RESTRAINTS, SECLUSION AND OTHER AVERSIVES: KEY ISSUES AND EMERGING LEGAL TRENDS

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1. What does the Individuals with Disabilities Education Act (IDEA) say?

IDEA does not address the use of aversive techniques as a disciplinary or behavior management tool in the school setting.

When developing a child's IEP, the IEP team must:

> In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 C.F.R. § 300.324(a)(2)(i).

In the disciplinary context, when misconduct is not a manifestation of the child's disability:

> The IEP Team must ensure that the child receives "as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur." 34 C.F.R. § 300.530(d)(1)(ii).

In the disciplinary context, when misconduct is a manifestation of the child's disability, the IEP Team must either:

(i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or
(ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior. 34 C.F.R. § 300.530(f)(1).

2. What does Section 504 of the Rehabilitation Act ("Section 504") say?

Section 504 does not address the use of restraints or any aversive techniques with students.

3. What about state law?

State laws frequently address these issues. There may be state laws that apply to all students, or state laws that apply to students with disabilities. Most states have abolished the use of corporal punishment for any student, while a minority of states still permit it. Many states have adopted state laws or regulations pertaining to techniques involving any form of isolation or physical restraint.

4. What has OSEP said about aversive techniques?

Letter to Anonymous, 50 IDELR 228 (OSEP 2008). In this 2008 letter, OSEP repeated much of what it said in its 2006 *Letter to Trader*. OSEP advised that the IDEA does not expressly prohibit the use of physical restraints or other aversives on students with disabilities. However, the use of aversives may be limited by either state law or the provisions of a particular student's IEP:

> If Alaska law would permit the use of mechanical restraints or other aversive behavioral techniques for children with disabilities served under IDEA, the critical inquiry is whether the use of such restraints or techniques can be implemented consistent with the child's IEP and the requirement that IEP Teams consider the use of positive behavioral interventions and supports when the child's behavior impedes the child's learning or that of others.

Letter to Trader, 48 IDELR 47 (OSEP 2006). In answering an advocate's concern about New York regulations allowing the use of aversive behavioral interventions, OSEP concluded that the state regulations did not conflict with the IDEA. While both the IDEA and the Part B regulations require a student's IEP Team to consider using positive behavior intervention supports and strategies

when the student's behavior interferes with learning, neither the statute nor the regulations prohibit the use of aversive behavioral interventions:

> Thus, while the Act requires that an IEP Team consider the use of positive behavioral interventions and supports, and as such, emphasizes and encourages the use of such supports, it does not contain a flat prohibition on the use of aversive behavioral interventions. Whether to allow IEP Teams to consider the use of aversive behavioral interventions is a decision left to each State.

5. What has OCR said about aversive techniques?

Use of aversives upheld as nondiscriminatory:

> *Florence (SC) County No. 1 Sch. Dist*., 352 IDELR 495 (OCR 1987). Even though the IEP forbade the use of corporal punishment, OCR found no violation of Section 504 because the physical restraint used by teachers and aides was for the purpose of preventing the student from harming himself or others.
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> *Ohio County (WV) Public Schools*, 16 IDELR 619 (OCR 1989). OCR found that a teacher's decision to have the student use the toilet was a response to an emergency situation, and not an attempt to disregard the IEP, which had eliminated toilet training from the educational program. Nor was the force used to restrain the student on the toilet excessive and as such there was no violation of Section 504.
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> *Wells-Ogunquit (ME) School Dist. No. 18*, 17 IDELR 495 (OCR 1990). The use of a physical restraint to subdue a student during a violent outburst as provided for in his IEP did not constitute disciplining a learning disabled student differently than other students due to his disability, and thus the district was not in violation of Section 504.
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> *Gateway (CA) Unified Sch. District*, 24 IDELR 80 (OCR 1995). OCR concluded the district was in compliance with Section 504 and Title II of the ADA because it properly followed the student's IEP and allowed him to eat lunch with his friends if his behavior was under control. Additionally, the student's behavior modification plan provided for physical restraint and as such, the use of restraint in response to the student's representations to school officials that he was going to harm himself was also not a violation of Section 504 or Title II.

