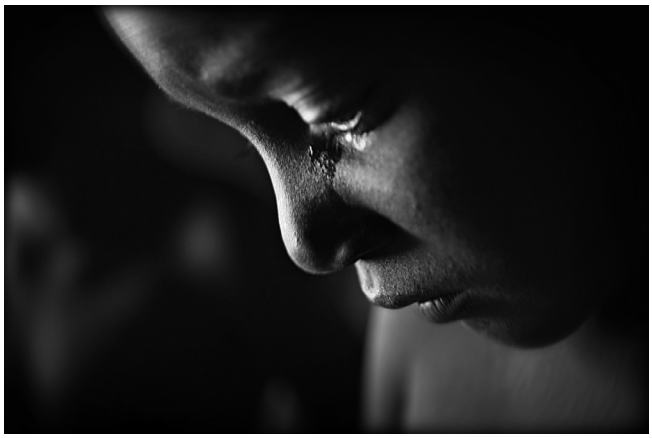

THE CRISIS OF TRAUMA AND ABUSE IN OUR NATION'S SCHOOLS

Students with disabilities are restrained and secluded in school more frequently than their nondisabled peers. Restraint and seclusion are dangerous and traumatizing and can cause death, particularly if the techniques used restrict breathing and if school staff has been inadequately trained. Our children are stuck in a crisis with no management plan.

COPAA

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In 2008 COPAA was among the first to call for the end to the imposition of restraint and seclusion in school with the release of its ***Declaration of Principles Opposing the Use of Restraint, Seclusion and Aversive Interventions.***[1] In 2009 we issued Unsafe in the Schoolhouse: Abuse of students with disabilities.[2] This report, among others,[3] started a national dialogue and much action at the state levels to strengthen protection. Despite these efforts, in October 2020, the U.S. Department of Education's Office for Civil Rights (OCR) issued its most recent Civil Rights Data Collection report on "The Use of Restraint and Seclusion on Children with Disabilities in K-12 Schools." This new data, from almost all school districts and public schools in the U.S. from the 2017-18 school year, shows no improvement with 13% of students who are children with disabilities. Among the students in the U.S. who were subjected to seclusion, a staggering 77% were students with disabilities receiving IDEA services, and 80% of all students who were subjected to physical restraint were students with disabilities receiving services through the Individuals with Disabilities Education Act (IDEA)[4]

Previously, the Government Accountability Office (GAO) studied hundreds of cases of abuse and released a report finding numerous cases where children had paid the ultimate price for a behavioral disruption due to disability. A child should never suffer the death penalty for misbehavior, especially behavior that can be a direct manifestation of that child's disability. The GAO study noted that students with disabilities were restrained and secluded more frequently than their nondisabled peers. Restraint and seclusion are

[1] https://cdn.ymaws.com/www.copaa.org/resource/resmgr/copaa_declaration_of_princip.pdf
[2] https://cdn.ymaws.com/www.copaa.org/resource/collection/662B1866-952D-41FA-B7F3-D3CF68639918/UnsafeCOPAAMay_27_2009.pdf
[3] *See* Nat'l Disability Rights Network, *School is Not Supposed to Hurt: The U.S. Department of Education Must Do More To Protect School Children from Restraint and Seclusion* (March 2012), https://www.ndrn.org/images/Documents/Resources/Publications/Reports/School_is_Not_Supposed_to_Hurt_3_v7.pdf.
[4] U.S. Dep't of Educ. Office for Civil Rights. *2017-18 Civil Rights Data Collection: The Use of Restraint and Seclusion on Children with Disabilities in K-12 Schools* at 6, 7 (Oct. 2020), https://www2.ed.gov/about/offices/list/ocr/docs/restraint-and-seclusion.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

dangerous and can cause death, particularly if the techniques used restrict breathing and if school staff has been inadequately trained in the use of restraint and seclusion.[5]

The Council of Parent Attorneys and Advocates calls for the creation of federal legislated standards applicable to all schools that accept federal funds that would at minimum:

- prohibit the seclusion of any child;
- prohibit any type of restraint that would restrict breathing or would otherwise cause serious physical injury or psychological harm or be life-threatening;
- prohibit the planned use of restraint in the form of interventions documented in a child's behavior plan, 504 Plan, or Individualized Education Program (IEP);
- require same-day parental notification if any incident of seclusion or restraint does occur;
- allow a private right of action for families whose child is unlawfully secluded or restrained, including for declaratory judgement, injunctive relief, compensatory relief, attorneys' fees, and expert fees;
- require states to train school personnel so they are equipped to use evidence-based proactive strategies and techniques to address student behaviors;
- require states to collect and report accurate annual data on the use of seclusion and restraint in schools, including the demographic categories of students who have been subjected to these practices; and,
- require states to develop and implement policies and enforcement mechanisms to ensure compliance with federal standards.

[5] U.S. Gov't Accountability Office. *Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers* at 1, 9 (May 19, 2009), https://www.gao.gov/new.items/d09719t.pdf.

I. The Current State of the Crisis

Current statutes, regulations, and cases do not provide a bright line regarding when seclusion and restraint may or may not be used in schools. The danger to students with disabilities posed by restraint and seclusion is indeed a crisis with no management plan. Claims for violations of the Fourth, Eighth and Fourteenth Amendments to the U.S. Constitution, as well as IDEA, and discrimination and tort claims brought by families of students who have been harmed by restraint and seclusion in schools typically meet with insurmountable roadblocks in court. Parents and children are all too often left without an end in sight or relief for the harm they have suffered.

The design and implementation of proactive behavioral supports for students with disabilities to prevent the harmful practices of restraint and seclusion are clearly best practices, but such supports, when offered, often fall short. There is a growing movement to call for positive school climates that include implementation of school-wide positive behavior interventions and supports, restorative justice programs and interventions, mediators, social and emotional learning programs, or other evidence-based trauma-informed services that emphasize physical, psychological, and emotional safety for both students and providers of services.[6] Some states have implemented Positive Behavioral Interventions and Supports (PBIS) in response to the crisis of restraint and seclusion and have seen "'significant reductions in office disciplinary referrals, suspensions [,] and expulsions—resulting in increased time for academic instruction and learning.'"[7]

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[6] *See* Emily Tate, *Why Social-Emotional Learning Is Suddenly in the Spotlight,* EdSurge (May 7, 2019), https://www.edsurge.com/news/2019-05-07-why-social-emotional-learning-is-suddenly-in-the-spotlight; Trauma and Services Adaptation Center, *What Is a Trauma-Informed School?* https://traumaawareschools.org/traumaInSchools.

[7] Darcie Ahern Mulay, *Keeping All Students Safe: The Need for Federal Standards to Protect Children from Abusive Restraint and Seclusion in Schools*. 42 Stetson L. Rev. 325, 336 (2012), citing H.R. Educ. & Labor Comm., *Examining the Abusive and Deadly Use of Seclusion and Restraint in Schools,* 111th Cong. (May 19, 2009), 24-45 (Prepared Statement of Elizabeth Hanselman, Assistant Superintendent for Special Education and Support Services, Illinois State Board of Education).

Imposition of restraint and seclusion fly in the face of the requirements of IDEA, which requires evidence-based interventions and that the IEP team of a child with a disability must, "[i]n 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."[8]

A. Restraint: What Is It?

OCR, which enforces Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990, defines restraint of a student as "restricting the student's ability to move his or her torso, arms, legs or head freely." [9]

There are three types of restraints: mechanical, physical or manual, and chemical. Mechanical restraint is the "use of any device or equipment to restrict a student's freedom of movement."[10] This definition excludes those items used as medical devices, adaptive devices, vehicle safety restraints, or orthopedics. However, they would include things such as "tape, straps, tie downs, ropes, weights, weighted blankets, and a wide variety of other devices."[11] OCR notes that what could be considered therapeutic in one setting could be a mechanical restraint in another, so the analysis should focus on *how* a device was used, not *what* it is.[12]

Physical restraint is a "personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely."[13] Physical escort using "temporary touching or holding of the hand, wrist, arm, shoulder or back" to walk a student to a safe location is excluded.[14] Chemical restraints are used when medication

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[8] 34 C.F.R. § 300.324(a)(2)(i).

