals, suspensions[,] and expulsions—resulting in increased time for academic instruction and learning."[63] Thus, implementing this system reduces behavior problems leading not only to the possible use of restraint and seclusion, but also other disciplinary measures that may hurt academic and behavioral progress.[64] Based on the success of the Illinois PBIS program, Illinois state officials "urge the adoption of a national model policy on the use of seclusion and restraint that can only be effective when coupled with a strong commitment and investment in the training and ongoing support of staff in the use of evidence-based prevention strategies."[65] Even though Illinois shows success at the state level, the necessary commitment to an evidence-based, systematic approach is severely lacking in a majority of states.[66]

As illustrated by Illinois, the implementation of school-wide PBIS programs has been highly successful for students. But implementation may be required specifically for students affected

62. H.R. Educ. & Labor Comm., *supra* n. 17, at 24–45 (Prepared Statement of Elizabeth Hanselman, Assistant Superintendent for Special Education and Support Services, Illinois State Board of Education). For example, the regulations impose time limits on restraint and seclusion, require constant monitoring of students subjected to emergency restraint or seclusion, and mandate that parents receive written notification within twenty-four hours of an incident of restraint or seclusion. *Id.* at 24–27.

63. *Id.* at 26 (explaining that the program includes elementary, middle, and high schools; alternative schools; residential schools; and juvenile correctional schools). Schools implementing PBIS also showed more improvement in academic areas measured by the Illinois Standards Achievement Test. *Id.* at 27.

64. *Id.* Furthermore, data indicates that implementing school-wide PBIS programs has resulted in a more than fifty percent reduction in the use of restraint in a facility for children with emotional disorders and a more than sixty percent reduction in "the occurrence of critical incidents" in a youth correctional center. *Id.* Other studies in Illinois and other states indicate that PBIS is highly successful in reducing problem behaviors among all children—with or without specific disabilities—that lead to more severe disciplinary measures including restraint and seclusion. Ill. PBIS Network, *End of Year Report FY 06*, at 3–5, http://docs2.pbisillinois.org/Online_Library/Downloads/Reports/FY06_Short_Rpt.pdf (accessed Feb. 5, 2013).

65. H.R. Educ. & Labor Comm., *supra* n. 17, at 27 (describing improvements in student and teacher safety when PBIS systems are implemented on a school-wide basis).

66. *See* Sugai & Horner, *supra* n. 52, at 246, 250 (describing the lack of resources and knowledge within schools and school districts to implement systematic behavioral support systems).

by the IDEA,[67] which mandates that students with disabilities receive a "free appropriate public education" (FAPE)[68] delivered in the "least restrictive environment"[69] and that an individualized education program (IEP)[70] be developed to meet that mandate.[71] Additionally, when a child's behavioral problems impede his or her learning or that of others, the IDEA requires that the IEP team[72] "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior."[73] Therefore, the IDEA may "create[ ] a rebuttable presumption in favor of positive behavioral interventions and supports . . . by acknowledging them to be techniques that the IEP team members must consider in one instance and that they may consider in another."[74]

In addition to training in positive behavior supports and other evidence-based practices, a crucial failure in the protection of children from restraint and seclusion is the lack of documentation and reporting when incidents do occur.[75] No one really knows the extent of the problem because most schools are not required to

67. *See* Turnbull, *supra* n. 58, at 462 (explaining that the IDEA requires schools to consider positive techniques when developing behavior strategies for eligible students).

68. 20 U.S.C. § 1401(9) (2006). A FAPE is defined as "special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the [s]tate educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the [s]tate involved; and (D) are provided in conformity with the individualized education program required under [20 U.S.C. Section 1414(d)]." *Id.*

69. *Id.* at § 1412(a)(5)(A). This Section provides for children with disabilities to be educated with children who are not disabled "[t]o the maximum extent appropriate." *Id.*

70. *Id.* at § 1414(d)(1)(A)(i); *see also* Kristen A. Demers, Student Author, Hill v. School Board for Pinellas County, 27 Stetson L. Rev. 1136, 1137 (1998) (explaining IEP requirements).

71. 20 U.S.C. § 1414(d)(1)(A)–(B); *see also infra* pt. III(A) (regarding IDEA provisions and requirements).

72. 20 U.S.C. § 1414(d)(1)(B). Generally, an IEP team, consisting of a child's parent(s), teachers, and administrator(s), develops a plan to meet the child's specific needs and enable the child to receive a free appropriate public education. *Id.*; Turnbull, *supra* n. 58, at 460.

73. 20 U.S.C. § 1414(d)(3)(B)(i).

74. Turnbull, *supra* n. 58, at 462; *see* 20 U.S.C. 1414(d)(3)(B)(i) (explaining when a child is hindering learning that "positive behavioral intervention" is required by the IEP team).

75. Thirty-one states do not require schools to notify parents when restraint or seclusion is used on a child, and only two states require schools to report restraint and seclusion data annually. *GAO Report*, *supra* n. 1, at 4. Two-thirds of parents whose children faced restraint or seclusion reported that they were "rarely or never informed" that the techniques had been used. D.S. Marshall et al., *Use of Restraints, Seclusion, and Aversive Procedures on Students with Disabilities*, 34 Research & Prac. for Persons with Severe Disabilities 116, 124 (2010).

report this information or notify parents, and not a single entity exists that collects information or statistics regarding restraint and seclusion.[76] Even in states that limit restraint and seclusion to emergency interventions for immediate safety threats, the lack of a documentation or reporting requirement makes enforcement virtually impossible, causing children to suffer restraint and seclusion as an everyday disciplinary strategy for the staff's convenience.[77] Reporting these incidents would be a prospective way to have the necessary information to identify problems and attempt to find meaningful solutions. Although two states currently require reporting, they only report the total number of restraints and seclusions.[78]

III. THE CURRENT SYSTEM IS INADEQUATE AND ILL-EQUIPPED TO SOLVE THE PROBLEM OF RESTRAINT AND SECLUSION IN SCHOOLS

Because no clear federal standards regarding restraint and seclusion of schoolchildren exist and the state laws contain many inconsistencies, it follows that the available legal remedies are wholly inadequate for children who have been or will be subjected to restraint or seclusion. Without prospective regulation and standards, parents of children exposed to these aversive techniques must seek remedies—usually in federal court—after the abuse has already occurred.[79] Because this process is adjudicatory

76. *GAO Report*, *supra* n. 1, at 5. The Office of Civil Rights began collecting this data in 2010, but the publication date is unknown, as is the number of children who were restrained or secluded during that time. *Id.*

77. Many states have laws or guidelines in place, but the laws contain limited or no reporting or documentation requirements, making them difficult to enforce and creating ways for schools to circumvent them. *See e.g.* Lynn Moore, *Fruitport Couple in Washington D.C. to Push for Ban of Restraints, Seclusion to Control Students*, Muskegon Chronicle (Mich.), http://www.mlive.com/news/muskegon/index.ssf/2009/12/fruitport_couple_in_washington.html (Dec. 9, 2009) (explaining a situation in which a four-year-old child was strapped to a chair for three hours per day for several weeks in Michigan, leading to a conclusion that the State's policy against restraint and seclusion was "not sufficient in preventing its overuse and abuse").

78. Only Texas and California require districts to report restraint and seclusion to the State, and they reported a total of 33,095 instances of restraint and seclusion for the 2007–2008 academic year. *GAO Report*, *supra* n. 1, at 4, 7.

79. The vast majority of lawsuits filed in response to restraint and seclusion are filed as a violation of a constitutional right under 42 U.S.C. Section 1983, and many are filed under the IDEA, which provides a federal private right of action. 20 U.S.C. § 1400. Rarely is a cause of action successful under either Section 1983 or the IDEA. *See infra* pt. III(A)–

in nature and highly fact-intensive, it generally impacts only the particular parties involved, cannot change the death or injuries suffered, and cannot provide a meaningful way to prevent future abuse.

These parents generally have two options in the court system, both with serious deficiencies. First, parents of children with disabilities can allege an IDEA violation, the typical argument being that the abusive techniques deprived the child of a FAPE as required under the law. Second, parents of children with or without disabilities can allege a violation of the child's constitutional rights, most commonly as a Fourteenth Amendment substantive due process violation and occasionally a Fourth Amendment unreasonable seizure.[80] Both the IDEA and constitutional caselaw establish nearly insurmountable barriers for parents seeking to prevent the use of restraint and seclusion on their children, making it nearly impossible for parents to get justice for their children. Because of the remedial nature of the adjudicatory process, even if there is a victory in court, nothing is in place to prevent similar abuse from happening again.[81] Parts III(A) and III(B) address the two types of actions available to parents and illustrate why these types of claims are insufficient to prevent and redress the problem of restraint and seclusion in schools.

(B) (discussing litigation under the IDEA and a violation of constitutional rights under Section 1983).

80. Parties have occasionally alleged that these aversive techniques constitute cruel and unusual punishment in violation of the Eighth Amendment. *See Dickens v. Johnson Co. Bd. of Educ.*, 661 F. Supp. 155, 158 (N.D. Tenn. 1987). The Supreme Court has held, however, that the Eighth Amendment was intended to protect prisoners and does not apply in the school context. *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). The *Ingraham* Court did, nonetheless, recognize that

> [a]mong the historic liberties so protected was a right to be free from and to obtain judicial relief, for unjustified intrusions on personal security. While the contours of this historic liberty interest in the context of our federal system of government have not been defined precisely, they always have been thought to encompass freedom from bodily restraint and punishment. It is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law.

Id. at 673–674 (citations omitted).

81. Claims filed both under Section 1983 and under the IDEA tend to require extremely fact-specific analyses and are therefore unhelpful as legal precedent. *See e.g. Brown v. Ramsey*, 121 F. Supp. 2d 911, 918–924 (E.D. Va. 2000) (determining whether a constitutional right was violated by attempting to analogize to previous school corporal punishment cases).

A. Litigation under the IDEA Does Not Protect All Children, Carries High Burdens, and Cannot Prospectively Solve the Problem of Restraint and Seclusion

The IDEA is the primary federal statute governing the education of children with disabilities.[82] At its core, the IDEA imposes an affirmative duty on schools to provide a FAPE[83] in the "[l]east restrictive environment"[84] for each eligible child between the ages of three and twenty-one.[85] This means that more children with disabilities are educated in public schools, often alongside classmates who do not have such disabilities. Because the IDEA specifically serves children with particular disabilities, only those eligible children have the ability to sue under the IDEA.[86]

Despite the IDEA's emphasis on positive behavioral strategies, the IDEA does not specifically prohibit the use of aversive disciplinary techniques such as restraint and seclusion, which leaves the door open for these types of abusive practices. Further, even though the IDEA mentions consideration of positive behavior supports,[87] courts focus more on academic progress than on behavioral progress when determining whether an IEP is ade-

82. 20 U.S.C. §§ 1400–1418. The IDEA was derived from the Education of all Handicapped Children Act of 1975, which was a response to the deplorable state of education for children with disabilities at that time. *Education for all Handicapped Children Act of 1975*, H.R. Rpt. 94–332 at 2 (June 26, 1975) (stating that "[t]he Subcommittee . . . learned that [f]ederal programs directed at handicapped children were minimal, fractionated, uncoordinated, and frequently given a low priority in the education community").