Use of aversives found to be discriminatory:

> *Portland (ME) School District*, 352 IDELR 492 (OCR 1990). In a rare intervention by OCR in an individual case justified by "extraordinary"

conduct, a teacher who unilaterally decided to strap a profoundly retarded student into a chair without disciplinary action or an IEP meeting violated the student's right to FAPE.

Oakland (CA) Unified School District, 20 IDELR 1338 (OCR 1990). Since evaluations and assessments had determined that the behavior was related to his disability, taping the mouth of an 18-year-old student with mental retardation for excessive talking was found to be a violation of the regulations of Section 504 and Title II of the ADA.

6. How have the courts addressed this issue?

Many of the cases brought before federal courts have involved allegations of constitutional violations.

Metzger v. Osbeck, 841 F.2d 518 (3rd Cir. 1988). The suit alleged that the teacher/coach put his arm around the neck and shoulders of a student while verbally admonishing him over the use of foul language. The suit alleged that the student had to stand on his toes due to the pressure on his chin, that he lost consciousness and fell face down onto the floor. The teacher/coach denied any ill intent, but the court ruled that the jury would have to decide.

Key Quotes:

> A decision to discipline a student, if accomplished through excessive force and appreciable physical pain, may constitute an invasion of the child's Fifth Amendment liberty interest in his personal security and a violation of the substantive due process prohibited by the Fourteenth Amendment.
>
> Even if physical reinforcement of a teacher's verbal admonitions is pedagogically appropriate and condoned by school disciplinary policy, we believe a reasonable jury could find that the restraints employed by Osbeck, if responsible for the student's loss of consciousness, exceeded the degree of force needed to correct Metzger's alleged breach of discipline and the substantial injuries sustained by Metzger served no legitimate disciplinary purpose. If the jury is persuaded that Osbeck employed those restraints with the intent to cause harm, Osbeck will be subject to liability for crossing the "constitutional line" separating a common law tort from a deprivation of substantive due process.

Hassan v. Lubbock ISD, 55 F.3d 1075 (5th Cir. 1995). Hassan was a 6th grader on a field trip with his classmates to the local juvenile detention center. Due to persistent misbehavior while on the field trip, school officials locked Hassan in an "intake room" for about 50 minutes. The intake room had a bed and a toilet but was otherwise bare, with a metal door that had a glass partition. Detention center employees monitored Hassan while he was locked up and the teacher came by to

check on him. At the conclusion of the tour, the other students were escorted past the intake room and were told to "look at Hassan." Back at school, Hassan was required to tell the class about his behavior, the punishment, and what he had learned from the experience. The Circuit Court held that school officials and center employees were entitled to qualified immunity from personal liability. Among other reasons, the court concluded that there was no constitutional violation:

> We perceive no constitutional violation inherent in the detention of Hassan in the Center's intake room. The room was relatively large with 80 square feet of space and was furnished with a toilet and a bed and had a glass partition in the door. Although Hassan could not leave the room, he was not otherwise physically restrained. He remained under adult supervision and protection.
>
> We also conclude that Hassan's punishment was within the range of discretion afforded school officials and that the punishment bore a rational relationship to the goal of providing a valuable and safe educational experience for the other 102 children.
>
> Hassan insists, and we do not disagree, that more appropriate means of punishment were available to the school officials. This argument, however, lacks persuasive force. That a better punishment may have been available does not establish that the punishment administered was unconstitutional.

Heidemann v. Rother, 84 F.3d 1021, 24 IDELR 167 (8th Cir. 1996). The use of a blanket wrapping technique upon a nine-year-old with severe mental and physical disabilities was not an unreasonable bodily restraint which violated the student's constitutional rights to substantive and procedural due process. Likewise, since the employees implementing the technique were following the recommendations of a licensed professional therapist the defendants in the Section 1983 action were all entitled to qualified immunity. A Section 504 claim was struck down for similar reasons.

The parent in this case produced expert testimony to establish that the technique as used was inappropriate. A licensed Physical Therapist, serving as an expert for the parents in this case stated as follows:

> The practice of wrapping a child in a blanket to promote calm and relaxation is not a widely used practice, and should only be performed in a certain fashion and under appropriate circumstances. Since I have become licensed as a physical therapist, I have attempted its use on only 2 or 3 children, each for a period of a month or two.