[9] Office for Civil Rights, Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities, at 2 (Dec. 28, 2016, updated Jan. 10, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-504-restraint-seclusion-ps.pdf.

[10] *Id*. at 6.

[11] *Id*. at FN 13, (citing Council for Children with Behavioral Disorders, Council for Exceptional Children, *The Use of Physical Restraint Procedures in School, at* 2 (July 2009)).

[12] *Id*. at FN 14.

[13] *Id*. at 6.

[14] *Id*.

or drugs are used to control behavior[15] and are not typically used in education settings, but rather in institutional facilities. The U.S. Department of Education has cautioned that "Schools should never use mechanical restraints to restrict a child's freedom of movement, and schools should never use a drug or medication to control behavior or restrict freedom of movement (except as authorized by a licensed physician or other qualified health professional)…. Physical restraint or seclusion should not be used except in situations where the child's behavior poses imminent danger of serious physical harm to self or others and other interventions are ineffective and should be discontinued as soon as imminent danger of serious physical harm to self or others has dissipated."[16]

B. Seclusion: What Constitutes Seclusion?

OCR defines seclusion as "confining a student alone in a room or area that he or she is not permitted to leave."[17] This includes situations where the door is locked, blocked by an object, blocked by a person, or held closed.[18] The use of seclusion not only limits a student's bodily integrity, but also denies a child with a disability the right to a free appropriate public education (FAPE) in the least restrictive environment, because the child is excluded from participation in the curriculum while in seclusion.[19] OCR notes that seclusion may be deemed to have occurred "regardless of what name the school uses to call the space in which the student is secluded," and that "there is sometimes no

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[15] 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*, at 27 (Feb. 2010), https://www2.ed.gov/policy/seclusion/summary-by-state.pdf.

[16] OCR, *Restraint and Seclusion: Resource Document,* at 12 (May 15, 2012) https://sites.ed.gov/idea/files/restraints-and-seclusion-resources.pdf.

[17] OCR Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities (2016), *supra.*

[18] U.S. Gov't Accountability Office, GAO-09-719T, *Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers*, at 1 (May 19, 2009), https://www.gao.gov/new.items/d09719t.pdf.

[19] OCR differentiates between seclusion and a timeout, "which is a behavior management technique that is part of an approved program, involves the monitored separation of the student in a non-locked setting, and is implemented for the purpose of calming." OCR Dear Colleague Letter at 7.

difference between what occurs in a 'seclusion room' vs a 'calm down room' or 'reset room.'"[20]

OCR has also stated that "[s]chools cannot divest themselves of responsibility for the nondiscriminatory administration of school policies, including restraint, by relying on school resource officers (SRO)s, school district police officers, contract or private security companies, security guards or other contractors, or other law enforcement personnel to administer school policies."[21] Therefore, all personnel at the school should be aware of the effects of discrimination when using restraint and seclusion.

Further, "data disparity alone does not prove discrimination. The existence of a disparity, however, does raise a question regarding whether school districts are imposing restraint or seclusion in discriminatory ways." [22] With reference to the implementing regulations for Section 504, OCR has further stated that "[a] school district discriminates on the basis of disability in its use of restraint or seclusion by (1) unnecessarily treating students with disabilities differently from students without disabilities; (2) implementing policies, practices, procedures, or criteria that have an effect of discriminating against students on the basis of disability or defeating or substantially impairing accomplishment of the objectives of the school district's program or activity with respect to students with disabilities; or (3) denying the right to a free appropriate public education (FAPE)."[23]

The GAO has found that techniques used by school staff in seclusion and restraint "can be dangerous because they may involve physical struggling, pressure on the chest, or other interruptions in breathing…. Even if no physical injury is sustained, we also [found] that individuals can be severely traumatized during restraint."[24]

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[20] OCR Dear Colleague Letter at 19.
[21] *Id*. at 15 (citing 34 C.F.R. § 104.4(b)).
[22] *Id*. at 2.
[23] *Id.* at 3 (citing 34 C.F.R. §§ 104.4, 104.33-35).
[24] U.S. Gov't Accountability Office, GAO-09-719T, *Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers*, *supra.*

Additionally, the Department of Education has stated that there "continues to be no evidence that using restraint or seclusion is effective in reducing the occurrence of the problem behaviors that frequently precipitate the use of such techniques."[25]

When seclusion and restraint is used for a student with a disability but would not be used for a student without a disability, it constitutes unlawful different treatment.[26] A school district that uses seclusion and restraint based on the "generalizations, assumptions, prejudices, or stereotypes about disability generally or specific disabilities in particular is likely in violation of Section 504."[27] Even if the treatment is not disparate, the school district may still be violating a student's right to a FAPE by not providing appropriate services to address that child's behavioral challenges.[28] Schools should train staff how to use de-escalation techniques rather than restraint.[29] OCR further suggests having a Memorandum of Understanding between the school and law enforcement to document roles, responsibilities and expectations.[30] School policies, practices, procedures or criteria that are neutral in language and evenhandedly implemented can have a discriminatory effect on students with disabilities if they defeat or substantially impair the implementation of a school district's programs with regard to children with disabilities.[31] Intent is not required if the effect is disparate impact discrimination.[32] Current policy and social justice advocates are calling for the removal of law enforcement in schools.

II. The Harmful Effects of Restraint and Seclusion

In 2012, The Department of Education stated that restraint and seclusion should only be used in "situations where the child's behavior poses imminent danger of serious

[25] *Id*. at iii.
[26] *Id*. at 15.
[27] OCR Dear Colleague Letter at 15.
[28] *Id*. at 16 (citing 34 C.F.R. § 104.33(a)).
[29] *Id*. at 15.
[30] *Id*.
[31] *Id*. (citing 34 C.F.R. § 104.4).
[32] *Id*.

physical harm to self or others and restraint and seclusion should be avoided to the greatest extent possible without endangering the safety of students and staff."[33] Recent data begs the question of what the Department is doing to assure imposition is a last resort.

A range of injuries results from restraint and seclusion, including physical, psychological, social, and emotional harms.[34] Physical harms include death from sudden respiratory arrest or fatal cardiac arrythmia, strangulation, or crushing and serious bodily injury such as muscle injuries, blunt trauma to the head, lacerations, broken bones and abrasions.[35] Psychological harms include lifelong trauma and fear.[36]

A. A Brief Historical Context

An understanding of the historical context surrounding the issues of restraint and seclusion is important when reading relevant case law. The use of physical restraint originated in the psychiatric hospitals of France during the late 18th century.[37] Developed by Philippe Pinel and his assistant Jean Baptiste Pussin, restraint procedures were developed for the same purpose for which it is used today: a means to prevent patients from injuring themselves or others.[38]. Almost immediately after the procedures became popular, a non-restraint movement was started in England in an effort to hinder physical and often brutally aversive mechanical restraint from being used on psychiatric patients

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[33] U.S. Dep't of Educ., *Restraint and Seclusion: Resource Document*, at 10 (2012), https://sites.ed.gov/idea/files/restraints-and-seclusion-resources.pdf.

[34] U.S. Gov't Accountability Office, GAO-09-719T, Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers 5 (2009) [hereinafter GAO Report], http://www.gao.gov/new.items/d09719t.pdf.

[35] Human Rights Watch & ACLU, *Impairing Education: Corporal Punishment of Students with Disabilities in US Public Schools*, at 2 (August 10, 2009), https://www.hrw.org/report/2009/08/10/impairing-education/corporal-punishment-students-disabilities-us-public-schools#.

[36] *See* Nat'l Disability Rights Network, *School is Not Supposed to Hurt: The U.S. Department of Education Must Do More To Protect School Children from Restraint and Seclusion*, at 22 (March 2012), https://www.ndrn.org/images/Documents/Resources/Publications/Reports/School_is_Not_Supposed_to_Hurt_3_v7.pdf.