83. 20 U.S.C. § 1401(9). In 1982, the Supreme Court interpreted the IDEA's language to mean that "if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the [IDEA]." *Bd. of Educ. of Hendrick Hudson C. Sch. Dist. v. Rowley*, 458 U.S. 176, 189 (1982). The Court found that there was no "clear obligation" placed upon the states to provide more than "some specialized educational services." *Id.* at 195.

84. 20 U.S.C. § 1412(a)(5)(A). This section provides that children with disabilities should not be placed in special classes or otherwise removed from the "regular educational environment" unless their disabilities are so severe that education in regular classes "cannot be achieved satisfactorily." *Id.*

85. *Id.* at § 1401(3)(A) (listing the various categories of disabilities rendering a child eligible for special education services).

86. Restraint and seclusion have the potential to affect any child who exhibits problem behavior. *See id.* (defining the term "child with a disability" to include a wide range of issues, including the vague term "other health impairments"). There are many children who have behavioral problems but who have not been diagnosed with a specific disability that would render them eligible for IDEA services. *See id.* (describing the conditions that bring a child under the IDEA).

87. *Id.* at § 1414(d)(3)(B)(i).

quate and the child has received a FAPE as required.[88] Even getting into the court system presents an enormous challenge to many parents because of the IDEA's exhaustion requirement.[89] Before a parent may bring an action in federal court under the IDEA, he or she must exhaust the administrative process provided in the law, or the case will be dismissed.[90] Throughout the entire process, the burden of persuasion is on the parents to demonstrate that the school district did not fulfill its statutory obligations under the IDEA.[91] Only after the state-level administrative appeal may the parents pursue their claim in federal court.[92] This exhaustion requirement may even apply in a Section 1983 lawsuit,[93] as the requirement applies to all claims for relief available under the IDEA, even if the claim arises under a different cause of action.[94] Thus, if a parent brings an action alleging a Section 1983 violation that would also be covered by the IDEA,

88. *See e.g. C.J.N. v. Minneapolis Pub. Schs.*, 323 F.3d 630, 642 (8th Cir. 2003) (finding that a child who had suffered excessive restraint and seclusion still received a FAPE because he was "progressing academically at an average rate").

89. 20 U.S.C. § 1415(i)(2)(A).

90. *Id.* This process begins with a meeting at the school level with the IEP team and may progress to mediation if the meeting does not solve the problem. *Id.* at § 1415(b)(1)–(8). After that, parents may request a due process hearing (done locally) and may appeal the outcome of the due process hearing at the state administrative level. *Id.* at § 1415(g)(1).

91. The IDEA is silent as to which party bears the burden of persuasion, but the Supreme Court has held that the party seeking relief under the IDEA (usually the parent) has this burden. *Schaffer v. Weast*, 546 U.S. 49, 51 (2005). In a dissent, Justice Ruth Bader Ginsburg, argued that "policy considerations, convenience, and fairness" justify allocating the burden of proof to the school district, noting that the school district was in a "far better position" to show that it had met its statutory obligations and that only after the district court in that case placed the burden on the school district did the school district take steps to modify the IEP at issue. *Id.* at 63, 64 (Ginsburg, J., dissenting) (quoting *Weast v. Schaffer*, 377 F.3d 449, 452, 457 (4th Cir. 2004).

92. 20 U.S.C. § 1415(i)(2)(A). States accepting federal funding under the IDEA have thereby waived sovereign immunity and consented to suit in federal courts. *Id.*

93. 42 U.S.C. § 1983.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any [s]tate . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Id.

94. *Jeremy H. v. Mt. Leb. Sch. Dist.*, 95 F.3d 272, 281 (3d Cir. 1996); *A.C. v. Indep. Sch. Dist. No. 152*, 2007 WL 1544507 at *4 (D. Minn. May 22, 2007).

the parent may not sue in federal court until the administrative process is exhausted.[95]

One relevant exception to the exhaustion requirement is the futility exception, which allows a party to bypass the administrative process and bring a claim in federal court if the administrative process cannot grant the relief sought, typically money damages.[96] Many of the cases involving inappropriate and dangerous restraint and seclusion meet this requirement, alleging constitutional violations and seeking money damages or other redress more substantial than revisions to an IEP or placement in another school or classroom.[97] This fails to solve the problem, however, because the child and family must still litigate the claim in court, which carries its own set of obstacles.[98]

In the administrative process, even if the outcome is favorable for the parents, the relief generally consists of a change in placement, revision of the child's IEP, and attorney's fees.[99] The result may improve that particular child's educational experience,

95. *E.g. Jeremy H.*, 95 F.3d at 281.

96. 20 U.S.C. § 1415(i)(2)(A). Money damages are not available under the IDEA. *Id.* In less serious IDEA cases that do not allege abuse of a child, most parents typically seek modification of an IEP or a change in a child's placement, not money damages. *See* Michael Soukup, *Tying the Hands of Children with Disabilities: Barriers to Children and Parents Challenging Physical Restraint Policy*, 26 Children's Leg. Rights. J. 41, 43–45 (2006) (describing multiple cases brought under the IDEA).

97. *John G. v. N.E. Educ. Intermediate Unit 19*, 490 F. Supp. 2d 565, 580 (M.D. Pa. 2007). This is one in a series of cases in Pennsylvania in which a teacher "continuously and systematically," in non-emergency situations, subjected autistic students to such aversive techniques as forcing them to the floor, violently grabbing their necks, and restraining them in Rifton Chairs with bungee cords. *Id.* at 571–572 (explaining that a Rifton Chair "looks like a small highchair with straps and a tray, but is low to the ground" and that its "sole, proper use and purpose . . . is to provide support for those autistic children with little motor control or muscular strength"); *see also Kimberly F. v. N.E. Educ. Intermediate Unit 19*, 2007 WL 1450364 at *3 (M.D. Pa. 2007) (discussing the use of a Rifton chair and other restraints on autistic children); *Joseph M. v. N.E. Educ. Intermediate Unit 19*, 516 F. Supp. 2d 424, 431 (M.D. Pa. 2007) (accusing defendant of using "aversive techniques," including "backhanding [a student] in the face, causing blood to gush from his nose and lips"); *Vicky M. v. N.E. Educ. Intermediate Unit 19*, 486 F. Supp. 2d 437, 447 (M.D. Pa. 2007) (detailing abuse within the same classroom and by the same teachers and aides described in the previous cases listed in this footnote).

98. *See infra* nn. 106–116 (describing court procedures and outcomes in lawsuits brought under the IDEA).

99. Justin J. Farrell, Student Author, *Protecting the Legal Interests of Children When Shocking, Restraining, and Secluding Are the Means to an Educational End*, 83 St. John's L. Rev. 395, 415 (2009) (stating that the procedural safeguards of the IDEA "fall short of effectively protecting the child who is to receive—or to be denied access to—aversive therapies").

but it offers no precedential value and sets no standards for use of aversive behavioral interventions, such as restraint and seclusion, in the classroom. This is especially so in many settlement agreements, in which parents may be "required to sign away their right to speak of their experience or to advocate for other families. Because their stories have effectively been lost, other students continue to fall victim to the same abuse."[100] The fact that parents may be forced to remain silent about the abuse their child suffered, thereby permitting the abuse to happen to other children, highlights the inadequacy of an adjudicatory, retrospective manner of addressing restraint and seclusion as opposed to express standards and requirements.

Even when the exhaustion requirement is satisfied and a family brings an action in federal court under the IDEA, that family faces nearly insurmountable obstacles. For example, in *C.J.N. v. Minneapolis Public Schools*,[101] a third-grade boy with brain lesions and a history of psychiatric illness was subjected to numerous and lengthy instances of restraint.[102] At the local due process hearing, the judge concluded that "[b]ased on 290 findings of fact," the boy did not receive a FAPE, "mainly because of the lack of sufficient positive behavioral interventions . . . and the amount of physical restraint that he was subjected to."[103] The judge further noted that the school district failed to comply with Minnesota standards governing aversive procedures such as restraint and seclusion,[104] violating the IDEA, which mandates

100. H.R. Educ. & Labor Comm., *supra* n. 17, at 75.

101. 323 F.3d 630 (8th Cir. 2003).

102. *Id.* at 634–635. The boy was restrained "more than half of all days" for approximately a month of school and also spent several days in locked seclusion "for excessive periods of time without any criteria for his release, without his mother's consent or authority, and in direct opposition to the opinion of his current mental health provider." *Id.* at 645 (Bye, J., dissenting).

103. *Id.* at 635.

104. The hearing officer concluded that the school district violated: (1) Minn. R. 3525.0850, which requires that behavioral intervention be directed at the student's acquisition of appropriate behavior and skills; and (2) Minn. R. 3525.1400, requiring "an atmosphere conducive to learning" designed to meet a child's specific needs. *Id.* at 648–649 (Bye, J., dissenting). Both standards were adopted pursuant to Minnesota Statute Section 121A.67. Further, the Supreme Court has held that a school district must meet the standards of the state educational agency as an integral part of providing a FAPE. *Rowley*, 458 U.S. at 203. Still, these laws and requirements went unenforced in *C.J.N.*, even by the courts. 323 F.3d at 639–641.

that a FAPE must meet the State's educational standards.[105] Despite the severity of the restraint and seclusion and the failure to meet Minnesota standards, the state hearing review officer reversed the decision.[106] Both the United States District Court and the Eighth Circuit affirmed the officer's decision, ignoring the original findings and relying on the boy's academic progress and the IEP team's efforts to control his behavior.[107] The Eighth Circuit considered the case on appeal, and while the court "very much regret[ted] that [the boy] was subject[ed] to an increased amount of restraint," it did not believe that the restraint made his education inappropriate within the meaning of the IDEA.[108] The court went on to hold that the evidence that the boy was progressing academically at an average rate was enough to indicate that his behavioral problems were "being sufficiently controlled for him to receive some educational benefit."[109] This court's holding essentially gives free reign to the school district to employ restraint whenever a child misbehaves, as long as that child is making minimal academic progress, even if there are state standards in place requiring positive interventions and discouraging aversive and punitive interventions.

B. Constitutional Litigation—Fundamentally and Practically—Cannot Adequately Protect Children and Cannot Provide a Legitimate Solution to Restraint and Seclusion

Constitutional litigation by its very nature, and as demonstrated by the caselaw, also fails to solve the problem of restraint and seclusion in schools. Courts impose a high standard on allegations of constitutional violations because such allegations must involve the most important individual rights. The Supreme Court has always emphasized constitutional issues as distinct from

105. 20 U.S.C. § 1401(9)(B).

106. *C.J.N.*, 323 F.3d at 635.