> The use of a blanket to provide relaxation is not a therapeutic technique, but is used to prepare the child for therapy. When used, the blanket should be folded over the child so that it enfolds them, and should be left on the child for a maximum of ten (10) minutes. The purpose of this method is to decrease excessive external stimuli so that the child can participate in and receive therapy and instruction. Leaving the blanket on the child for more than a ten (10) minutes period is inappropriate because the presence of the blanket ceases to serve its purpose once the child is accustomed to it.
>
> The standard course of practice in this field for inducing relaxation prior to therapy would also include the use of other methods in lieu of blanket wrapping. For example, excessive external stimuli can be relieved by redirecting the child, or by removing the child to a quieter environment.
>
> In my opinion, wrapping a child in a blanket so tightly that they cannot move, and leaving the child so wrapped for an hour would constitute restraint, and would clearly fall outside of the scope of the appropriate use of the method, that being blanket wrapping.

Another expert for the parents said this:

> Based upon my review ... it is my opinion that the blanket wrapping technique was used on Cherry Heidemann as a behavior management tool. The technique was used in order to produce physical restraint to address behaviors such a kicking, hitting and biting. As such, this technique would be recognized by behavior analysts as an aversive behavior management technique.
>
> Prior to the use of an aversive behavior management tool, it is necessary that data be collected as a baseline on the behaviors in question. It is necessary to use these data to first develop behavior management programming using non-restrictive techniques. Data must be collected to determine the effectiveness of those techniques. Use of an aversive, restrictive technique should be considered only after a documented showing that less restrictive techniques are ineffective. At that point, the aversive method should be used only in conjunction with a non-restrictive method of addressing the problem behaviors.
>
> Aversive behavior management techniques such as the one used on Cherry Heidemann must be utilized appropriately and with the aforementioned safeguards. Aversive methods are subject to abuse and misuse, and when used inappropriately or for convenience of staff persons prove harmful and detrimental to the health and well being of the child subjected to such treatment.

Faced with expert testimony produced by the parent opposing the technique as inappropriate as used, the court acknowledged that this was an area where professional judgments may differ. However, that was not enough for the court to rule in favor of the parents:

> Although plaintiffs have submitted affidavits showing that other professionals in the field would not have recommended the use of blanket wrapping in this particular case or in the manner applied in this case,... we hold that plaintiffs' submission of evidence on summary judgment was insufficient to create a genuine dispute as to whether the blanket wrapping treatment represented *a substantial departure from accepted professional judgment, practice, or standards* in the care and treatment of Cherry. Accordingly, defendant Joy is protected by qualified immunity as a matter of law. A decision to the contrary, we believe, "would restrict unnecessarily the exercise of professional judgment as to the needs" of special students such as Cherry. (Emphasis added.)

Brown v. Ramsey, 121 F.Supp.2d 911 (E.D.Va. 2000). Teachers obtained a summary judgment in their favor in a case involving the use of a "basket hold" on an elementary-age student with Asperger's Syndrome:

> While the court appreciates the sincerity with which the Browns have pursued a remedy for the alleged abuse suffered by Daniel, like other courts that have considered these issues, there is nothing before the Court to suggest that the alleged actions of Ramsey and Hart were anything other than a disciplinary measure within the sound discretion of the teacher.

M.H. v. Bristol Board of Education, 169 F.Supp.2d 21 (D.C. Conn. 2001). Suit was brought by the parents of a student with a severe cognitive disability alleging that the use of physical and mechanical restraints violated IDEA, the constitution and state law. The court denied the school district's motion for summary judgment:

> Specifically, the court is without facts concerning the circumstances of when physical and mechanical restraint was necessary for the safety of M.H. or others, whether each of the individual defendants followed the prescribed rules for using restraints, and whether the defendants received adequate training to use such restraints in an appropriate manner. In addition, the defendants have not provided the court with sufficient information about the individual defendants' level of expertise and experience for the court to conclude that they were each "competent, whether by education, training, or experience, to make the particular decision [regarding M.H.]." *Youngberg v. Romeo*, 102 S.Ct. 2452 (1982).

CJN by SKN v. Minneapolis Pub. Schs., 38 IDELR 208 (8th Cir. 2003). The circuit court upheld a lower court decision that a student with lesions in his brain

and a long history of psychiatric illness was not denied FAPE as a result of (in part) the increasing use of restraints in response to his aggressive behavior. The court refused to create a rule prohibiting the use of physical restraints and time-outs because the proper use of such techniques "may help prevent bad behavior from escalating to a level where a suspension is required...."