[37] Joseph B. Ryan & Reece L. Peterson, (2004). Physical Restraints in School. *Behavioral Disorders,* 29(2), 155-169.

[38] *Id.*

in hospitals. In response, a Lunacy Commission was established in 1854 to monitor and regulate the use of seclusion and restraint in asylums.[39]. Contrary to England's decrease in use of restraint during this time frame, the United States viewed physical restraint as a form of therapeutic treatment and adopted it as an accepted practice for dealing with violent patients.[40]

For many years, law enforcement and correctional organizations have used physical restraint and conflict de-escalation procedures as tools in managing prisoners. Physical restraint also has a long history in hospitals and psychiatric institutions, particularly in the treatment of violent persons. The use of physical restraint has been applied to children with emotional disturbance since the 1950s.[41] However, Redl and Wineman (1952), authors of *Controls from Within: Techniques for the Aggressive Child*, stated explicitly that physical restraint should not be used as, nor should it be associated with, physical punishment. They believed that a child's loss of control should be viewed as an emergency situation in which the educator should either remove the child from the scene or prevent the child from doing physical damage to his person or others. The person performing the restraint should "remain calm, friendly, and affectionate while attempting to maintain a positive relationship with the child, thereby providing the opportunity for therapeutic progress once the child's crisis subsides."[42]

In most medical, psychiatric, and law enforcement organizations, strict guidelines govern the use of physical restraint. Unfortunately, there has been no such requirement for schools. The lack of commonly accepted guidelines or standards for the use of restraint and seclusion in schools increases the likelihood of misunderstanding, improper implementation, and abuse. Further, staff may lack training in the behavioral interventions necessary for the prevention of emotional outbursts that are commonly associated with children experiencing severe behavioral challenges.[43]

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[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id*.
[43] *Id.*

B. The Fight of Families Against Seclusion and Restraint: Litigation

Parents filing suit against their school districts after their children with disabilities have been injured or killed following the use of restraint or seclusion are not limited to claims arising under the Individuals with Disabilities Education Act. Parents who want to seek a remedy can choose to sue in state or federal court, but, unfortunately, neither path has proven fruitful. There are a number of causes of action that can be pursued. First, parents can allege a constitutional violation of the Eighth, Fourth, or Fourteenth Amendment. Fourteenth amendment claims allege a violation of substantive and procedural due process, while Fourth amendment claims focus on unreasonable seizures. Second, if the child has a disability, parents can bring claims under the Individual with Disabilities Education Act (IDEA) for the denial of a free appropriate public education (FAPE), but this requires exhaustion of administrative remedies and does not truly remedy the harm or establish rules for the future. It also does not provide monetary damages for personal injuries. And third, families can sue under tort law; however, this requires the action to be outside the scope of the actor's employment to withstand a governmental immunity defense. Unfortunately, the case law is not favorable for any of these claims, and children are left with the loss of educational opportunities, personal injuries, trauma, or in some cases even death.

1. United States Supreme Court Litigation:

Ingraham v. Wright

A number of federal cases have defined the constitutional limits on school officials' physical interventions with students. One of the children at the center of the 1977 U.S. Supreme Court case *Ingraham v. Wright* was James Ingraham, an eighth-grade student in Florida, who in 1970 was paddled by his public school principal while being restrained by the assistant principal and the principal's assistant. Ingraham was paddled more than twenty times and required medical care.

In *Ingraham*, the Court held that the Eighth Amendment's ban on "cruel and unusual punishment" does not apply to corporal punishment in public schools, but rather

applies only to individuals convicted of crimes.[44] However, the Supreme Court stated that "[p]ublic school teachers and administrators are privileged at common law to inflict only such corporal punishment as is reasonably necessary for the proper education and discipline of the child; any punishment going beyond the privilege may result in both civil and criminal liability."[45] The *Ingraham* court also held that Fourteenth Amendment liberty interests are implicated "where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain."[46] The Court held that because corporal punishment in public schools was "authorized and limited by common law," the Due Process Clause does not require school officials to provide notice and hearing prior to administering the punishment.[47]

In his majority opinion, Justice Lewis Powell stated, "The prisoner and the school child stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration."[48] Instead of a remedy based on constitutional law, the Supreme Court pointed out the various states' procedural safeguards that subjected teachers and administrators who inflicted unreasonable or excessive corporal punishment to civil or criminal liability.[49]

In reaching its decision, the Supreme Court valued the tradition of corporal punishment in public schools in the United States and the long-standing common-law requirement that corporal punishment be reasonable but not excessive, as well as the impracticalities of requiring notice and a hearing each time a teacher decides to corporally punish a student.[50] The judicial deference to the judgment of educators and school authorities regarding the education—and punishment—of children throughout the *Ingraham* opinion is noteworthy.

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[44] *Ingraham v. Wright*, 430 U.S. 651, 664, 683 (1977).
[45] *Id.* at 670, 683.
[46] *Id.* at 674.
[47] *Id.* at 682.
[48] *Id.* at 679.
[49] *Id.* at 674.
[50] *Id.* at 660-61.

Youngberg v. Romeo

While not pertaining to the school setting, *Youngberg v. Romeo* is a landmark U.S. Supreme Court case regarding the rights of the involuntarily committed and those with intellectual disabilities.[51] The questions at issue in this case were whether the due process clause of the Fourteenth Amendment grants an involuntarily committed patient 1) the right to safe confinement, 2) the right to be free from bodily constraints, and 3) the right to adequate habilitation (training or treatment with the goal of eventual release). In *Youngberg,* the court held that individuals with disabilities have a constitutional right to remain free from bodily restraint; however, this individual right is balanced against the state's "professional judgment" in deciding when to use restraint.[52] The official's conduct must substantially depart from accepted professional judgment for liability to be imposed.[53] However, the court held that a qualified professional's judgment is presumptively valid.[54]

Nicholas Romeo was a 33-year old man with an intellectual disability who was involuntarily committed to Pennhurst State School and Hospital on a permanent basis. Romeo suffered injuries and was physically restrained at times. Romeo's mother claimed that his treatment violated the protections of the Due Process Clause of the Fourteenth Amendment as well as the Eighth Amendment; specifically, Romeo's mother claimed he had the right to safe conditions of confinement, freedom from bodily restraints, and access to habilitation. At trial, the court instructed the jury that they could find that Pennhurst violated Romeo's constitutional rights only if the officials had been deliberately indifferent to Romeo's medical and psychological needs, and the jury found in favor of Pennhurst.[55] The United States Court of Appeals for the Third Circuit reversed and remanded for a new trial. The Third Circuit held that the Eighth Amendment's prohibition of cruel and unusual punishment was inapplicable because it applies to individuals

[51] *Youngberg v. Romeo*, 457 U.S. 307 (1982).
[52] *Id.* at 321-23.
[53] *Id.* at 318.
[54] *Id.* at 322.
[55] *Id.* at 312.

convicted of crimes, not the involuntarily committed. However, under the Due Process clause of the Fourteenth Amendment, Romeo had liberty interests in freedom from restraint, safe conditions, and minimally adequate habilitation, which could be violated only if three distinct standards were met. An infringement of the right to safe conditions can be justified only by "substantial necessity," the right to freedom from bodily restraints can be infringed only for "compelling necessity," and the access to habilitation must be "acceptable in the light of present medical or other scientific knowledge."[56]

The Court held that the involuntarily committed do have liberty interests in safe confinement and freedom from bodily restraint under the Fourteenth Amendment. Given that no amount of habilitation would permit Romeo to live independently, the Court was uncertain what would qualify as adequate. The U.S. Supreme Court vacated and remanded.[57] In an opinion written by Justice Powell, it was held that individuals with intellectual disabilities have liberty interests under the Due Process Clause of the Fourteenth Amendment, which requires the state to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint. Powell also wrote that the state was under a duty to provide individuals with intellectual disabilities with such training as an appropriate professional would consider reasonable to ensure the safety of the patient and to facilitate the patient's ability to function free from bodily restraints.[58]

New Jersey v. T.L.O

In *New Jersey v. T.L.O*, the U.S. Supreme Court set forth principles governing searches of students by public school authorities.[59] The Fourth Amendment "right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures," applies to searches conducted by public school authorities. However, the Court held that the school environment requires a certain easing of the restrictions. In *T.L.O.,* the Court held that determining the reasonableness of any search

[56] *Id.* at 313.
[57] *Id.* at 325.
[58] *Id.* at 324.
[59] *New Jersey v. T.L.O,* 499 U.S. 325 (1985).

involved a two-prong test: (1) whether the search was justified at its inception and (2) whether the search, as conducted, was reasonably related in scope to the circumstances that initially justified the search.[60] It is common to use the terms search and seizure interchangeably in connection with the Fourth Amendment, and yet it is important to note that the terms are not one and the same. The Supreme Court established a test for only searches; *T.L.O* developed the reasonableness standard. The Supreme Court has not specifically defined a test for seizures, and thus courts are left without a specific standard for seizure cases.