107. *Id.* at 638. *See also Nygren v. Minneapolis Pub. Sch.*, 2001 U.S. Dist. LEXIS 21980 at *9 (Dec. 14, 2001) (holding that evidence of average academic progress indicates that an IEP is appropriate and a child is receiving a FAPE).

108. *C.J.N.*, 323 F.3d at 639. The court also noted that using restraint may prevent behavior from reaching the point where the student would be suspended, thereby keeping the student in the classroom, assuming that remaining in the classroom and suffering physical restraint was an acceptable alternative to being suspended. *Id.*

109. *Id.* at 643.

other issues, explaining that constitutional liability cannot be imposed every time a state actor causes harm, or the Constitution's protections would become watered-down.[110] The Court has also specifically articulated that challenges of executive action under Section 1983 "raise a particular need to preserve the constitutional proportions of constitutional claims, lest the Constitution be demoted to what we have called a font of tort law."[111] Federal courts have reiterated this concept, placing it in the context of restraint and seclusion in schools.[112]

Specifically, the Supreme Court has always been reluctant to expand the concept of substantive due process, noting concerns such as the lack of guideposts from the language and "preconstitutional history"[113] of the substantive due process clause, and the need for judicial restraint in light of those concerns.[114] Consistent with this reluctance, the Court has stated "that only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense'"[115] and has developed the "shocks-the-conscience" standard for assessing whether official conduct is outrageous enough to constitute a substantive due process violation.[116] The Court and all lower federal courts have applied this test as a threshold question—whether the conduct is so egregious as to literally shock the contemporary conscience—and one way to distinguish the magnitude of a constitutional violation from a state law tort and prevent individuals from using Section 1983 "to

110. *Co. of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998); *Rochin v. Cal.*, 342 U.S. 165, 168 (1952).

111. *Lewis*, 523 U.S. at 847 n. 8. *Lewis* also underscores the importance of distinguishing conduct rising to the level of a constitutional violation by quoting Chief Justice John Marshall's famous point that "it is a *constitution* we are expounding." *Id.* at 846 (quoting *M'Culloch v. Maryland*, 17 U.S. 316, 407 (1819) (emphasis in original)).

112. *E.g. Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) (explaining that "not every state law tort becomes a federally cognizable 'constitutional tort' under [Section] 1983 simply because it is committed by a state official"); *Fessler v. Giles Co. Bd. of Educ.*, 2005 WL 1868793 at *9 (M.D. Tenn. 2005) (quoting *Hall*, 621 F.2d at 613) (stating that "'[n]ot every violation of state tort and criminal assault laws will be a violation of this constitutional right, but some of course may'").

113. *Regents of U. Mich. v. Ewing*, 474 U.S. 214, 225–226 (1985).

114. *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

115. *Lewis*, 523 U.S. at 846 (quoting *Collins*, 503 U.S. at 129).

116. *Rochin*, 342 U.S. at 172. The Court first articulated this test in *Rochin*, holding that the forced pumping of a suspect's stomach "shock[ed] the conscience" and violated the "decencies of civilized conduct." 342 U.S. at 172–173. It has "repeatedly adhered" to this benchmark when considering substantive due process challenges. *Lewis*, 523 U.S. at 847.

convert state tort claims into federal causes of action."[117] This also reflects how courts have interpreted Section 1983 as a way to carefully balance the enforcement of individual rights with the practical necessity for state officials to do their jobs and achieve legitimate state objectives such as education.

It is essential for courts to maintain a high standard for constitutional litigation, so that state causes of action are adjudicated by state courts and every state law violation does not end up in a federal courtroom with a federal label. It can be difficult, however, to determine where to draw the line between what falls under state tort law and what reaches the level of a substantive due process violation, allowing too much subjectivity and room for interpretation.[118] The "shocks-the-conscience" standard is one way courts have attempted to draw that line, and they have added requirements such as an intent on the part of the official to "injure in some way unjustifiable by any government interest,"[119] or for the official to be acting with "malice or sadism" equivalent "to a brutal and inhumane abuse of official power."[120]

Because of the heightened standard required to prevail on a substantive due process claim and the distinction that must be made between state and constitutional causes of action, constitutional litigation is not a viable solution for many restraint and seclusion incidents, even those incidents that are clearly harmful. The majority of school restraint and seclusion lawsuits allege substantive due process violations under the Fourteenth Amendment, using 42 U.S.C. Section 1983,[121] and courts have developed stringent and highly fact-specific tests to determine whether offi-

117. *T.W.*, 610 F.3d at 598.

118. Courts have noted this difficulty, such as in *Jackson v. City of Joliet*, when the court stated that "[n]o problem so perplexes the federal courts today as determining the outer bounds of . . . [Section] 1983." 715 F.2d 1200, 1201 (7th Cir. 1983).

119. *Lewis*, 523 U.S. at 834, 849; *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

120. *Hall*, 621 F.2d at 613.

121. Goodmark, *supra* n. 21, at 264–266. Claims occasionally allege restraint or seclusion as an unreasonable seizure under the Fourth Amendment, but courts require such a high standard for what is considered unreasonable that few, if any, of these challenges survive. *See e.g. C.N. v. Willmar Public Schs.*, 591 F.3d 624, 634–635 (8th Cir. 2010) (finding that restraint and seclusion practices in a special education classroom were not sufficient to state a claim for an unreasonable seizure); *Couture v. Bd. of Educ. of Albuquerque*, 535 F.3d 1243, 1252 (10th Cir. 2008) (holding that secluding students in a small room that could not be monitored as an everyday disciplinary tactic was "eminently reasonable" for Fourth Amendment purposes).

cials' conduct reaches the level of a constitutional violation.[122] Because of the immensely high burden the parent must meet, the lack of specifically documented events, and the absence of any notification and reporting requirements, these claims frequently do not even survive motions to dismiss or summary judgment motions.[123] Further, like IDEA claims, these cases are adjudicatory in nature and impact the rights of a very small number of individuals; thus, they cannot prevent the abuse from happening and, by their nature, do not provide clear standards or guidelines.[124]

There are two lines of cases regarding substantive due process violations in the context of restraint or seclusion of students: one stemming from the notion of conscience-shocking official conduct in the context of excessive corporal punishment[125] and the other in the context of a disabled person's right to be free from bodily restraint.[126] Both establish tremendous barriers for parents who challenge restraint and seclusion, both require very fact-specific analyses, and both reflect the Court's attempt to balance individual rights with government interests, often disadvantaging the individual and highlighting the need for federal law to establish uniform standards for the prevention of the dangerous techniques.

The first and more extensive line of cases regarding restraint and seclusion in schools and substantive due process violations developed in the context of excessive corporal punishment, beginning with the Fourth Circuit's decision in *Hall v. Tawney*.[127] The court developed a test to determine whether physical force used in the school setting rises to the level of a constitutional violation.[128]

122. *Hall*, 621 F.2d at 615; *Neal v. Fulton Co. Bd. of Educ.*, 229 F.3d 1069, 1075 (11th Cir. 2000).

123. *See e.g. Brown v. Ramsey*, 121 F. Supp. 2d 911, 913, 922–925 (E.D. Va. 2000) (granting summary judgment to defendant school district and staff in the case of a first grader restrained in a basket hold—which has killed children in other cases—and restrained in various ways more than forty times).

124. Soukup, *supra* n. 96, at 42–43.

125. *Hall*, 621 F.2d at 613.

126. *Youngberg v. Romeo*, 457 U.S. 307, 319 (1982). Only students with disabilities can allege a substantive due process violation under *Youngberg*, again limiting which children have remedies against restraint and seclusion. Soukup, *supra* n. 96, at 43–44.

127. 621 F.2d 607 (4th Cir. 1980).

128. *Id.* at 613. The court emphasized that a substantive due process claim is "quite different" from a state assault and battery claim. *Id.*

According to the *Hall* test, a court must analyze "whether the force applied [(1)] caused injury so severe, [(2)] was so disproportionate to the need presented, and [(3)] was so inspired by malice or sadism . . . that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience."[129] This creates a nearly unreachable standard for parents and children: the abuse itself must be so rampant and serious as to convince one or more judges that it satisfies all three prongs of the *Hall* test. Parents must have evidence, and the children involved may have disabilities that limit communication skills or are children without disabilities but whose credibility has been diminished by past behavioral problems. Given all of those factors, these children have almost no chance of getting justice through the court system. Even if they could achieve some form of justice, it cannot undo the abuse they experienced.

A series of cases regarding a central Florida teacher's systematic and repeated use of dangerous restraint and seclusion illustrates the barriers parents face when trying to fight back against inappropriate, aversive disciplinary techniques used on their children in school.[130] In one of those cases, *T.W. v. School Board of Seminole County*,[131] the court detailed several incidents of dangerous restraint by the teacher, including one incident in which the teacher put the child on the floor with his face to the ground, straddled him so that she was essentially sitting on him, and pulled his arms behind his back[132]—a technique that has caused asphyxia and resulted in death in similar situations.[133] Despite the fact that facedown restraint can cause death and that the aide testified that she had warned the teacher, the court focused on the fact that the incident did not last longer than five minutes and the child did not suffer lasting physical injuries.[134]

129. *Id.*

130. *T.W.*, 610 F.3d at 595; *G.C.*, 639 F. Supp. 2d 1295; *J.A.*, 2007 U.S. Dist. LEXIS 98391; *M.S.*, 636 F. Supp. 2d 1317; *J.V. v. Sch. Bd. of Seminole Co., Fla.*, 2007 U.S. LEXIS 98385 (M.D. Fla. Mar. 20, 2007) (detailing the potentially deadly restraint of students by a teacher who was six feet tall and weighed 300 pounds); *A.B.*, 2005 U.S. Dist. LEXIS 36722.

131. 610 F.3d 588.

132. *Id.* at 595.

133. *GAO Report*, *supra* n. 1, at 6. The teacher's aide testified that she had warned the teacher about the possibility of asphyxiation with facedown restraint and the teacher had ignored the information and continued applying facedown restraint. *T.W.*, 610 F.3d at 595–596.

134. *T.W.*, 610 F.3d at 601–602.

Based on such reasoning, the court held that the child's substantive due process rights were not violated and the teacher was entitled to summary judgment.[135]

In the court's analysis, it applied the *Neal* test,[136] the Eleventh Circuit's adaptation of the *Hall* test for conscience-shocking excessive physical force in the school setting. Under the *Neal* test, the evidence must show objectively that the punishment was "obviously excessive" and the teacher "'subjectively intend[ed] to use that obviously excessive amount of force in circumstances where it was foreseeable that serious bodily injury could result.'"[137] The court determined that the teacher's restraint of T.W. was "'capable of being construed as an attempt to serve pedagogical objectives,'" even though the teacher herself testified that a teacher should only use physical force against an autistic student as a last resort.[138] Next, the court ruled that even though the teacher "could have restrained T.W. in a less harmful manner," the force used was not disproportionate to the behavior, and T.W. suffered no lasting physical injuries.[139]

In *T.W.* and in various other cases involving substantive due process claims regarding restraint and seclusion, the conscience-shocking standard is simply too high to provide children with a remedy. The courts generally disregard psychological trauma, require severe and lasting physical injury, and also require genu-

135. *Id.* There were at least three other instances of similar restraint and another incident in which the teacher placed the child in the "cool down room," turned off the lights, and blocked the exit to the door. *Id.* at 596.