Doe v. State of Hawaii Department of Education, 334 F.3d 906 (9th Cir. 2003). The vice principal taped the student's head to a tree for disciplinary purposes. The court held that the vice principal was not entitled to qualified immunity in a suit alleging constitutional violations:

> At the time that Keala taped him to the tree, Doe's only offense had been "horsing around" and refusing to stand still. There is no indication that Doe was fighting or that he posed a danger to other students. Doe was eight years old. Taping his head to a tree for five minutes was so intrusive that a fifth grader observed that it was inappropriate. There is sufficient evidence for a fact finder to conclude that Keala's conduct was objectively unreasonable in violation of the 4th Amendment.

P.T. v. Jefferson County Bd. Of Educ., 46 IDELR 3 (8th Cir. 2006). The Eighth Circuit held in an unpublished decision that an Alabama school district appropriately considered the safety of the students on the school bus when it decided to go forward with the use of a safety harness on an 11-year-old nonverbal student with autism and as such did not deny the student FAPE.

Couture v. Albuquerque Public Schools, 535 F.3rd 1243, 50 IDELR 183 (10th Cir. 2008). The court granted qualified immunity to individual defendants who were sued over constitutional claims arising from the use of time-out and various physical punishments. The court held that, as a matter of law, the actions of the educators were reasonable and the due process interests of the student were not implicated:

> The educators' response was particularly reasonable given that the timeouts were expressly prescribed by M.C.'s IEP as a mechanism to teach him behavioral control. The IEP, which was developed by educational specialists in conjunction with M.C.'s mother, and to which she agreed in writing, sets forth educational and behavioral methods that M.C.'s classroom teachers were required to follow. Neglecting to follow the IEP—including failure to use the prescribed timeouts—could have exposed the teachers to liability.
>
> While the timeouts were not as effective as the teachers hoped, the continued employment of timeouts over a two-month period was reasonable. If we do not allow teachers to rely on a plan specifically approved by the student's parents and which they are statutorily required

> to follow, we will put teachers in an impossible position—exposed to litigation no matter what they do.

Waukee Community School District v. Douglas and Eva L., 51 IDELR 15 (S.D.Ia. 2008). The court affirmed an ALJ decision in favor of the parents, holding that the IEP denied FAPE. The court acknowledged that there are no substantive standards for a BIP in the law. However, the court found that the problems with the behavioral plan, as set out by the ALJ, rendered the IEP inappropriate under the *Rowley* standard. Much of the case deals with excessive amounts of time in time-out and excessive use of restraint. The court also concluded that the district made a procedural error by failing to provide prior written notice that it was using restraint on a regular basis:

> The Appellants argue that a prior written notice is not required before the implementation of every modification in a teaching strategy or intervention. While this may be true, a significant change to the implementation of a behavioral modification strategy, such as the continued use of restraint to effectuate a planned intervention, constitutes a change to the provision of a free appropriate public education to Isabel for which notice is required.

O.H by Ortega v. Volusia County School Board, 50 IDELR 255 (M.D. Fla., 2008). Allegations that a student with autism was confined to a dark bathroom as punishment for off-task behaviors were enough to support a Section 1983 claim against a special education teacher. Finding that summary judgment was premature at this juncture, the district court concluded that the parent pleaded a violation of the student's due process rights. In determining whether corporal punishment "shocks the conscience" and violates a student's due process rights, district courts within the Eleventh U.S. Circuit Court of Appeals consider two factors. The first is whether the amount of force used was "objectively ... obviously excessive." The second factor is whether the person inflicting the punishment subjectively intended to use excessive force when it was foreseeable that serious bodily injury could result. In considering the excessiveness factor, the court acknowledged that the teacher needed to redirect the student's off-task behaviors but that the teacher's alleged actions of strapping the student into a classmate's wheelchair and confining him to a dark bathroom may have been out of proportion to his conduct. Although the extent of the student's injuries could not be accurately discerned because of the student's impaired communication abilities, the court noted that the student toppled the wheelchair in an attempt to free himself, and thus concluded that the risk of serious bodily harm was reasonably foreseeable. The court denied the teacher's motion to dismiss, determining that the parent established both the use of "obviously excessive" force and a subjective intent to use excessive force.