2. Corporal Punishment

After *Ingraham*, corporal punishment in schools has been challenged on other grounds. In *Hall v. Tawney*, a case before the United States Court of Appeals for the Fourth Circuit, a grade-school student from West Virginia, Naomi Faye Hall, claimed that she had been severely injured after being struck repeatedly with a hard, rubber paddle by her teacher.[61] The result of the application of force was a visit to the emergency room where the student was admitted and kept for trauma to the hip, thigh and buttocks. She and her parents filed suit against the teacher who had paddled her, the principal who had authorized the act, the former and then-current superintendent, and members of the county board of education. The suit alleged numerous violations of their constitutional rights, including Naomi's Eighth Amendment rights, Equal Protection rights, and substantive and procedural due process rights.

While the case was pending, the U.S. Supreme Court handed down its decision in *Ingraham,* and the United States District Court for the Southern District of West Virginia dismissed the case. Naomi and her parents appealed the ruling on their substantive due process claims, and the Fourth Circuit held that excessive corporal punishment in public schools *could* violate a student's constitutional right to substantive due process—an issue that the Supreme Court had not taken up in *Ingraham*—and thus subject school officials

[60] *Id.* at 326.
[61] *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980).

to liability under 42 U.S.C.A. § 1983.[62] The court determined that a "shocks-the-conscience" standard should be used when considering excessive corporal punishment in the context of substantive due process claims.[63] The Fourth Circuit stated that "the substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience."[64] The Fourth Circuit remanded the case to the district court so that the plaintiffs' Section 1983 claim against Naomi's teacher and principal could be tried in light of the Fourth Circuit's ruling. This heightened standard has proven equally difficult for plaintiffs to meet.

In *T.W. ex rel. Wilson v. School Board of Seminole County*, the United States Court of Appeals for the Eleventh Circuit in 2010 affirmed a district court's ruling that a teacher—who had restrained a student with autism multiple times, called him insulting names, and provoked him—had not, along with the school board, violated the student's due process rights under the Fourteenth Amendment and that the school board had not discriminated against him in violation of Section 504 of the Rehabilitation Act of 1973.[65] The Eleventh Circuit determined that the teacher's actions were "not so arbitrary and egregious as to support a complaint of a violation of substantive due process. We do not condone the use of force against a vulnerable student on several occasions over a period

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[62] 42 U.S.C.A. § 1983 provides that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

[63] *Hall*, 621 F.2d at 613.

[64] *Id.*

[65] *T.W. ex rel. Wilson v. Sch. Bd. of Seminole Cnty.*, 610 F.3d 588, 592-93 (11th Cir. 2010).

of months, but no reasonable jury could conclude that Garrett's use of force was obviously excessive in the constitutional sense."[66] The court noted that the student's teacher had straddled him face-down on the floor, holding his arms behind him for several minutes, that he had suffered "minor physical injuries," and that he had presented "evidence of psychological injury."[67]

A showing of egregious conduct may provide a pathway for recovery for a student who has been harmed by corporal punishment. A student's substantive due process violation claim may be able to survive summary judgment if the student has suffered severe and lasting physical injury that "shocks the conscience." In *M.S. ex rel. Soltys v. Seminole County School Board.,* a case before the United States District Court for the Middle District of Florida, a teacher was physically abusing a boy with autism and "slammed M.S. to the desk and leaned on him with enough force to cause his eyes to bulge out and his face to turn blue."[68] The court found that this amount of corporal punishment *could* shock the conscience as an exercise of excessive force and form the basis of a jury finding that the student's substantive due process rights had been violated.[69]

In *Garcia by Garcia v. Miera*, the United States District Court for the Tenth Circuit heard a case involving particularly harsh corporal punishment, and while it was not specifically about restraints, seclusion, or special education, the court stated "that at some point of excessiveness or brutality, a public school child's substantive due process rights are violated by beatings administered by government-paid school officials."[70]

The court found that excessive brute force—in this case the repeated beating of a child causing bleeding and scarring—can meet the high threshold for recovery on constitutional claims due to corporal punishment and survive a motion for summary

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[66] *Id.* at 602.
[67] *Id.* at 601.
[68] *M.S. ex rel. Soltys v. Seminole Cnty. Sch. Bd.*, 636 F. Supp. 2d 1317, 1325 (M.D. Fla. 2009).
[69] *Id.* at 1323.
[70] *Garcia by Garcia v. Miera*, 817 F.2d 650, 655 (10th Cir. 1987).

judgment.[71] The court stated that "[w]here school authorities, acting under the color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable pain, we hold that Fourteenth Amendment liberty interests are implicated." If the purpose is to ensure a safe learning environment and to isolate disturbances, the court held that restraints and seclusion are justifiable as long as the act itself is not meant to induce harm. The opinion categorized three levels of corporal punishment: the first is justifiable corporal punishment which does "not exceed the traditional common law standard of reasonableness," the second is excessive corporal punishment, which exceeds common law standards, and the third is grossly excessive punishments that shock the conscience.[72]

3. A Review of Restraint Cases: Federal and State Courts

In *Metzger v. Osbeck*, a case before the United States Court of Appeals for the Third Circuit, a swimming teacher disciplined a junior high school student, overheard using inappropriate language with another student, by placing his arm around the student's neck and shoulders in a manner that restricted his breathing. The student passed out, fell, and suffered broken teeth, a broken nose, and facial lacerations.[73] The Third Circuit reversed the district court's grant of summary judgment to the teacher on the question of whether the student's constitutional due process rights had been violated, stating that "[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 substantive due process prohibited by the Fourteenth Amendment."[74] Notably, the court stated that because the teacher was a wrestling coach and physical education teacher, a jury could reasonably conclude that "he was aware of the inherent risks of restraining" the student.[75]

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[71] *Id.* at 658.
[72] *Id.* at 656.
[73] *Metzger v. Osbeck*, 841 F.2d 518 (3d Cir. 1988).
[74] *Id.* at 520.
[75] *Id.* at 521.