136. *Neal*, 229 F.3d 1069. The court noted that it "has yet to articulate the analysis that applies when a school official's use of force does not constitute corporal punishment," but determined that the *Neal* test was applicable because the teacher applied the force as a disciplinary measure. *T.W.*, 610 F.3d at 599.

137. *T.W.*, 610 F.3d at 599 (quoting *Neal*, 229 F.3d at 1075). To determine whether restraint is conscience-shocking, the court must consider the totality of the circumstances, including T.W.'s disability, and analyze the case with the following factors: "'(1) the need for the application of corporal punishment, (2) the relationship between the need and amount of punishment administered, and (3) the extent of the injury inflicted.'" *Id.* (quoting *Neal*, 229 F.3d at 1075).

138. *Id.* at 600 (quoting *Gottlieb v. Laurel Highlands Sch. Dist.*, 272 F.3d 168, 174 (3d Cir. 2001)). The court noted that it was not expressing any judgment as to the desirability of corporal punishment as a policy matter. *Id.*

139. *Id.* at 601. The court also downplayed the significant psychological injuries inflicted on the student by concluding that the teacher's conduct was not arbitrary or egregious enough to support a constitutional violation, even though it stated that the "evidence establishes that [the teacher's] conduct aggravated [the student's] developmental disability, exacerbated his behavioral problems, and caused symptoms of post traumatic stress disorder." *Id.*

ine malicious intent on the part of the official engaging in the restraining and secluding.[140] Even in cases such as *T.W.*, where a child was subjected to a technique that has killed other children, and *T.W.*'s companion cases, one of which involved a classroom full of children who were intentionally terrorized, restrained, and secluded, the children's injuries did not rise to the level of conscience-shocking, with one exception.[141] In courts' attempts to achieve the proper balance between the deprivation of a constitutional right and the violation of state tort law, they have created a body of caselaw that cannot provide a legitimate solution to the problem of restraint and seclusion in schools.

The second line of substantive due process cases regarding restraint of schoolchildren applies only to students with disabilities and is based on the reasoning of a landmark Supreme Court decision, *Youngberg v. Romeo*.[142] In *Youngberg*, the Court recognized that individuals with disabilities have a constitutional right to remain free from bodily restraint, but the Court qualified this right by stating that the Constitution only requires "professional judgment," and courts prefer not to get involved in making professional decisions and questioning professional judgment.[143] Therefore, the Court determined that professional decisions made in restraining individuals with disabilities are presumptively valid and will not be interfered with unless the decisions are shown to be a "substantial departure" from accepted professional judgment, creating an immensely heavy burden for those who would challenge restraint in schools.[144] Again, even if a plaintiff

140. *C.N.*, 591 F.3d at 634; *M.H. v. Bristol Bd. of Educ.*, 169 F. Supp. 2d 21, 30–31 (D. Conn. 2001); *T.W.*, 610 F.3d at 601.

141. *M.S.*, 636 F. Supp. 2d at 1325 (finding that when the teacher "slammed [a child] to the desk and leaned on him with enough force to cause his eyes to bulge out and his face to turn blue," in addition to numerous other instances of physical abuse, the teacher was not entitled to summary judgment).

142. *See* 457 U.S. 307 (involving a profoundly mentally handicapped man who sued to be free from bodily restraint in the mental institution to which he was involuntarily committed).

143. *Id.* In *Youngberg*, the Court attempted to balance the protection of constitutional rights with the necessity for professionals to use decision-making power. *Id.* at 321–323.

144. *Id.* The Court did not define "professional judgment" or set any clear standards for what a substantial departure from accepted professional judgment actually is. *See id.* It did define "professional decision-maker" as a "person competent, whether by education, training[,] or experience, to make the particular decision at issue." *Id.* at 323 n. 30. The Court described this professional in the context of a mental health facility, as relevant to the *Youngberg* case. *Id.* at 323–324. It remains unclear, however, what constitutes a pro-

prevails, it is still a reactive situation, leaving nothing to guide school officials except for one particular instance of a situation that is either accepted or rejected by a court. School officials will know that they can continue restraining or secluding students in a particular manner without substantial legal consequences, or they will know that one particular technique in question may be a constitutional violation.

Problems created by the lack of clear standards, lack of documentation, and heavy burden on the plaintiffs under *Youngberg* are evident in *Heidemann v. Rother*,[145] in which special education teachers used a technique called "blanket wrapping" on a mentally disabled girl.[146] The child's mother discovered the use of this technique on her child when she arrived at the school to find her child on the floor, wrapped in the blanket, with flies crawling in and around her mouth and nose.[147] The Eighth Circuit analyzed the claim and determined that the *Youngberg* standard governed, holding that because a licensed professional therapist approved the technique, in the court's opinion, it did not "constitute a substantial departure from professional norms," and both the therapist and the school district were entitled to qualified immunity and summary judgment.[148] This holding reversed the district court's denial of summary judgment to both defendants, even though the district court had heard testimony from expert witnesses who disputed the professional acceptability of the blanket-wrapping technique.[149]

This case highlights the need for documentation and standards for discipline—specifically restraint—in the context of students with disabilities. First, if clear standards existed prohib-

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fessional decision-maker with regard to restraining and secluding children in schools.

145. 84 F.3d 1021 (8th Cir. 1996).

146. *Id.* at 1025. Teachers and aides wrapped the girl so tightly in a blanket that she was unable to use her arms, legs, or hands, and could not escape the restraint. *Id.*

147. *Id.* at 1026. The child was wrapped so tightly that her mother needed assistance in freeing her. *Id.* This situation actually occurred twice; after the mother found the child in this situation the second time, she removed the child from the school. *Id.*

148. *Id.* at 1029, 1033.

149. *Id.* at 1030–1031. One of the plaintiff's expert witnesses, a licensed physical therapist, testified that blanket-wrapping is a technique with a very narrowly defined acceptable use of preparing a child for therapy sessions that should never be utilized on a child for more than ten minutes and that "wrapping a child in a blanket so tightly that [he or she] cannot move, and leaving the child so wrapped for an hour would . . . clearly fall outside of the scope of the appropriate use of the method." *Id.* at 1030 n. 6.

iting the use of mechanical restraints, school officials would be on notice that restraining a child in a manner that prevents use of his or her arms, legs, or hands was prohibited. Schools would not be forced to rely on the "substantial departure" from accepted professional methods but would have a clear indication of which disciplinary methods are permitted. Second, if the instances of restraint were documented and the parent was notified, the problem could be addressed earlier, before level that necessitated a lawsuit. Because no documentation as to what happened is required, and the child was incapable of communicating proficiently as to what transpired, no one will ever really know what that child went through, how extensive the restraint actually was, and how many others have been subjected to such treatment.[150]

Overall, constitutional remedies have not and cannot solve the problem of abusive restraint and seclusion in school: they are available only after a child has suffered the abuse and therefore cannot prevent it; the standard is far too high for most victims to meet; and the fact-specific nature of the analysis serves little prospective value in preventing future restraint and seclusion. While not all instances of restraint and seclusion rise to the level of a constitutional violation, they all involve violations of individual rights, and they all merit a meaningful remedy and an effective way to stop restraint and seclusion from happening in the first place.

While many cases point to the notion that restraint and seclusion claims should arise in state court under state criminal or tort laws,[151] those are also highly ineffective in solving the problem of restraint and seclusion. First, state laws regarding restraint and seclusion vary widely, with some states having no

150. This is true in multiple cases. *E.g. J.V.*, 2007 U.S. Dist. LEXIS at **10–11 (revealing that because a school policy did not require documentation of restraint methods, these incidents went unreported). Courts have noted that a lack of documentation or evidence regarding restraint and seclusion have allowed individuals and school districts to escape liability for instances of restraint and seclusion, either because there was no record of the incident, no communication to the parents, or information had been withheld. *E.g. Schaffer*, 546 U.S. 49; *A.B.*, 2005 U.S. Dist. LEXIS 36722 (providing examples of undocumented, inappropriate punishment methods used on disabled students).

151. For example, Kathleen Garrett, the teacher implicated in the horrific abuse in Seminole County, Florida, was convicted of child abuse and could have faced five years in prison but was given only probation. *Garrett v. Fla.*, 978 So. 2d 214, 215 (Fla. 5th Dist. App. 2008).

laws at all, and state tort laws also have many inconsistencies.[152] Second, state criminal laws often are no better—state officials who have fatally restrained or secluded children often do not face any criminal charges, or they are placed on probation.[153] Some continue to teach or otherwise work directly with children.[154] It is clear that no adequate remedy exists for children subjected to this abuse—whether at the state or federal level—and, in the majority of states and at the federal level, there is no effective regulation or prevention of restraint and seclusion.

IV. RESTRAINT AND SECLUSION OF CHILDREN IN SCHOOLS IS A NATIONAL ISSUE REQUIRING FEDERAL LEGISLATION

Children have actually died. Hundreds or maybe thousands more could have died—they were subjected to the same abusive restraint or seclusion techniques that led to the deaths of others.[155] These are not isolated incidents, they are not happening only in small pockets of the country, and they are not happening only to violent or dangerous children. This is a nationwide problem, happening in both public and private schools, to disabled and non-disabled students, at the hands of teachers and staff who need more support and options for handling students' challenging behaviors. No one really knows just how much this is happening because almost no one is keeping track or reporting it. States are

152. *See supra* pt. II (discussing current state legislation regarding restraint and seclusion in schools). This leaves parents the option of suing under state assault and battery laws, for example, which also vary widely and lead to wildly different outcomes. *See e.g. King v. Pioneer Reg'l Educ. Serv. Agency*, 301 S.E.2d 7, 15 (Ga. App. 2009) (finding no applicable state law for the hanging death by suicide of a middle school student in a locked, unmonitored seclusion room); Sandy Phillips, Student Author, *Tort Liability and Governmental Immunity:* Carestio v. Sch. Bd. of Broward Co., 34 Stetson L. Rev. 969, 978 (2005) (describing the broad immunity most state officials, including teachers and school employees, enjoy from state tort liability).

153. *See* Dave Reynolds, *Renner-Lewis Family Sues School over Son's Restraint Death*, Inclusion Daily Express, http://www.inclusiondaily.com/archives/04/01/02.htm #010204renner (Jan. 2, 2004) (explaining that no criminal charges were filed when "at least" four staff members held a fifteen-year-old autistic boy facedown in a prone restraint, causing his death).