Damian J. v. School District of Philadelphia, 49 IDELR 161 (E.D. Penn. 2008). Although a Pennsylvania school district did not violate the IDEA by restraining a

12-year-old boy during behavioral outbursts, it did deny the student a FAPE when it failed to implement his IEP. Although district staffers had to restrain the student three times due to behavioral outbursts, it was the district's failure to implement substantial portions of the student's IEP that amounted to a denial of FAPE. The court concluded that by failing to assign a qualified teacher to the student's emotional support classroom, the district did deny the student a FAPE. The court pointed out that the teacher did not have a degree in education, was not certified or licensed to teach in any state, and had no prior experience teaching a special education class. Nonetheless, the court observed, the district assigned her to teach students who had significant emotional and behavioral problems. The court noted that the district provided little training to the teacher. Not only was the teacher unqualified to instruct children with emotional disturbances, but she had no training on IEP implementation. The court added that the teacher did not provide daily progress reports, as she believed it would be unfair to single the student out. Moreover, the teacher continued implementing an old IEP after the district developed a new IEP to address the student's ongoing behavioral problems.

W.E.T. by Tabb v. Mitchell, 49 IDELR 130 (M.D. N.C. 2008). Although North Carolina law permits educators to use reasonable force to restrain or correct students and maintain order, a therapist could not persuade a district court to dismiss a Section 1983 action brought by a 10-year-old student. The court concluded that the student, who claimed that he suffered mental and emotional injuries as a result of the therapist taping his mouth shut, sufficiently pleaded a violation of his constitutional rights. The court based its decision on the nature of the student's allegations. According to the student, the therapist "sharply rebuked" the student for talking to a classmate, ripped a piece of masking tape off a roll, and forcefully placed the tape over the student's mouth. The student, who had asthma and cerebral palsy, maintained that he experienced breathing problems as a result of the tape. When the student tried to speak to the therapist through the tape, the therapist purportedly ripped the tape from his mouth. Noting that students have a long-established right to be free from unreasonable restraint and mistreatment, the court determined that a reasonable educator would have known that forcefully taping the mouth of a child with asthma amounted to a constitutional violation. As such, the therapist could not use the qualified immunity doctrine to shield herself from liability. Still, the student would need to prove his allegations in order to obtain relief.

King v. Pioneer Reg. Educ. Service Agency, 109 LRP 4988 (Ga. Super. Ct., 2009). The Court ruled that a school district was not liable for the death of a special education student who committed suicide after being placed in a "time-out"/"seclusion" room by school officials. When J.K. arrived at school on the day of death, he was given a length of rope to hold up his pants because he had forgotten his belt. Later J.K. was locked in the seclusion room after he exhibited threatening behavior toward other students. While in the room, he used the rope to hang himself. The parents sued PRESA under Section 1983. The suit alleged that PRESA failed to adequately train employees and failed to maintain adequate

policies and procedures regarding: (1) the use and supervision of the seclusion room; (2) prevention of suicide by students; and (3) the supervision and handling of students with behavioral disorders such as those exhibited by Jonathan. According to their claim, these failures amounted to deliberate indifference to and deprivation of his constitutional rights under the Fourteenth Amendment's Due Process Clause.

To sustain their claim under Section 1983, the court required the parents to demonstrate that J.K.'s death was caused by deprivation of a constitutional right to which he was entitled and that a policy, custom or practice of PRESA caused the deprivation. The court rejected the contention that detaining J.K. in the "seclusion room" created a "special relationship" between the school and student such that the school had an affirmative duty to prevent harm to the student. The parents also failed to identify an official "policy, practice, or custom" that violated J.K.'s rights under Section 1983. The court found no evidence of deliberate indifference to and deprivation of J.K.'s rights under the Fourteenth Amendment's Due Process Clause. It also found no evidence that school staff were aware that J.K. was a suicide risk. While acknowledging that the staff's decision to allow Jonathan to keep the rope when he was placed in the "seclusion room" may have amounted to negligence, it did not violate a right or privilege afforded Jonathan under Section 1983.