The Third Circuit provided a helpful explanation of situations in which a student's constitutional rights may be implicated in the use of restraint by school personnel: "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 [the teacher], if responsible for the student's loss of consciousness, exceeded the degree of force needed to correct Metzger's [the student's] alleged breach of discipline and that 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 a substantive due process."[76]

Wallace v. Batavia School District 101, a case before the United States Court of Appeals for the Seventh Circuit, is an instrumental case in developing the constitutional framework of a reasonable seizure within a public school and addresses physical restraint.[77] It is the first case to apply the Fourth Amendment's protection to a teacher's use of force against a student. In this case, James Cliffe, a teacher, attempted to break up a fight between Wallace, a sixteen-year old student, and another student, to maintain order. Cliffe grabbed Wallace by the wrist to speed her exit, and when the student bent over a desk, he grabbed her elbow to move her out of the classroom. Wallace sued the teacher and the school district, alleging injury to her elbow in violation of her Fourth Amendment right against unreasonable seizures. The Seventh Circuit noted that although the Fourth Amendment applies primarily to the law-enforcement arena, the U.S. Supreme Court has applied its protection to searches of public-school students by school authorities in *New Jersey v. T.L.O.*[78] The court stated *T.L.O's* reasoning was instructive, and that the Fourth Amendment seizure of a public school student should be examined under the reasonableness standard "evaluated in the context of the school environment,

[76] *Id*. at 520-21.
[77] *Wallace by Wallace v. Batavia Sch. Dist. 101*, 68 F.3d 1010 (7th Cir. 1995).
[78] *New Jersey v. T.L.O.*, *supra*.

where restricting the liberty of students is a sine qua non of the educational process."[79] In application, the reasonableness test is objective, determining "whether under the circumstances presented and known the seizure was objectively unreasonable."[80] The court explained that the reasonableness standard provides a middle ground, enabling teachers to deal with disruptive students while protecting students against the potentially excessive use of state power. In applying this standard to *Wallace*, the court held that Wallace did not suffer a constitutional deprivation of her liberty interest because Cliffe grabbing Wallace's wrist and elbow could "hardly be seen as unreasonable" given that its purpose was to prevent a fight.[81]

In a case involving the restraint and injury of a child in public school, *Ebonie S. v. Pueblo School District 60*, the United States Court of Appeals for the Tenth Circuit ruled that the Plaintiff must first determine if the school's restraints rose to the level of a seizure under the Fourth Amendment.[82] In *Ebonie S.*, a young child with a disability was placed in a desk with a holding bar along the back, which she could not unfasten. Her standard seated position was upright, facing forward, and she could slide under or over the front of the desk to remove herself. In spite of the fact that Ebonie suffered a broken arm—perhaps due to the restraining nature of the desk—the court found that the restraints placed on her did not "'significantly exceed that inherent in every-day, compulsory attendance.'" [83]

The court held that to evaluate if an in-school seizure is permissible, the court must determine if the seizure was "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place."[84] The court went on to rule that the Fourth Amendment allows restrictions in a school setting that

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[79] *Wallace by Wallace*, 68 F.3d at 1014.
[80] *Id.* at 1015.
[81] *Id.*
[82] *Ebonie S. v. Pueblo Sch. Dist. 60*, 695 F.3d 1051, 1056 (10th Cir. 2012) (citing *Couture v. Bd. of Educ. of the Albuquerque Pub. Schs*, 535 F.3d 1243, 1250 (10th Cir. 2008)).
[83] *Id.* at 1057 (citing *Couture v. Bd. of Educ. of the Albuquerque Pub. Schs*, 535 F.3d 1243, 1251 (10th Cir. 2008)).
[84] *Id.* (citing *Edwards ex rel. Edwards v. Rees*, 883 F.2d 882, 884 (10th Cir. 1989)).

would be untenable elsewhere.[85] The court applied a rational basis review to determine that the restraint used to keep Ebonie in her seat was not a Fourth Amendment seizure.[86]

The court in *Ebonie S.* discussed other cases that did involve seizures under the Fourth Amendment because they involved physically binding a student, including *Gray v. Bostic*, in which handcuffing a student was an unreasonable seizure,[87] and *Doe ex rel. Doe v. Hawaii Department of Education.*, in which the court ruled that taping a student's head to a tree was a seizure.[88]

In addition to these high standards for entrance into Constitutional claims, parents hold the burden of proof, and children with disabilities must be credible and effective reporters and later witnesses. Constitutional claims are frequently unsuccessful, and plaintiffs typically lose on motions for summary judgment or motions to dismiss, seemingly no matter how egregious the conduct on the part of school officials. For example, in one case before the United States District Court for the Eastern District of Virginia, the student was placed in a basket hold numerous times, a technique that has killed other children, but the court ruled for the school district on summary judgment.[89]

4. Seclusion Cases

An early case related to seclusion in schools was a case before the United States District Court for the District of Kansas, *Hayes v. Unified School District*, which involved the repeated seclusion of two special education students, Dennis and Sally Hayes.[90] The children's father, Mr. Hayes, after hearing that Dennis and Sally were being placed in an isolation area during the school day, tried to remove his children from that portion of the personal/social adjustment program. Determining that the Eighth Amendment is applicable only to convicted criminals, the court found that the parents could not bring an Eighth Amendment challenge to the imposition of a time out, and therefore the defendant's motion for summary judgment was granted on that issue. The plaintiffs also

[85] *Id.* at 1058.
[86] *Id.* at 1057.
[87] *Id.* (citing *Gray v. Bostic*, 458 F.3d 1295, 1306 (11th Cir. 2006)).
[88] *Id*. (citing *Doe ex rel. Doe v. Haw. Dep't of Educ*., 334 F.3d 906, 910 (9th Cir. 2003)).
[89] *Brown v. Ramsey*, 121 F. Supp. 2d 911, 922-25 (E.D. Va. 2000).
[90] *Hayes v. Unified Sch. Dist.*, 669 F. Supp. 1519 (D. Kan. 1987).

alleged a violation of their Fourteenth Amendment rights.[91] The court recognized that the case law clearly states that a student has both a property and liberty interest in receiving an education, and that the case law further supports the notion that a student should not be deprived of his or her right to an education without due process of law. The court found, however, that the record did not establish that the students had been deprived of a property or liberty interest in education.[92] While the court found that the use of the time out room may not be the most effective or sensible of disciplinary measures, the court did not find that it constituted a constitutional deprivation. Instead, the court determined that the school's use of the time out room ensured that students would not be deprived of their educational rights due to being suspended.[93]

The court found that that the clearly established school procedures provided students with adequate notice to enable them to protect against being placed in the time out room. The court also found that the use of the time out room for cool-down periods did not constitute a constitutional deprivation; rather, the time out room for cool-down periods was used to ensure the safety of other students in the classroom from the disruptive behavior of another student. The record stated that prior to being placed in the time out room, the students were given sufficient notice of the reasons for the placement in the room. The record further stated that a written notice was sent home to parents. Finally, the court found that the use of the 3' x 5' room did not deprive the students of adequate ventilation, air, or light.[94]

The court also addressed plaintiffs' allegations that Fourth Amendment rights against unreasonable seizure had been violated. The court found the decision in *New Jersey v. T.L.O.* instructive on this issue and recognized that although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which the search or seizure takes place. The court found undisputed that the students were disruptive in their behavior and

[91] *Id.* at 1525.
[92] *Id.* at 1528-29.
[93] *Id.* at 1528.
[94] *Id.*

violated school rules; the court further found that the school officials' conduct was reasonably related to their authority and ability to discipline the students and that such discipline, including placing students in the time out room, was justified.[95]

In *Hassan v. Lubbock Independent School District*, a case before the United States Court of Appeals for the Fifth Circuit, Hassan, a sixth-grade student on a field trip to a local juvenile detention center with his classmates, was locked in a holding room for about fifty minutes due to persistent misbehavior.[96] The room had a bed and a toilet but was otherwise bare, with a metal door and a glass partition.[97] Center employees and a teacher continuously checked on Hassan. At the end of the tour, classmates walked by him and were instructed to look at him. When back at school, Hassan was asked to tell the class about his behavior, the punishment, and what he had learned from the experience. At issue was whether school officials and the center employee violated the student's Fourth and Fourteenth Amendment rights when isolating him for misbehavior, while other students took a tour. The court explained 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 children. The actions properly maintained order and discipline within the touring group, making it possible for the other students to continue their valuable learning experience. The court also concluded that the placement of Hassan in the holding room at the detention center was reasonably related in scope to the relevant circumstances, thus justifying the action. The presence of other potentially dangerous juveniles justified Hassan being left alone in an easily accessible area. Further, this restriction of his freedom of movement lasted no longer than was absolutely necessary. Under these circumstances, the court found no violation of any of Hassan's clearly established constitutional rights. The court emphasized that the fact that a better punishment may have been available does not establish that the punishment was unconstitutional.[98] The Court of Appeals held that

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[95] *Id.*
[96] *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075 (5th Cir. 1995).
[97] *Id.* at 1078.
[98] *Id.* at 1081-82.

school officials and the center employee were entitled to qualified immunity from liability.