154. H.R. Educ. & Labor Comm., *supra* n. 17, at 21 (Prepared Statement of Tori Price, Parent of Victim) (noting that a Texas teacher who fatally restrained a fourteen-year-old boy when he attempted to leave a classroom did not face criminal charges and was teaching in Virginia at the time of the Congressional Hearing).

155. *GAO Report*, *supra* n. 1, at 4.

not doing their part to protect children, and the states' legal system is incapable of solving this problem. The solution—or at least a start—is the adoption of federal standards to address and regulate restraint and seclusion in schools.

Comprehensive federal legislation is the most appropriate solution and will spare the most children from death, serious physical injury, and traumatic emotional scars. Although state and local governments typically regulate educational issues,[156] the federal government must step in with comprehensive standards to protect the lives and safety of children. Just as Congress has enacted educational legislation in other areas for the benefit of all children,[157] it must also enact legislation to protect children—disabled or not—from restraint and seclusion.[158] Too many states are unwilling or unable to pass laws regulating restraint and seclusion or have passed laws that are insufficient to protect children from these dangerous techniques.[159] Some states have put effective laws into place, showing that a state can regulate this problem effectively if it is willing to invest the resources without a

156. U.S. Dep't of Educ., *The Federal Role in Education*, http://www2.ed.gov/about/overview/fed/role.html (last modified Feb. 13, 2011).

157. *E.g.* 20 U.S.C. § 7801 (detailing the Elementary and Secondary Education Act of 1965, which applies to both disabled and non-disabled students).

158. Amending the IDEA to prevent restraint and seclusion has been discussed. Sarah Marquez, Student Author, *Protecting Children with Disabilities: Amending the Individuals with Disabilities Education Act to Regulate the Use of Physical Restraints in Public Schools*, 60 Syracuse L. Rev. 617, 635–637 (2010). Such an amendment, however, would not protect non-disabled children from restraint and seclusion. Even though these aversive techniques affect a greater proportion of disabled children than non-disabled children, restraint and seclusion methods have still been used on children with no known disabilities. *GAO Report*, *supra* n. 1, at 7–8. Addressing this problem only through the IDEA suggests that restraint and seclusion would be permitted for children who are not eligible for IDEA services. Additionally, because weak reporting and documentation requirements persist, it is not even certain how many children—disabled or not—have been subjected to restraint and seclusion. *Id.*

159. Even a year after the GAO issued its report illustrating the dangers of restraint and seclusion, especially prone restraint, only two state legislatures (Missouri and Minnesota) and six state departments of education (Tennessee, Colorado, Maine, Maryland, Nevada, and Pennsylvania) actually enacted or strengthened laws or regulations regarding restraint and seclusion, and these regulations differ greatly and provide varying degrees of protection for students. *NDRN Report*, *supra* n. 13, at 19; *see also* Greg Toppo, *USA Today*, *Since Hearing, States Take Little Action on Restraint in Schools*, http://usatoday30.usatoday.com/news/education/2009-12-14kidrestraint14_st_n.htm?csp=noo9 (Dec. 14, 2009) (describing the lack of action at the state level in protecting students from restraint and seclusion).

federal mandate,[160] but many other states are taking no such measures, and there can be no practical expectation that all fifty states would commit the necessary resources to these programs when local budgets are already extremely tight.[161]

Additionally, protecting the rights, safety, and security of children in schools across the nation is a task best addressed by Congress, which has the tools and expertise to prospectively solve the problem of restraint and seclusion.[162] The breadth of the problem—the fact that restraint and seclusion methods are occurring nationwide—suggests the need for an entity with broad power to address the situation, namely Congress.[163] Only the legislative branch possesses the authority and ability to create standards to protect the most basic rights of students in our nation's schools.[164] Unlike the judicial system, which is constrained by prior rulings and no specific laws on point, Congress can solve this problem without the fact-specific, case-by-case limitations by creating minimum standards that require states to protect children from restraint and seclusion in schools.[165] Therefore, because the states are failing to protect students from this abuse, and the courts are fundamentally ill equipped to do so, it logically follows that if we want to protect our children in school, Congress must step in and mandate standards.

160. 105 Ill. Comp. Stat. 5/24-23; Ill. Admin. Code tit. 28, §§ 1.280, 1.285. Colorado has enacted similar regulations. 1 Colo. Code Regs. 301-45, § 2620-R-1.00 (2009) (available at http://www.sos.state.co.us/CCR/Welcome.do); *see also GAO Report*, *supra* n. 1, at app. I (providing an overview of state laws that have been enacted relating to restraint and seclusion in schools).

161. *GAO Report*, *supra* n. 1, at 4.

162. Congress has the power to enact legislation for the general welfare of the country. U.S. Const. art. I, § 8, cl. 1.

163. *Id.*

164. *Id.*

165. *See supra* pt. III (discussing the inadequacies of the judicial system regarding solutions to restraint and seclusion in schools); *see also* Monica Teixeira de Sousa, *A Race to the Bottom? President Obama's Incomplete and Conservative Strategy for Reforming Education in Struggling Schools or the Perils of Ignoring Poverty*, 39 Stetson L. Rev. 629, 631 (2010) (explaining the need for stronger federal involvement in education).

A. Federal Regulation of Restraint and Seclusion Has Succeeded in Similar Areas and Must Be Extended to Protect Children in Schools

The federal government has legislated in this area before and has done it quite successfully. In 2000, Congress enacted the Children's Health Act,[166] which amended Title V of the Public Health Service Act to regulate the use of restraint and seclusion on children in hospitals, mental health facilities, and similar institutions after reports of abuse surfaced in 1998.[167] The Hartford Courant's investigation confirmed 142 deaths directly related to restraint, seclusion, or both and also reported that no federal regulations existed and state regulations were widely disparate regarding restraint and seclusion of patients at mental facilities.[168] The alarming statistics prompted Congress to request a Government Accountability Office (GAO) investigation into restraint and seclusion practices at mental facilities, similar to the investigation the GAO conducted regarding schools.[169] The

166. 42 U.S.C. § 290jj. This legislation protects children from inappropriate restraint and seclusion practices in facilities receiving Medicaid and other federal funding, such as hospitals and certain residential facilities. *Id.* at § 290jj(a). Additionally, the Act contains a reporting requirement and requires training in both the use and prevention of restraint and seclusion. *Id.* at § 290jj(b). This law, however, does not extend protection to children in schools. *Id.* at § 290jj.

167. Eric M. Weiss, *Hundreds of the Nation's Most Vulnerable Have Been Killed by the System Intended to Care for Them*, Hartford Courant (Oct. 11, 1998). The Hartford Courant conducted an investigation into restraint and seclusion in mental health facilities and psychiatric institutions, and uncovered information about serious injury and death resulting from the use of these practices. *Id.* at 1–2. The series detailed heartbreaking stories of children in mental health and psychiatric facilities, including children who were "[s]lammed [facedown] on the floor" with their arms pinned behind them and held to the floor until the "breath of life was crushed from their lungs." *Id.*

168. *Id.* at 2–3. The study further noted that the federal government did not collect data on the number of patients killed by restraint and seclusion in mental hospitals, and often the deaths go unreported. *Id.* at 3. The Child Welfare League of America conducted a study and estimated that between eight and ten children die each year as a result of restraint or seclusion. Joseph B. Ryan & Reece L. Peterson, *Physical Restraints in School* 3 (unpublished ms. 2003) (copy on file with Dep't Spec. Educ. & Commc'n Disorders, U. Neb. Lincoln) (available at http://www.unl.edu/srs/pdfs /restmanu.pdf).

169. *GAO Mental Health Report*, *supra* n. 9. The 1999 GAO investigation into mental health facilities reached similar conclusions to its recent investigation into restraint and seclusion in schools, finding inappropriate use of restraint and seclusion that caused death, physical injury, and psychological trauma. *Id.* at 6–9. It also concluded that the most effective way to reduce or eliminate restraint and seclusion was to implement comprehensive, proactive training programs and require documentation and reporting. *Id.* at 17–22.

GAO concluded that state laws were insufficient to protect children in these facilities, proactive training was essential to safeguard children and staff, and reporting and documentation were critical to the enforcement of any federal laws enacted in the future.[170]

Following the GAO's report and Congress' enactment of the Children's Health Act, organizations and facilities responded to the federal mandates by implementing proactive training programs and cultivating a shift from a culture where restraining and secluding patients was the norm, to a culture in which restraint and seclusion is considered a "treatment failure."[171] As a result, rates of restraint and seclusion, patient injuries and deaths, and staff injuries have decreased dramatically nationwide, creating a higher quality of life for all involved.[172]

Congress must act to extend similar protections to children in school so that these children may also remain safe from restraint and seclusion in their classrooms. Clearly, there are differences between an inpatient psychiatric unit or hospital and a school setting, including the severity of the behavioral issues or the disabilities children face, the disparities in training and medical knowledge between a nurse or clinician and a teacher, and the lower ratio of staff to patient than teacher to student.[173] Addition-

170. *Id.* at 14–18.

171. Kirkwood, *supra* n. 56; *see also* Martin et al., *supra* n. 10 (finding a reduction in restraints from 263 restraints per year to 7 restraints per year at a Connecticut psychiatric inpatient unit as a result of Collaborative Problem Solving, a program implemented following the enactment of the Children's Health Act of 2000).

172. For example, after two and a half years, the use of restraint and seclusion decreased seventy-eight percent in licensed child facilities in Massachusetts, sixty-five percent in facilities that served both children and adolescents, and forty-four percent in adolescent service agencies. Kirkwood, *supra* n. 56. Facility directors also noted that staff retention improved dramatically during that time, allowing staff to serve as teachers and role models rather than "custodians and police." *Id.* Between 2004 and 2007, Griffith Centers for Children in Colorado realized a greater than seventy percent reduction in restraints and three hundred fifty percent reduction in workman's compensation claims. Beth Caldwell & Janice LaBel, *Reducing Restraint and Seclusion: How to Implement Organizational Change*, Children's Voice Online (Mar.–Apr. 2010) (available at http://www.cwla.org/voice/MA10restraint.html). In Nebraska, a multiservice agency serving more than 3,500 children annually has eliminated restraint completely in both of its shelter programs and in its residential treatment center, which decreased restraints and seclusions from 363 restraints and 315 seclusions, respectively, in 2004–2005 to no restraints or seclusions in 2007–2008. *Id.*

173. *See* Alliance to Prevent Restraint, Aversive Interventions, and Seclusion (APRAIS), *Preventing Harmful Restraint and Seclusion in Schools Act, S. 2860*, http://www

ally, in a mental health facility or hospital, the primary goal is behavioral modification and mental or emotional improvement, but in school the primary goals is academic success, managing behavior to achieve that success, and maintaining an orderly learning environment.[174] Despite these differences, there is no reason that schools cannot aspire to prevent and reduce restraint and seclusion in much the same way mental health facilities have done. If facilities that treat children with severe psychiatric disorders—children that cannot be placed in typical schools—can reduce and eliminate the use of restraint and seclusion, it logically follows that schools are capable of achieving the same result with children who have less severe disabilities or no disabilities at all.