Key Quote:

> Having considered the evidence and argument offered by all parties, and following a thorough review of applicable legal authority, this Court finds that Defendants Pioneer and Alpine did not owe an affirmative duty to protect Jonathan from self-inflicted harm and further finds that a "special relationship" did not exist between Jonathan and Defendants Pioneer and Alpine such as those that arise with prison inmates, involuntarily committed mental patients, or arrestees. The Court additionally finds that Plaintiffs have failed to identify an official "policy, practice, or custom" employed by Defendants Pioneer and Alpine that violated Jonathan's rights under § 1983, which resulted in or caused the suicide of Jonathan.

G.C. v. School Board of Seminole County, Florida, 52 IDELR 255 (M.D.Fla. 2009). The court dismissed a suit alleging unconstitutional restraint of the student. The parent made many allegations of restraint but failed to present evidence of any injury that would be so severe as to violate the constitution. There was evidence involving restraint of the student at the bus stop to keep him from running. The teacher placed her leg over the student's legs. The court found this to be "not obviously excessive," and that it did not cause any "shock the conscience" injuries to the student.

H.H. v. Moffett, 52 IDELR 242 (4th Cir. 2009). The court held that neither the teacher nor the aide were entitled to qualified immunity from personal liability.

The suit alleged that the teacher and aide kept the child confined to a wheelchair through the entire school day, even though this was not necessary. The suit alleged that this was done maliciously, rather than for any educational purpose, and that it was accompanied by mocking and disparaging comments to the student. The constitutional right at stake was the right to be free from unreasonable restraint.

Key Quote:

> We stress that Appellees' facts make this an unusual case, and our opinion is one that no reasonable teacher who errs in judgment ought to fear. Qualified immunity is intended to protect officials who make reasonable mistakes about the law. [Cite omitted]. But the immunity simply does not extend protection to an official motivated by the kind of bad faith alleged here.

Some of the allegations in this case were based on information obtained from a recording device the parent attached to the child's wheelchair. The fact that the child, a kindergarten student, had limited ability to communicate, due to her disabilities, was also a factor.

B.D. v. Puyallup School District, 53 IDELR 120 (W.D.Wash. 2009). The court upheld a hearing officer's decision in favor of the school district. Among other rulings, the court observed that "The use of a quiet room or area, offered to the student to go to voluntarily if some noise disrupted or agitated him, is no an aversive therapy." State law has a definition of "aversive interventions" but the court held that this technique did not meet that definition.

C.N. v. Willmar Public Schools, ISD No. 347, 591 F.3d 624, 53 IDELR 251 (8th Cir. 2010). The student's BIP allowed the teacher to use seclusion and restraint. The Court explained that the BIP set the standard for the teacher's use of seclusion and restraint. "Because [the IEP] authorized such methods, [the teacher's]- use of those and similar methods …, even if overzealous at times and not recommended by [the independent evaluator], was not a substantial departure from accepted judgment, practice or standards, and was not unreasonable in the constitutional sense." Thus, the teacher's use of seclusion and restraint did not amount to a Fourth Amendment violation. The court also dismissed the IDEA claim against the district because the parents and child did not reside in the district at the time of the request for a due process hearing. This followed 8th Circuit precedent.

7. Tell us about the recent national developments in the area of restraint and seclusion.

Although there are no federal laws restricting the use of seclusion and restraint on students in public schools, there has been increasing national attention paid to this

issue in recent months. In January 2009, the National Disability Rights Network published a report titled "School Is Not Supposed to Hurt: Investigative Report on Abusive Restraint and Seclusion in Schools." This report described various instances of student injuries and deaths resulting from the use of restraint and seclusion, and called for immediate federal government attention (including the development of a data collection system) to address the issue.

In response to that report, the chairman of the Congressional House Education and Labor Committee, Rep. George Miller (D-California), requested that the Government Accountability Office (GAO) investigate the issue to provide an overview of existing applicable laws and to determine how widespread the allegations are of student injury and death resulting from the use of restraint and seclusion in schools. In addition, the committee scheduled a hearing on this issue, which took place on May 19, 2009.

The GAO issued its report on May 19, 2009, titled "Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers," highlighted the following key points: (1) state laws governing the use of restraint and seclusion vary widely across the country; (2) there have been hundreds of alleged cases of injury and death resulting from the use of these techniques over the last 20 years, although it could not be determined whether such allegations are widespread; and (3) there is currently no system for data collection regarding the use of these methods or allegations of abuse. The full GAO report can be found at: http://www.gao.gov/new.items/d09719t.pdf.