While *Garcia by Garcia,* previously discussed, provides some definition to legal student restraints, *Gerks v. Deathe*, a case before the United States District Court for the Western District of Oklahoma, provides some definition to legal student seclusion.[99] Gerks was a first grader with cerebral palsy and a cognitive disability. Gerks and the rest of her classmates were instructed to go to the bathroom before class began; however, Gerks had a documented fear of bathrooms. Her teacher persuaded her to go, and after some time, all of the classmates returned with the exception of Gerks. The teacher went to check on Gerks and found three piles of excrement on the floor. The teacher asked Gerks to help in cleaning it up, but Gerks offered little assistance. The teacher cleaned up some of the mess but demanded that Gerks complete the task of cleaning up. The teacher left Gerks alone in the bathroom and used a ribbon to prevent the student from leaving. Unable to exit from the bathroom, Gerks cleaned the mess but soiled her clothes in the process. Parents filed suit against the teacher, the principal, and the district for violating the IDEA and the Due Process Clause of the Fourteenth Amendment. Given that the student's fear of bathrooms was documented and known by the teacher and principal, that she had an intellectual disability making her possibly unaware of what the teacher was asking her to do, and that she was left alone in the bathroom for more than two hours, the court agreed with the parents and found this case to be one of unjustifiable seclusion; the school district did not appeal.[100] The court determined that it is only appropriate for a child to be secluded if it is the last possible alternative to diffuse a situation and the place where a child who is secluded is safe.

Couture v. Board of Education of Albuquerque Public Schools

A significant case related to seclusion in schools is *Couture v. Board of Education of Albuquerque Public Schools*, in which special education teachers often forced a special education student into a time out room when he "became violent, a threat to himself or

[99] *Gerks v. Deathe*, 832 F. Supp. 1450 (W.D. Okla. 1993).
[100] *Gerks*, 832 F. Supp. at 1454-55.

others," or if he demonstrated "aggressive behavior either to himself or aggressiveness toward other children."[101] The parent argued that the teachers violated the child's Fourth and Fourteenth Amendment rights by repeatedly placing him in a time out room. The United States Court of Appeals for the Tenth Circuit held that repeated use of the time out room as punishment for the student's disruptive behavior did not violate the Fourth Amendment, that the student's placement in the time out room for refusing to do his school work was justified from the start, and that the lengthy time outs were reasonably related to the school's objective of behavior modification, especially given that the time outs were written into the student's IEP as a tool to teach him behavioral management.[102] The court also stated placement in the time out room did not trigger procedural due process requirements because time outs, unlike suspensions or expulsions, are intended to calm a child while keeping him within close proximity to the classroom. The court reasoned that the student, in this situation, could resume his education as soon as he settled down. The court stated this method balanced the need for punishment and discipline with the important goal of preserving access to public education.[103]

King v. Pioneer Regional Educational Service Agency

One of the more tragic seclusion cases is *King v. Pioneer Regional Educational Service Agency,* in which a student with a disability committed suicide while being held in a seclusion room.[104] Jonathan King was a student at Alpine Psychoeducational Program, a school for students with severe emotional behavior disorders. It was typical for Jonathan to be disruptive at school, pick a fight with one of the other students, and climb over his study carrel in an effort to attack another student. After physically restraining Jonathan, school authorities placed him in the time out room and monitored him from the outside. During the first fifteen minutes, he cursed, asked to be let out and repeatedly hit the door. A few minutes later after he had become quiet, the teacher decided to let him out of the room. As the teacher started to push the door open, he realized that all of Jonathan's

[101] *Couture v. Bd. of Educ. of the Albuquerque Pub. Schs*, 535 F.3d 1243, 1247 (10th Cir. 2008).
[102] *Id.* at 1257-58.
[103] *Id.*
[104] *King v. Pioneer Reg'l Educ. Serv. Agency*, 688 S.E.2d 7, 10 (Ga. Ct. App. 2009).

weight was leaning against the door, and the teacher soon discovered that he was unconscious, having hanged himself from the mental grate on the door's window with string he had been given by a teacher to use as a belt. In response to the parents' claim that school authorities had violated Jonathan's substantive due process rights, the court held that there was no evidence that the school employees responsible for putting him in the time out room on the day of his suicide acted with deliberate indifference. The court held that Jonathan's suicide was not caused by deprivation of substantive due process rights.[105]

Even with the plaintiffs' argument that the time-out room in which their son committed suicide was more similar to incarceration in a prison than to the standard curtailment of liberty that any school presents, the court still did not find a substantive due process violation, citing the lack of a showing of deliberate indifference on the part of school officials. Further, the court found no tort/wrongful death liability on the part of the state department of education, as no department members had been directly involved in the incident. As for the plaintiffs' IDEA claims, there are no tort liability provisions under the act, and because IDEA involves providing relief from denial of a FAPE, there was no relief to be granted, as the Kings' child had died.

III. IDEA Judicial Decisions Involving Restraint and Seclusion

The IDEA establishes the framework for providing students with disabilities with a Free Appropriate Education (FAPE)[106] in the Least Restrictive Environment (LRE).[107] Students who are eligible under the IDEA can file a complaint under the detailed remedy provisions of IDEA.[108] IDEA has many provisions that relate to behavioral concerns, which may lead to seclusion and restraint. First, the IEP team must discuss all areas of concern that would impede a student's academic success.[109] When the behavior of a child with a disability obstructs the child's learning or the learning of others, the IEP must consider

[105] *Id.* at 15-17.
[106] 20 U.S.C. § 1412(a)(1).
[107] 20 U.S.C. §1412(a)(5).
[108] 20 U.S.C. § 1415.
[109] 20 U.S.C. § 1414(b)(2)(A).

"the use of positive behavior interventions and supports, and other strategies, to address that behavior."[110] Furthermore, prior to a change in placement due to a violation of the code of student conduct, the IEP Team must meet to determine if the conduct was caused by or had a substantial relationship to the child's disability.[111] If the IEP Team determines the behavior is a manifestation of the child's disability, they must conduct a functional behavioral assessment and implement (or if one exists, modify) a behavioral intervention plan.[112]

There is nothing in the IDEA specifically, however, that addresses the use of seclusion and restraints, and the Department of Education has said that the "IDEA does not flatly prohibit the use of mechanical restraints or other aversive behavioral techniques for children with disabilities."[113] The Department has made clear that state law may address whether restraints may be used and, if restraints are allowed, the "critical inquiry is whether the use of such restraints or techniques can be implemented consistent with the child's IEP and the requirement that IEP Teams consider the use of positive behavioral interventions and supports when the child's behavior impedes the child's learning or that of others."[114] Likewise, the Supreme Court has not specifically addressed the use of seclusion or restraints under the IDEA.

IV. The FAPE Standard

A. IDEA

From 1982 until 2017, the general standard for whether a school district had provided a free and appropriate public education to a student with a disability under the Individuals with Disabilities Education Act could be found in *Board of Education v. Rowley,* in which the United States Supreme Court defined FAPE under the IDEA as "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to

[110] 34 C.F.R. § 300.324(a)(2)(i).
[111] 20 U.S.C. § 1415(k)(1)(E).
[112] 20 U.S.C. § § 1415(k)(i)(F).
[113] Letter to Anonymous, 50 IDELR 228 (OSEP March 17, 2008).
[114] *Id*.

benefit' from the instruction…. 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 Act."[115] Further, the court read into the IDEA "the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child."[116] In the years after 1982, what resulted from the various federal circuit courts' readings of the *Rowley* court's "some educational benefit" standard was a split, with some courts imbuing the idea of *some* benefit with more force and effect than other courts.