Federal legislation and standards must address the most serious issues surrounding the inappropriate and sometimes deadly use of restraint and seclusion in schools, which will protect the health and safety of all students and also staff and teachers who work with these students. First, it must immediately and absolutely prohibit the most dangerous and never-necessary forms of restraint and seclusion: prone or facedown restraint, mechanical restraint, and locked seclusion.[175] Legislation must also impose specific limits on the emergency use of other forms of restraint and seclusion.[176] Next, it must address the issues underlying the use of restraint and seclusion in schools, specifically the lack of training in safe restraint and in evidence-based PBS systems and de-escalation to prevent the necessity of restraint or seclusion.[177] Documentation and enforcement must also be a part of the legislation, as too many times we have seen rules or laws in place that restrict restraint and seclusion to emergency situations, only to find that they were being used as everyday disciplinary tactics by

.copaa.org/wp-content/uploads/2010/10/PREVENTING-HARMFUL-RESTRAINT-AND-SECLUSION-IN-SCHOOLS-ACT-8-2010.pdf (Aug. 2010).

174. *See* Ian Arthur, *Time-Out, Seclusion, and Restraint in Indiana Schools Literature Review*, http://www.in.gov/ipas/files/SR_Lit_Review_Final_AA.pdf (Mar. 2008).

175. *See supra* pt. II (explaining the risks and dangers of certain types of restraint and seclusion).

176. *See supra* pt. II (describing student and staff injury trends in schools and facilities where restraint and seclusion use has been reduced or eliminated).

177. Teachers and staff must be given the resources and support they need to effectively manage difficult behaviors and prevent behaviors that lead to restraint and seclusion. Miller, *supra* n. 36, at 8. It is easy to instruct someone not to restrain a child, but if no alternatives and training are provided, actions are unlikely to change. *Id.*

staff members who were not required to report such tactics to parents, administrators, or the state.[178]

B. Both Houses of Congress Introduced Meaningful Legislation in 2010, but No Law Was Enacted

During 2010, both the House and Senate introduced Spending Clause[179] legislation that would dramatically alter the way restraint and seclusion methods are utilized in a school setting; however, neither bill was enacted into law.[180] The House and Senate each passed its own version of the Keeping All Students Safe Act ("House bill" and "Senate bill"), and both bills require states to meet minimum standards regarding restraint and seclusion.[181] The two bills are identical in many important respects, with both including absolute prohibitions on the most dangerous forms of restraint, specific restrictions on other forms of restraint and on seclusion, requirements to implement training programs, and enforcement through documentation and reporting of all instances of restraint and seclusion.[182] The bills differ, however, in two notable and meaningful areas: (1) the Senate bill allows restraint and seclusion to be included in a child's IEP,[183] enabling

178. See *e.g. Heidemann v. Rother*, 84 F.3d 1021 (8th Cir. 1996); *Ramsey*, 121 F. Supp. 2d 911; *GAO Report*, *supra* n. 1, at 27.

179. U.S. Const. art. I, § 8., cl. 1. Often referred to as the "Spending Clause," Article I, Section 8 of the United States Constitution bestows upon Congress the power to legislate for the general welfare of the nation, and the Court has interpreted this to permit Congress to condition federal funding upon compliance with legislation passed under this clause. *S.D. v. Dole*, 483 U.S. 203, 205 (1987). Congress has done this in several instances in the field of education, including the enactment of the IDEA, and has also passed legislation such as the Elementary and Secondary Education Act of 1965, 20 U.S.C. Section 7801. Both the House and Senate bills addressing restraint and seclusion in schools are being considered under this power, and both provide minimum standards that a state must meet to receive federal funding. H.R. 4247, 111th Cong. at § 6(c) (withholding further payments under applicable education programs to any State that does not comply with the standards imposed by H.R. 4247); Sen. 3895, 111th Cong. at § 103(c) (withholding the same).

180. The Keeping All Students Safe Act, passed by the House on March 3, 2010, by a vote of 262-153, was not debated or voted on in Senate and thus expired at the end of the 111th Congress. Lib. Cong., *Bill Summary and Status, 111th Congress, H.R. 4247* (Dec. 20, 2010) (available at http://thomas.loc.gov/cgibin/bdquery/z?d111:HR04247:@@@L&summ2=m&). The Senate version of the Keeping All Students Safe Act was not introduced until September 29, 2010, and was never debated or voted on. GovTrack, *S. 3895 (111th): Keeping All Students Safe Act*, http://www.govtrack.us/congress/bills/111/s3895 (accessed Feb. 5, 2013).

181. H.R. 4247, 111th Cong. at § 5; Sen. 3895, 111th Cong. at § 102.

182. *Id.*

183. *Id.* at § 102(a)(5)(A)–(C).

teachers and staff to circumvent restrictions on these practices;[184] and (2) the Senate bill limits the effect of these standards on private schools,[185] allowing many private schools to completely avoid any restrictions on restraint and seclusion.

In addressing the most dangerous forms of restraint, both bills flatly prohibit all public school personnel from imposing mechanical restraints, chemical restraints, physical restraints that restrict breathing,[186] or any "aversive behavioral interventions that compromise health and safety."[187] Both bills recognize that these extreme types of interventions are unnecessary and that they are responsible for the majority of deaths and serious injuries among children subjected to physical restraint.[188] This provides a necessary bright-line rule for states, school districts, and teachers and puts them on notice that these extremely dangerous forms of restraint will not be tolerated in any situation,

184. COPAA, *Unsafe in the Schoolhouse: Abuse of Children with Disabilities* 11 n. 8, http://c.ymcdn.com/sites/www.copaa.org/resource/collection/662B1866-952D-41FA-B7F3-D3CF68639918/UnsafeCOPAAMay_27_2009.pdf (accessed Mar. 3, 2013).

185. Sen. 3895, 111th Cong. at §§ 101(10), 107(b)(1).

186. H.R. 4247, 111th Cong. at § 5(a)(1)(A)–(D). This presents clear guidelines to school districts and teachers, leaving little or no room for debate on actions that would be impermissible under these standards and preventing states such as Florida from omitting this important provision from regulations on restraint and seclusion. *See* Pat Beall & Laura Green, *Florida "Gutted" Child Restraint Bill of Most Important Protections, Mother of Restrained Child Says*, Palm Beach Post (Oct. 10, 2010) (available at http://www.palmbeachpost.com/news/schools/florida-gutted-child-restraint-bill-of-most-important-964179.html) (explaining that Florida removed a provision banning prone restraint from pending legislation, even though four of Florida's five largest school districts use some form of prone restraint).

187. These forms of intervention are undefined in both bills, prompting criticism from supporters wishing to ensure children's safety and opponents who believe this phrase will spawn excessive litigation. *See* Ltr. from Leslie E. Packer, Ph.D., to Chairman George Miller, H.R. Educ. & Lab. Comm., Rep. Cathy McMorris Rodgers, H.R. Educ. & Lab. Comm., & Sen. Christopher Dodd, Sen. Health, Educ., Lab. & Pensions Comm., *Preventing Harmful Restraint and Seclusion in Schools Act (H.R. 4247, S. 2860)* (Jan. 12, 2010) (available at http://www.tourettesyndrome.net/Files/LP_HR4247.pdf). The letter suggests that these types of interventions may be defined as "any technique or intervention intended to rapidly decelerate behavior through the planned and contingent application of noxious or painful stimuli, exposure to harsh environmental conditions, or the removal or withholding of nutrition, hydration, sleep, or clothing." *Id.* It also suggests that the bill should list some examples of prohibited conduct, as long as the list is not all-inclusive. *Id.*

188. Mohr, *supra* n. 46; *GAO Report*, *supra* n. 1, at 8–9. Even in a serious emergency, there is no need to place a child in a life-threatening position; the bills both provide options for less dangerous ways to restrain a child in a true emergency without impeding the child's breathing. *See* H.R. 4247, 111th Cong. at § 5; Sen. 3895, 111th Cong. at § 102. If either the House bill or Senate bill had been in place and followed, many children may not have suffered death and injury by prone restraint. H.R. Educ. & Lab. Comm., *supra* n. 17, at 23–25.

thereby clarifying what is currently a vague and arbitrary area of the law.[189] Courts will not have to determine whether a prone restraint "shock[s] the conscience,"[190] is a "substantial departure" from accepted practices,[191] or deprives a child of a FAPE[192] because the law clearly states that it is prohibited in all circumstances.

Both bills acknowledge that there are emergency situations when a child must be restrained, and both allow some forms of restraint and seclusion to be used in specific circumstances when a student's behavior poses an "imminent danger of physical injury to the student, school personnel, or others," and "less restrictive interventions would be ineffective in stopping such imminent danger of physical injury."[193] Both bills further specify that the person imposing the emergency restraint must monitor the restrained student face-to-face or maintain direct visual contact, and the restraint must stop immediately when the imminent threat has subsided.[194] By including these provisions, the bills take an important step to add clarity to the laws and set basic standards for exactly what types of restraint and seclusion are permitted and exactly when they may be used.

While prohibiting the use of the most deadly types of restraints and restricting the use of other types of restraint and seclusion are a positive step, it is not sufficient on its own, as teachers and staff need alternative solutions to deal with unruly and sometimes violent students.[195] Congress recognized and addressed the disastrous consequences of inadequate staff training in: (1) the actual use of emergency physical restraint; and (2) behavioral programs designed to prevent these emergencies

189. *See* Soukup, *supra* n. 96, at 42–44 (explaining ambiguity in current state law and federal caselaw).

190. *Hall*, 621 F.2d at 613.

191. *Youngberg*, 457 U.S. at 323.

192. 20 U.S.C. § 1401(9); *see supra* pt. III (describing court decisions regarding whether restraint or seclusion denied a student a FAPE).

193. H.R. 4247, 111th Cong. at § 5(a)(2). Restricting the use of restraint or seclusion to situations where physical harm is threatened will reduce or prevent instances in which a child is subjected to restraint or seclusion for less serious behaviors. *See e.g.* H.R. Comm. on Educ. & Lab., *supra* n. 17, at 12 (detailing the repeated physical restraint of a seven-year-old girl for such actions as wiggling a loose tooth or failing to complete work).