On May 26, 2009, the president's Special Assistant for Special Education Policy Kareem Dale met with over forty representatives from education and disability groups to gather their input on the issue.

On July 31, 2009, the U.S. Secretary of Education, Arne Duncan, sent a letter to all Chief State School Officers urging them to review, revise and publicize their state policies and guidelines on restraint and seclusion before the start of the 2009-2010 school year "to ensure that every student in every school under [their] jurisdiction is safe and protected from being unnecessarily or inappropriately restrained or secluded." The letter also stated that the USDE would contact each Chief State School Officer by August 15, 2009, to discuss each state's efforts, and that the USDE would post information about those state-level efforts on its website.

8. I heard there was legislation in the works.

On December 9, 2009, Representative George Miller (D-California) along with Representative Cathy Morris (R-Washington), introduced H. R. 4247. The bill, if passed, would create a new Act titled, "Keeping All Students Safe" (formerly, "Preventing Harmful Restraint and Seclusion in Schools Act''). The bill was referred to the Committee on Education and Labor. Additionally, a companion bill was introduced in the Senate, S. 2860 by Senator Chris Dodd (D-

Connecticut). The companion bill has been referred to the Senate Committee on Health, Education, Labor, and Pensions.

The stated purposes of H.R. 4227 are to:

(1) prevent and reduce the use of physical restraint and seclusion in schools;
(2) ensure the safety of all students and personnel in schools and promote a positive school culture and climate;
(3) protect students from—
  (A) physical or mental abuse;
  (B) aversive behavioral interventions that compromise health and safety; and
  (C) any physical restraint or seclusion imposed solely for purposes of discipline or convenience;
(4) ensure that physical restraint and seclusion are imposed in school only when a student's behavior poses an imminent danger of physical injury to the student, school personnel, or others; and
(5) assist States, local educational agencies, and schools in—
  (A) establishing policies and procedures to keep all students and school personnel safe, including students with the most complex and intensive behavioral needs;
  (B) providing school personnel with the necessary tools, training, and support to ensure the safety of all students and all school personnel;
  (C) collecting and analyzing data on physical restraint and seclusion in schools; and
  (D) identifying and implementing effective evidence-based models to prevent and reduce physical restraint and seclusion in schools. H.R. 4227 Section 3.

9. How do the House and Senate bills define physical restraint?

These bills adopt the definition of the term in section 595(d)(3) of the Public Health Service Act (42 U.S.C. 290jj(d)(3) as follows:

> The terms "mechanical restraint", "physical escort", "physical restraint", "seclusion", and "time out" have the meanings given such terms in section 595(d) of the Public Health Service Act (42 U.S.C. 290jj(d)), except that the meanings of such terms shall be applied by substituting "student" or "student's" for "resident" or "resident's", respectively.

…

> **Sec. 595(D) PUBLIC HEALTH SERVICE ACT 675**
> (3) PHYSICAL RESTRAINT.—The term ''physical restraint'' means a personal restriction that immobilizes or reduces the ability of an individual

to move his or her arms, legs, or head freely. Such term does not include a physical escort.

10. How do the House and Senate bills define seclusion?

These bills adopt the definition of the term in section 595(d)(4) of the Public Health Service Act (42 U.S.C. 290jj(d)(4) as follows:

> The terms "mechanical restraint", "physical escort", "physical restraint", "seclusion", and "time out" have the meanings given such terms in section 595(d) of the Public Health Service Act (42 U.S.C. 290jj(d)), except that the meanings of such terms shall be applied by substituting "student" or "student's" for "resident" or "resident's", respectively.

…

> **Sec. 595(D) PUBLIC HEALTH SERVICE ACT 675**
> (4) SECLUSION.—The term ''seclusion'' means a behavior control technique involving locked isolation. Such term does not include a time out.

11. How do the House and Senate bills define time-out?

These bills adopt the definition of the term in section 595(d)(5) of the Public Health Service Act (42 U.S.C. 290jj(d)(5) as follows:

> The terms "mechanical restraint", "physical escort", "physical restraint", "seclusion", and "time out" have the meanings given such terms in section 595(d) of the Public Health Service Act (42 U.S.C. 290jj(d)), except that the meanings of such terms shall be applied by substituting "student" or "student's" for "resident" or "resident's", respectively.