In 2017, the U.S. Supreme Court finally weighed in again on the question of the substantive FAPE standard under the IDEA in *Endrew F. vs. Douglas County School District.* In *Endrew F.*, the court revised the *Rowley* requirement to the following: "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[117]

In the context of restraint and seclusion, in *Waukee Community School District,* an Iowa administrative law judge in 2007 noted that the school district relied on the use of restraint and seclusion and failed to implement most of the strategies listed in a 9-year-old student's IEP and behavioral support plan.[118] Accordingly, the failure to implement strategies in the IEP and the reliance on seclusion and restraint interventions, which were in direct conflict with the positive supports that were included in the IEP, were determined to constitute a denial of her right to FAPE.

B. Section 504

In addition to the FAPE obligation pursuant to the IDEA, Section 504 also requires that students with disabilities receive a free appropriate public education (FAPE). FAPE is

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[115] *Bd. of Educ. v. Rowley*, 458 U.S. 176, 188-89 (1982)
[116] *Id.* at 200.
[117] *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. ___ (2017)
[118] *Waukee Cmty. Sch. Dist.,* 48 IDELR 26 (SEA Iowa 2007), *aff'd*, *Waukee Cmty. Sch. Dist. v. Isabel*.

defined within the 504 regulations as follows: "the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of [additional 504 regulations]."[119] OCR has opined that "if a student is provided FAPE consistent with the requirements of Section 504, it would result in reduced frequency of those situations in which school districts believe the use of restraint or seclusion is justified."[120] Repeated seclusions could create a denial of FAPE due to the student losing valuable access to the regular or special education curriculum.[121]

First, FAPE under Section 504 can be denied by the use of seclusion and restraint if the student suffers trauma from the incident.[122] Students with disabilities "may be especially physically or emotionally sensitive" to the use of seclusion and restraint.[123] Second, Section 504 FAPE can be denied if the student is secluded for "extended periods and on multiple occasions."[124] This type of a seclusion would have a cumulative effect and would not allow the student access to the curriculum, aids and services, supplemental services and modifications, or the least restrictive environment.[125] If FAPE has been denied, the school has the duty to "(1) determine the extent to which additional or different interventions or supports and services, including positive behavioral interventions and supports and other behavioral strategies may be needed; (2) determine if current interventions and supports are being properly implemented; (3) ensure that any needed changes are made promptly; and (4) remedy any denial of FAPE that resulted from the school's prior use of restraint or seclusion."[126] These remedies might include

[119] 34 C.F.R. § 104.33.
[120] OCR Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities, FN.34.
[121] *Id.* at 9.
[122] *Id*. at 16.
[123] *Id*.
[124] *Id.* at 17.
[125] *Id*.
[126] *Id*. (citing 34 C.F.R. § 104.33).

compensatory services or an IEP Team meeting to discuss possible reevaluation and alternative placements.[127] Additionally, the school may need to provide the student with counseling to "specifically address any new education-related needs" that stem from the use of seclusion and restraint, especially if these issues lead to school refusal.[128]

Third, if the school has reason to know that the student's behaviors have changed, but the school has not modified the 504 Plan or IEP, this would be a denial of FAPE.[129] Changes in behavior require a 504 or IEP Team meeting to discuss the new behavior, whether the current strategies are adequate, possible new evaluations if the underlying disability has changed or not been previously identified, and a Behavior Intervention Plan integrated into the 504 Plan or IEP.[130] OCR looks specifically to see if positive behavioral interventions have been developed for the child.[131]

C. Duty to Evaluate a Student Not Previously Identified

When a student who has not previously been identified as a student with a disability but who exhibits behavioral challenges to which a school district responds by restraining or secluding that child, the district's Child Find obligations under Section 504 should be triggered. The student may also be in need of special education and related services pursuant to the IDEA. If the student's behavior interferes with the student's education or the education of others, the school personnel should suspect a disability and refer the student for an evaluation.[132] The state is justified to restrain or seclude a student when the "student's behavior poses imminent danger of serious physical harm to self or others."[133] However, the need for these measures should signal a need for an evaluation and development of a plan to prevent future behavioral challenges.[134] School districts should determine if the behavior "is out of the expected range of behaviors of students

[127] *Id*. at 21.
[128] *Id*. at 17.
[129] *Id*. (citing 34 C.F.R. § 104.33).
[130] *Id*.
[131] *Id*. at 19.
[132] *Id.*
[133] *Id.*
[134] *Id.*

that age," which would trigger the child find and evaluation obligations, unless there is another non-disability related reason for the student's crisis.[135] Evaluations must cover all areas of suspected disability, including academics (if impacted) and social, emotional, and behavioral needs.[136]

D. Duty to Reevaluate an Already-Identified Student

For students who have already been evaluated and provided special education services, the perceived need for seclusion and restraint can be an indicator that the special education and related services are deficient.[137] The intervention team should meet to discuss alternative services, "positive behavioral interventions and supports and other strategies to mitigate or eliminate the need for restraint and seclusion."[138] OCR gives examples of indicators when reevaluation might be essential. First, the behavior is impeding the student's learning or that of others in the classroom, including a drop in academic performance.[139] Second, there are new or additional outbursts, which would be indicated by an increase in frequency or intensity.[140] Third, there is a change that includes becoming withdrawn or non-communicative.[141] Fourth, there are attendance issues.[142] Students with purely academic services may need to be evaluated to add services for behavior management.[143]

After the school has gained parental consent for a new evaluation, the team conducting the new evaluation may discover additional needs that require the intervention team to reconvene to "(1) determine whether and to what extent additional or different interventions or supports and services are needed; (2) ensure that any needed changes are made promptly; and (3) remedy any negative effects that may have resulted from the school's prior use of restraint or seclusion that, if left unaddressed,

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[135] *Id*. at 10.
[136] *Id*.
[137] *Id.* at 11.
[138] *Id*.
[139] *Id*.
[140] *Id*.
[141] *Id*.
[142] *Id*.
[143] *Id*.

would result in a denial of FAPE."[144] Despite the lack of specific language in the IDEA regarding the use of restraints and seclusion, a student who is eligible for special education services under the IDEA has the right to a FAPE, and accordingly, cases have been brought alleging that the use of restraints and seclusion violates that right. In *Melissa S. v. School District of Pittsburgh*, the United States Court of Appeals for the Third Circuit examined claims of IDEA violations involving a school's response to a child's serious behavior challenges.[145] The court noted that the child "sat on the floor kicking and screaming, struck other students, spit at and grabbed the breast of a teacher, refused to go to class, and once had to be chased by her aide after running out of the school building." It was determined that given this situation, the school's use of a time out area in an unused office where her aide and others would give her work and encourage her to go to class did not violate the IDEA because it did not change the child's placement and was within normal procedures for dealing with children who were endangering themselves or others. This is similar to the ruling in *B.D. and D.D. v. Puyallup School District*, in which the United States District Court for the Western District of Washington held that the use of a quiet room did not violate FAPE since the student could go and leave voluntarily, and the room was not used to discourage undesirable behaviors.[146]

C.J.N. v. Minneapolis Public Schools

Although the IDEA sets out an elaborate scheme for providing accommodations and positive behavioral interventions for students with disabilities, the repeated use of seclusion and restraint is rarely considered a denial of FAPE if the child is receiving some educational benefit.[147] The United States Court of Appeals for the Eighth Circuit, in *C.J.N. v. Minneapolis Public Schools*, held that a third grade child with brain lesions and a history of psychiatric illness was progressing academically and the school had made efforts to tailor his IEP to address his behavior despite severe seclusion tactics of repeated "time

[144] *Id*. at 12.
[145] *Melissa S. v. Sch. Dist. of Pittsburgh*, 183 F. App'x 184 (3d Cir. 2006).
[146] *B.D. v. Puyallup Sch. Dist.*, No. C09-5020RJB, 2009 U.S. Dist. LEXIS 91743 (W.D. Wash. Sept. 10, 2009).
[147] *CJN v. Minneapolis Pub. Schs.*, 323 F.3d 630 (8th Cir. 2003).

outs" and restraints that lasted for extended periods.[148] Although Minnesota has standards governing aversive procedures (such as restraint and seclusion), and FAPE must meet the state's educational standards, the state review hearing officer still determined that FAPE had not been denied.[149] C.J.N. was making progress academically despite his behavioral issues, and the IEP Team met repeatedly to make changes and provide positive behavioral incentives.[150] The Eighth Circuit held that his "behavioral problems [were] being sufficiently controlled for him to receive some educational benefit."[151] Although he was being subjected to repeated restraints, the court ruled that the school district did not deny FAPE by its failure to provide positive behavioral interventions.[152] Therefore, the hearing review officer's decision was affirmed by the District Court and the Eighth Circuit.[153] Sadly, the courts have not been likely to find a denial of FAPE when the student has received *some* educational benefit, despite the repeated use of seclusions and restraints and the loss of educational time on task.