194. H.R. 4247, 111th Cong. at § 5(a)(2)(A)–(C), (E).

195. *See* Kirkwood, *supra* n. 56 (explaining that telling staff not to restrain children is easy, but behavior will not change unless viable alternatives are provided).

and teach children appropriate behavior and coping skills.[196] Training staff in the use of physical restraint, while essential for those situations in which restraint and seclusion are absolutely necessary, falls short of fully protecting children, as evidenced by accounts of children who have died at the hands of staff members trained in physical restraint.[197] Therefore, it is of vital importance that staff members receive training in not only the safest use of restraint for a true emergency, but also in preventing the need for physical restraint. Both bills provide for this training by instituting a grant program, in which each state must develop strategies and policies to prevent and reduce physical restraint and seclusion in the classroom consistent with the regulations prohibiting restraint and seclusion in non-emergency situations.[198] States, however, are not specifically required to use evidence-based approaches that have been so successful in many individual schools and school districts.[199] Instead, a state or local agency that receives a grant is "[a]uthorized" to use such approaches in a variety of ways, which could dilute the efficacy of the training requirements and prevent teachers from honing these important skills and creating a safer learning environment for all students.[200]

In addition to addressing the lack of training in PBS and other techniques that reduce the need for restraint and seclusion, both bills also discuss the significance of documenting and reporting instances of restraint and seclusion.[201] The GAO noted that

196. H.R. 4247, 111th Cong. at § 5(a)(2)(D). This requires anyone who restrains a child in school to be trained and certified in a crisis intervention training program, which includes training in evidence-based techniques to prevent restraint and seclusion, de-escalation techniques, procedures shown to keep students safe during restraint and seclusion, and cardiopulmonary resuscitation. *Id.* at § 4(16)(A)–(D).

197. *See e.g. GAO Report*, *supra* n. 1, at 13–15 (describing the death of a fourteen-year-old boy who was restrained face down for more than twenty minutes by two employees who had been trained in applying multiple restraints).

198. H.R. 4247, 111th Cong. at § 7(a), (f); Sen. 3895, 111th Cong. at § 104(a), (f).

199. *See supra* pt. II (describing the success of the Illinois implementation of schoolwide PBIS systems).

200. H.R. 4247, 111th Cong. at § 7(g).

201. *Id.* at § 5(a)(5)(A)(i)–(ii). Parents must be notified verbally or by email on the same day as the incident and receive written notification within twenty-four hours of the incident. *Id.* This would have made a tremendous difference for families in which the parents were unaware that their children were being restrained or secluded and only discovered it when their children were injured or killed. *See e.g. Heidemann*, 84 F.3d at 1025–1026 (describing a nine-year-old girl who was blanket wrapped and physically restrained by her teachers, leaving her mother to find her on multiple occasions and one time more than an hour after the alleged restraint occurred).

since many of these dangerous disciplinary techniques go undocumented and unreported, the extent of the problem cannot be adequately measured, yet children have died and many more have been seriously injured, and currently nothing is in place to stop it from happening again.[202] Both bills require not only prompt communication with a child's parent, but also require states to submit yearly reports that include the total number of incidents of restraint or seclusion and disaggregated statistics.[203] This focus on accuracy, both in total numbers and in specific categories, will help school officials and policymakers evaluate the problems and devote the proper resources to solve those problems. Parents will be better informed and will no longer have to rely on stumbling into the abusive situation or trying to elicit information from nonverbal children or unwilling school officials.

One extremely significant provision on which the bills differ is whether to allow restraint or seclusion to be included in a child's IEP, which specifically affects children with disabilities, who suffer restraint and seclusion at higher levels than other children.[204] Allowing this inclusion would be completely inconsistent with the other provisions of the bills—both bills prohibit restraint and seclusion from being applied except in very specific, *unpredictable* emergency situations.[205] By its very nature, an IEP creates a plan for prospectively addressing foreseeable and known difficulties of a child, issues that do not fall under the category of

202. *GAO Report*, *supra* n. 1, at 4–5.

203. H.R. 4247, 111th Cong. at § 6(b)(2). The reports must include "the total number of incidents in which physical restraint or seclusion was imposed on a student—that resulted in injury; that resulted in death; and in which the school personnel imposing physical restraint or seclusion were not trained and certified as described [by this Act]." *Id.* at § 6(b)(2)(B)(i)(I). Demographic categories are also created including age and disability status, which will give a better indication as to which children are bearing the brunt of these practices. *Id.* at § 6(b)(2)(B)(i)(II). To ensure greater accuracy, the Act requires the disaggregation to be done in a way as to produce an unduplicated count of the total number of incidents of restraint and the total number of incidents of seclusion. *Id.* at § 6(b)(2)(B)(ii).

204. *Id.* at § 5(a)(4). The House bill prohibits the inclusion of restraint and seclusion in a child's IEP, but the Senate bill allows it in certain instances where a child has a violent or dangerous disciplinary record. Sen. 3895, 111th Cong. at § 102(a)(5). This aspect of the Senate bill is completely unnecessary and dangerous because (1) the other provisions of the bill allow for emergency restraint in the same circumstances included in the IEP provision; and (2) it will allow staff and teachers to utilize restraint and seclusion in non-emergency situations and have the IEP to validate their actions. *See id.* at § 102(a)(2).

205. H.R. 4247, 111th Cong. at § 5(a)(2); Sen. 3895, 111th Cong. at § 102(a)(2).

"emergency."[206] Courts have determined that because restraint or seclusion was written into a child's IEP, the practices are acceptable and consistent with professional judgment.[207] Under the IDEA, the purpose of an IEP is to provide the student with a FAPE and to identify services designed to enable students with disabilities to make academic and functional progress;[208] however, restraint and seclusion prevent a child from making any sort of progress, provide no educational benefit, and therefore merit no place in a child's IEP.[209] Even when a provision in a child's IEP stated that restraint or seclusion could be used in emergency situations or when children are a danger to themselves or others, that provision was often exploited, and the dangerous techniques were used as a behavior management or convenience tool.[210] Prohibiting the incorporation of restraint and seclusion in an IEP will prevent teachers and staff from using these techniques for everyday discipline and prevent courts from condoning these techniques by virtue of inclusion in the IEP. Further, the school's ability to handle a true emergency will not be diminished because the prohibition on including aversive interventions in a child's IEP does not prevent school officials from implementing a general plan of emergency restraint for an individual school or school dis-

206. An IEP functions as an educational plan designed specifically to meet a particular child's needs, which by nature includes expected, predictable behaviors and methods of addressing and improving those behaviors. APRAIS, *supra* n. 22, at 7–8. Inclusion of restraint and seclusion in such a plan indicates that the techniques will be used to deal with non-emergency behavioral challenges that the teachers and staff are aware of and expect.

207. *C.N.*, 591 F.3d at 633; *C.J.N.*, 323 F.3d 630. Thus, allowing restraint and seclusion in a child's IEP muddies the waters as to whether such practices are considered acceptable and commonplace and puts children with IEPs in the same vulnerable position they are already in today.

208. 20 U.S.C. § 1414(d).

209. *See* Jessica A. Butler, *Preventing Harmful Restraint and Seclusion in Schools Act: What Does It Mean For Children with Disabilities?* http://www.wrightslaw.com/info/restraint.hr4247.butler.htm (last revised Dec. 21, 2009) (describing the negative consequences of allowing restraint and seclusion to be written into a child's IEP); Wanda K. Mohr & Jeffrey A. Anderson, *Faulty Assumptions Associated with the Use of Restraints with Children*, 14 J. Child & Adolescent Psychiatric Nursing 141, 146–147 (July–Sept. 2001) (explaining the lack of any benefit from restraint and seclusion).

210. *GAO Report*, *supra* n. 1, at 27–28. Allowing restraint and seclusion into a child's IEP would enable officials to avoid implementing positive behavior supports and revert to restraint and seclusion to manage behaviors that, while challenging and difficult, are predictable and do not constitute emergencies.

trict.[211] The other major provision on which the two bills differ is whether to require the majority of private schools to meet the same minimum standards as the public schools.[212] As established by the GAO and numerous other studies, the problem of abusive restraint and seclusion is not confined to the public schools but extends into a variety of private schools as well, including private schools that serve children with disabilities.[213] While the Senate bill does include private schools that serve students whose education is paid by the state,[214] there are numerous private schools that do not accept state-funded students but do accept federal funding from the U.S. Department of Education.[215] Excluding them from these requirements jeopardizes the many thousands of students in these schools who could also be subject to restraint and seclusion.[216]

The strongest critics of federal legislation criticize it as an unnecessary "one-size-fits-all federal mandate" and claim that states are responding effectively to the problem.[217] They note that

211. H.R. 4247, 111th Cong. at § 5(a)(4). Schools "may establish policies and procedures for use of physical restraint or seclusion in school safety or crisis plans, provided that such school plans are not specific to any individual student." *Id.* This enables the school to respond to an emergency situation by restraining or secluding a student if necessary, without targeting specific students and thereby implying that restraint and seclusion could be used more often on those students. Additionally, since the IEP exists solely for children with disabilities, there is no equivalent plan for a child with behavioral challenges but no disability—why should a disabled child have abusive techniques preplanned for him or her, when it has been shown that the techniques have no educational or therapeutic value?

212. The House bill requires all public and private schools that receive funding from the U.S. Department of Education to meet the minimum standards. H.R. 4247, 111th Cong. at §§ 4(11), 11(b)(1). The Senate bill, however, narrows the effect by requiring public schools and only those private schools that have students placed or paid for by the state to meet the standards. Sen. 3895 §§ 101(10), 107(b)(1).

213. *GAO Report*, *supra* n. 1, at 2; *NDRN Report*, *supra* n. 13, at 19.

214. Sen. 3895, 111th Cong. at §§ 101(10), 107(b)(1).

215. U.S. Dep't of Educ., *Fiscal Year 2010–FY 2013 President's Budget State Tables for the U.S. Department of Education*, http://www2.ed.gov/about/overview/budget/statetables/index.html (last updated Oct. 11, 2012).

216. U.S. Census Bureau, *Facts for Features, Back to School: 2011–2012*, http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb11-ff15.html (June 27, 2011) (finding that approximately eleven percent of students pre-kindergarten through twelfth grade are enrolled in private schools).

217. H.R. Rpt. 111-417 at 29. Opponents suggest that it is sufficient that only thirty-one states have laws that address restraint and/or seclusion techniques, even though many of those laws are inadequate to protect students. *Id*; *see also* 156 Cong. Rec. H1051–1052 (2010) (explaining that states are not adequately protecting the safety of students). Further, opponents suggest that every time this has happened and caused serious injury or death, there has been justice either by settlement, criminal conviction, or a jury finding of

"[t]he use of restraint and seclusion techniques, including defining what constitutes a restraint or seclusion, is primarily regulated at the state level" and that the "federal government should respect the rights of states to exercise their capacity and expertise to regulate in this area."[218] Several groups, such as the American Association of School Administrators and the National Conference of State Legislators, argue that since thirty-one states have regulations regarding restraint and seclusion in place and fifteen more states are developing legislation in this area, the issue should be left to the states.[219] The reports, however, fail to mention that states are not doing their jobs in regulating restraint and seclusion and most of the laws are ineffective, leaving students and their families unprotected by the law and children unsafe in their classrooms.[220]

It is important to note that both the House bill and Senate bill leave the states a good deal of flexibility in determining how they will meet the federal standards, and both bills emphasize that these are in fact minimum *standards* for the states to meet.[221] The federal government is not forcing the states to choose one particular method to meet the standards but would allow each state to choose the method that best improves safety in the schools by reducing and preventing restraint and seclusion in those schools.[222]

Opponents also cite the lack of reliable data on restraint and seclusion in schools as a reason to reject the idea of federal legis-

liability, ignoring the fact that prospective standards could have prevented those deaths, injuries, and court proceedings, and ignoring the more fortunate children who may have been moments away from death or serious injury when they were released from restraint. *E.g. T.W.*, 610 F.3d 588.