…

> **Sec. 595(D) PUBLIC HEALTH SERVICE ACT 675**
> (5) TIME OUT.—The term ''time out'' means a behavior management technique that is part of an approved treatment program and may involve the separation of the resident from the group, in a non-locked setting, for the purpose of calming. Time out is not seclusion.

12. What are some other key definitions?

Although the IDEA uses the phrase "positive behavior supports" it does not define it. H.R. 4227 and S.2860 define "positive behavior supports" as follows:

> The term "positive behavior supports" means a systematic approach to embed evidence-based practices and data driven decisionmaking to improve school climate and culture, including a range of systemic and individualized strategies to reinforce desired behaviors and diminish reoccurrence of problem behaviors, in order to achieve improved

academic and social outcomes and increase learning for all students, including those with the most complex and intensive behavioral needs.

13. Are there any absolute prohibitions in the House and Senate bills?

Yes. Both bills prohibit mechanical restraints, chemical restraints and physical restraint or escort that restricts breathing.

14. Under what conditions can school districts use physical restraint or seclusion?

Both bills contain the same language (although formatted slightly different). The Senate version is as follows:

(2) School personnel shall be prohibited from imposing physical restraint or seclusion on a student unless—
  (A) the student's behavior poses an imminent danger of physical injury to the student, school personnel, or others; and
  (B) less restrictive interventions would be ineffective in stopping such imminent danger of physical injury.

(3) In the event physical restraint or seclusion is imposed upon a student, such physical restraint or seclusion shall—
  (A) end upon the cessation of the conditions described in paragraph (2);
  (B) be imposed by school personnel who—
    (i) continuously monitor the student face-to-face; or
    (ii) if school personnel safety is significantly compromised by such face-to-face monitoring, are in continuous direct visual contact with the student; and
  (C) be imposed by—
    (i) school personnel trained and certified by a State-approved training program that is approved by the Secretary; or
    (ii) other school personnel in the case of a rare and clearly unavoidable emergency circumstance when school personnel trained and certified as described in clause (i) are not immediately available due to the unforeseeable nature of the emergency circumstance.

15. Tell me more about this training requirement.

Both the House and Senate bills require that states and local school districts "ensure that a sufficient number of school personnel are trained and certified by a State-approved training program."

16. What happens when circumstances require that physical restraint or seclusion be used?

There are reporting requirements in both bills. Additionally, the Senate bill requires a debriefing session

17. What about including physical restraint or seclusion in the IEP?

One controversial aspect of the two bills is that they direct that restraint and time-out not be included as part of a child's IEP. H.R. 4227 provides:

> The use of physical restraint or seclusion as a planned intervention shall not be written into a student's education plan, individual safety plan, behavioral plan, or individualized education program (as defined in section 602 of the Individuals with Disabilities Act (20 U.S.C. 1401)). Local educational agencies or 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. H.R. 4227 Section 5(a)(4).

S. 2860 provides:

> The use of physical restraint or seclusion as a planned intervention shall not be written into a student's education plan, individual safety plan, behavioral plan, or individualized education program (as defined in section 614(d) of the Individuals with Disabilities Education Act (20 U.S.C. 1414(d)). S. 2860 Section 5(a)(5).

The national Council for Administrators in Special Education (CASE) has commented on this aspect of these bills, and recommended the following change:

> Allow school personnel to include appropriately administered physical restraint as part of a comprehensive behavioral intervention plan for all students used only when required in an emergency situation. While CASE commends the committees for stating planned physical interventions and seclusion should not be part of any student's individual plan of any type, we recommend the "potential use of physical interventions" could be a part of a student's plan and could also be stated as a part of a school wide behavior plan for all students in an emergency situation when a student's behavior poses a threat of imminent danger to the student or others.

The CASE input on both these bills is located at: http://www.casecec.org/pdf/jan10/Restraint%20and%20Seclusion%201-16-10%20CASE%20Recommendations.pdf.

18. How do the House and Senate bills deal with time-out?

Although time-out is defined in the House and Senate bills, neither bill addresses the use of time-out except to prohibit the Secretary of Education from promulgating rules that prohibit the use of time-out.