218. H.R. Rpt. 111–417 at 29.

219. Ltr. from Dan Domench, Exec. Dir. Am. Ass'n of Sch. Adm'rs, to H.R., *Letter to the U.S. House of Representatives* (Mar. 2, 2010) (available at http://www.aasa.org/uploadedFiles/Policy_and_Advocacy/files/HR4247LetterMarch2010.pdf); 156 Cong. Rec. at H1052–1053.

220. Of the thirty-one states, many have completely useless laws in place and likely have no intention of improving those laws. For example, Alaska permits restraint to "maintain reasonable order in the classroom" and to protect property but gives no further details and has no regulations regarding seclusion. Alaska Admin. Code tit. 4 §§ 07.010–07.900 (2012); U.S. Dep't of Educ., *supra* n. 31.

221. H.R. 4247, 111th Cong. at § 5; Sen. 3895, 111th Cong. at § 102.

222. H.R. 4247, 111th Cong. at § 7(f); Sen. 3895, 111th Cong. at § 103(b)(2); 156 Cong. Rec. at H1056. Both bills also provide opportunities for states to receive grants to implement the programs designed to meet the federal standards. H.R. 4247, 111th Cong. at § 7(d); Sen. 3895, 111th Cong. at § 103(a).

lation protecting children from these dangerous techniques, suggesting that "a more appropriate precursor to taking any federal legislative action, would be to collect information from states in an effort to determine the problem's prevalence first."[223] Waiting for more data from schools may be a viable option in response to an ordinary, non-life-threatening problem; however, there is no doubt that children have been killed in school—it is only a question of how many children are suffering restraint and seclusion in school and are at risk of death and serious injury. It is morally abominable to wait for more statistics on these practices before implementing standards to shield these children from these dangerous and often deadly practices. Even before legislation can be fully implemented, interim measures, such as an outright ban on facedown restraint and reporting requirements, must be put in place.

Opponents go on to criticize language within the legislation, claiming that it will open states and school districts up to litigation.[224] First, they claim that even though the bill does not create a private right of action, it "contains vague language on restricted actions," which would "open schools to potential litigation."[225] The example provided for "broad phrases" is the portion of the House bill requiring states to restrict "aversive behavioral interventions that compromise health and safety," which opponents claim would result in massive litigation nationwide and would even empower advocates to sue the twenty-one states that currently allow corporal punishment.[226] Certainly the bill could be amended to define more clearly what is meant by "aversive behavioral interventions that compromise health and safety," but read in context, the serious nature of these interventions is clear, as they are included on a list with only the most harmful techniques: mechanical restraints, chemical restraints, and physical restraints that restrict breathing.[227]

223. H.R. Rpt. 111-417 at 28; *see also* 156 Cong. Rec. at H1052 (urging Congress to wait for more information before enacting legislation).

224. H.R. Rpt. 111-417 at 31 (discussing views of representatives opposed to legislation and views of the American Association of School Administrators).

225. *Id.* Because the Act does not contain a private right of action, an individual cannot bring a case based on it. *Id.*

226. *Id.*; *see* Packer, *supra* n. 187 (explaining that the legislation would not increase the level of litigation concerning restraint and seclusion).

227. H.R. 4247, 111th Cong. at § 5(a)(1)(A)–(D); Sen. 3895, 111th Cong. at § 102(a)(2).

Finally, opponents worry that federal legislation will preempt successful programs within each state, but that is simply not the case since both bills set minimum standards for each state to meet and give states the flexibility to determine the best way to proceed.[228] As co-sponsor Representative Cathy McMorris Rogers stated, "For the [ten] [s]tates that already have comprehensive policies, all they need to do is show what they have already done."[229] This further illustrates that setting minimum federal standards and allowing states to choose the manner in which they meet those standards will not preempt any successful programs that already exist.

C. The Solution: Federal Standards and Support for States, School Districts, Teachers, and Students

Minimum federal standards are a critical first step in protecting children from dangerous restraint and seclusion in schools and will go a long way in improving the safety, health, and educational experiences for all children and for everyone involved in the educational system. It is of vital importance to require states and schools to meet certain minimum criteria because they are not doing it on their own,[230] nor does it appear that they can.[231] State laws are inconsistent at best, and some fail to offer even minimal protection to children against restraint that has proven deadly.[232] The judicial system is both fundamentally and practically ill equipped to solve the problem.[233] Prospective regulation, similar to the House bill, must be enacted at the federal level, must establish minimum requirements, and must provide support and assistance to the states so they can meet the requirements.

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228. Both bills state that federal legislation would not limit any rights or remedies otherwise available, including state regulations. H.R. 4247, 111th Cong. at § 11(a); Sen. 3895, 111th Cong. at § 108.

229. 156 Cong. Rec. at H1056.

230. *Supra* pt. II (describing the failure of states to protect students from restraint and seclusion).

231. *Supra* pt. II (noting that states may not have the resources and capability to regulate restraint and seclusion properly).

232. *Supra* pt. II (discussing weaknesses and inconsistencies among state provisions for restraint and seclusion).

233. *Supra* pt. III (discussing the inadequacies of the court system in addressing restraint and seclusion in schools).

First and foremost, the need to absolutely ban any restraint that inhibits breathing and any mechanical restraint is apparent, and this must be done immediately because these are the restraint methods that have caused death or serious injury.[234] Beyond that, the standards must provide for specific restrictions on other forms of restraint and on seclusion and must also provide support and training to change the culture surrounding restraint and seclusion.[235] The legislation must include grants and funding for states to: (1) train staff and teachers in safer types of restraint for true emergency situations; and (2) implement evidence-based, systematic, positive behavioral intervention and support programs and require states to implement these types of programs with the funding. These programs work;[236] like anything else that is comprehensive, proactive, and successful in changing an entire system and culture, the programs require money and effort. Many states have already proven unwilling or unable to provide even the most basic protections in the area of restraint and seclusion, so it is unrealistic to expect that they will establish these protections without funding and without a requirement that the funding go toward programs proven to be successful.[237]

In addition to training and support, it is critical that the legislation include reporting and documentation requirements. Throughout the reports, cases, and investigations into restraint and seclusion, a tremendous problem is the lack of information available, the lack of documentation of the incidents, and the lack of reporting.[238] We know that children have died, many more have been injured, and thousands more could have been (or may have

234. *GAO Report*, *supra* n. 1, at 8–9.

235. Both the House bill and Senate bill provide a good start in this area, allowing for grants and funding for evidence-based training, but both could be improved. The House bill does not require states to implement evidence-based systematic approaches but includes it as an "[a]dditional [a]uthorized [a]ctivity." H.R. 4247, 111th Cong. at § 7(g). The Senate bill actually goes a bit further and lists implementation of evidence-based systematic approaches to school-wide PBIS under "Required Activities" for states receiving grants. Sen. 3895, 111th Cong. at § 104(f).

236. H.R. Educ. & Labor Comm., *supra* n. 17, at 24–27.

237. Federal funding must also be sufficient to make the program financially feasible for the state. For example, if it costs more for a state to implement the programs than it would lose in funding, it could potentially choose not to implement the program and accept the penalty of the loss of funding. Providing adequate funding and allowing states to choose among various programs still allows plenty of flexibility for states.

238. *GAO Report*, *supra* n. 1, at 4.

been).[239] Documenting and reporting each incident will provide information essential to developing and implementing programs to prevent future incidents, and will also be useful in recognizing trends and areas where improvement is needed.[240] Both the House bill and Senate bill include reporting requirements, mandating that states collect information including the total number of incidents of restraint and seclusion, and also requiring states to disaggregate the information by: (1) severity and type of incident;[241] and (2) student's demographic characteristics.[242] Tracking this information is a step toward protecting all children across the country and targeting the schools and classrooms needing the most support.

The legislation must protect all children, in all states, and all schools possible. Currently, there are numerous advocacy groups emphasizing the importance of this legislation in the disabled community[243]—and rightfully so—but it is important to remember that any student regardless of disability can be the victim of abusive restraint or seclusion. Thus, legislation must reflect that reality and must implement protections and programs on a school-wide basis so that all children are safe from restraint and seclusion.

Even though protections must extend to all children, one specific issue that affects children with disabilities must be addressed—the IEP. The reason for the legislation is to prevent and reduce this abuse, not to prospectively plan for restraint and

239. *Id.* at 5.

240. Since almost no schools are documenting or reporting this information now, it is difficult to target the schools or states where the most change is needed.

241. H.R. 4247, 111th Cong. at § 6(b)(2)(B)(i)(I); Sen. 3895, 111th Cong. at § 103(b)(2)(B)(i)(I). This includes incidents that resulted in serious bodily injury to a student or school personnel, incidents where an untrained individual imposed restraint, and incidents where the restraint did not meet minimum standards. H.R. 4247, 111th Cong. at § 6(b)(2)(B)(i)(I); Sen. 3895, 111th Cong. at § 103(b)(2)(B)(i)(I).

242. H.R. 4247, 111th Cong. at § 6(b)(2)(B)(i)(II); Sen. 3895, 111th Cong. at § 103(b)(2)(B)(i)(II). Categories include those already established by the Elementary and Secondary Education Act, 20 U.S.C. § 6311(h)(1)(C)(i) (including race, ethnicity, gender, disability status, migrant status, English proficiency, and status as economically disadvantaged). H.R. 4247, 111th Cong. at § 6(b)(2)(B)(i)(II); Sen. 3895, 111th Cong. at § 103(b)(2)(B)(i)(II). The bills add the categories of age and require more specific information on disability status. *Id.*

243. *E.g. NDRN Report*, *supra* n. 13, at 19–20; APRAIS, *supra* n. 22, at 16; Council of Parent Att'ys & Advocs., *Unsafe in the Schoolhouse: Abuse of Children with Disabilities*, http://www.copaa.org/news/unsafe.html (updated May 27, 2009).

seclusion to be applied to children. Studies continue to indicate that these measures only exacerbate behavior problems, so allowing them in an IEP solves nothing and makes the problem worse.[244] Federal standards must not allow anyone to circumvent the prohibitions and restrictions—thereby allowing use of restraint and seclusion as a routine disciplinary tactic—by including restraint or seclusion in the prospective plan of a child.

Proposed legislation must consider all interests involved: children clearly must be protected, but so must teachers and staff, who are often injured when imposing restraint or seclusion on a child. By receiving training in effective and positive techniques, teachers and staff will suffer fewer and less serious injuries, and will be more powerful figures in creating a safer and more productive learning environment. Congress must reintroduce and enact legislation as soon as possible, so that all states must work to protect children from these dangerous and deadly practices.

244. Mohr & Anderson, *supra* n. 209, at 141.