A strong dissent was filed in *C.J.N.,* noting the child seemed to be trapped in an increasingly punitive approach to discipline. The dissent noted that the police had been called following an incident in which the child pushed and kicked staff and threatened to kill them, and that the child's behaviors seemed to escalate with the increased use of seclusion until the child attempted to kill himself within the locked seclusion room. The dissent stated, "[w]e are essentially telling school districts that it's copacetic to deal with students with behavioral disabilities by punishing them for their disability, rather than finding an approach that addresses the problem. We also tacitly approve the District's resort to police intervention for the behavioral problems it helped create by failing to address [the student's] behavioral disorder."[154] The dissent noted that subsequently, when the student's mother placed him in a private school where there was no locked

[148] *Id.* at 635.
[149] *Id.* at 637.
[150] *Id.*
[151] *Id.* at 642-43.
[152] *Id.* at 643.
[153] *Id.*
[154] *Id.* at 649.

seclusion or police intervention, the child's behavioral problems decreased and he showed an increased interest in learning, making friends, and attending school.[155]

V. Consideration of Positive Behavioral Supports

The IDEA requires that an "IEP must consider the use of positive behavioral interventions and supports, and other strategies, to address the behavior of a child whose behavior impedes the child's learning or that of others."[156] If a student has been secluded or restrained, and his IEP Team fails to consider the use of positive behavioral interventions and supports, the student may claim that the IEP Team violated his or her rights under the IDEA. In *Waukee Community School District*, the student claimed that her positive behavioral plans were inconsistent with the positive behavioral supports in her IEP, which provided for the use of hand-over-hand assistance.[157] When those positive behavioral supports in her IEP were deemed ineffective, the school district resorted to multiple, lengthy physical restraints and episodes of seclusion. It was argued that the school district failed to consider the harmful effects that seclusion or restraint might have had on her and that these interventions had a negative impact on her behavior. The hearing officer held that the school district violated the student's right to have the IEP Team consider the use of positive behavioral supports in order to manage the behavior and emphasized that the school district increasingly relied on restraint and seclusion without holding an IEP meeting and that the use of restraint and seclusion did not benefit the child or improve her behavior. Although the hearing officer in *Waukee* held that the student's rights had been violated, it is important to note that the language of the IDEA does not require the use of positive behavioral interventions; it merely requires consideration, and for this reason, a student may have difficulty prevailing on a similar claim.

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[155] *Id.* at 645.

[156] 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i).

[157] *Waukee Cmty. Sch. Dist.*, 107 LRP 22231 (SEA Iowa 2007), *aff'd*, *Waukee Cmty. Sch. Dist. v. Isabel*.

VI. Exhaustion of Administrative Remedies

The IDEA allows "such relief as the court determines is appropriate."[158] However, monetary damages are not available. Therefore, if a child has been injured and requires a monetary award to provide relief, IDEA's administrative remedies will not redress the harm.[159] In *Ortega v. Bibb County School District,* the court held that the IDEA does not provide for tort-like damages.[160] The court held that "[t]he purpose of IDEA is to provide educational services, not compensation for personal injury, and a damages remedy…is fundamentally inconsistent with this goal."[161] The court also noted that the IDEA does not "restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C.A. [42 U.S.C.A. § 12101 et seq.], Title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 791 et seq.], or other Federal laws protecting the rights of children with disabilities. 20 U.S.C. § 1415(*l*)." [162] Therefore, families can choose to file under IDEA as a denial of FAPE or proceed under a tort or discrimination claim under the above statutes.

Courts also have dealt with whether administrative exhaustion requirements apply to claims arising from seclusion and restraint, generally finding that exhaustion of administrative remedies pursuant to the IDEA is required. The IDEA requires the exhaustion of administrative remedies prior to bringing an action in federal court.[163] Depending on state law, this sometimes requires the parents to go through a two-tier administrative hearing process. Although states, by accepting federal funds under the IDEA, have waived their rights to sovereign immunity and consented to being hauled into federal court, plaintiffs must exhaust administrative remedies prior to filing in federal court.[164]

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[158] 20 U.S.C. § 1415(i)(2)(B)(iii).
[159] *Witte by Witte v. Clark Cnty. Sch. Dist.*, 197 F.3d 1271, 1275 (9th Cir. 1999).
[160] *Ortega v. Bibb Cnty. Sch. Dist.*, 397 F.3d 1321, 1325 (11th Cir. 2005) (citing *Sellers v. Sch. Bd.*, 141 F.3d 524, 527 (4th Cir. 1998)).
[161] *Id.* (citing *Polera v. Bd. of Educ.*, 288 F.3d 478, 486 (2d Cir. 2002)).
[162] *Id.* at 1325.
[163] 20 U.S.C. § 1415(i)(2)(A).
[164] *Id*.

Fry v. Napoleon Community Schools

In 2017, the United States Supreme Court ruled in *Fry v. Napoleon Community Schools* that plaintiffs who sue their school districts seeking damages pursuant to the Americans with Disabilities Act are not required to first exhaust their administrative remedies pursuant to the IDEA if they are not also seeking relief under the IDEA.[165] In the years since the *Fry* decision, however, a number of courts have dismissed parents' non-IDEA claims for failure to exhaust. In many of these cases, parents have filed a variety of federal and state law claims, with courts nonetheless finding that the gravamen of the complaints was the denial of FAPE pursuant to the IDEA and that the parents had therefore been required to exhaust administrative remedies.[166] Lessons from cases prior to 2017 regarding exhaustion may still therefore apply.

C.N. v. Willmar Public Schools

In *C.N. v. Willmar Public Schools*, a case before the United States Court of Appeals for the Eighth Circuit in 2010, the student's IEP and behavioral intervention plan allowed for the use of seclusion and restraint procedures when the child was a danger to herself or others.[167] The parents argued that these procedures were used improperly and excessively, and they withdrew their daughter from school and placed her in another school. The parents then requested a due process hearing challenging the adequacy of the educational services rendered prior to removal, and the Eighth Circuit ultimately found that if the parent was dissatisfied with the child's education, she must follow the IDEA due process procedures and file for a due process hearing while the child was still in the school district against which the complaint was made.[168] Similarly, in *Payne v. Peninsula School District*, the U.S. Court of Appeals for the Ninth Circuit held that administrative exhaustion was required since the use of a "safe room" was included in the child's IEP, was a recognized tool under state statute, and the plaintiff did not allege

[165] *Fry v. Napoleon Cmty. Schs.*, 580 U.S. ___ (2017).
[166] *See, e.g., Prunty v. Desoto Cnty. Sch. Bd. & Dist., 738* F. App'x 648 (11th Cir. 2018), cert. *denied, 201*9 U.S. LEXIS 323 (Jan. 7, 2019).
[167] *C.N. v. Willmar Pub. Schs.*, 591 F.3d 624 (8th Cir. 2010).
[168] *Id.* at 635.

physical injuries.[169] However, in an earlier Ninth Circuit case, *Witt v. Clark County School District*, distinguished in *Payne*, the court found no administrative exhaustion requirement in an action for damages for physical and emotional abuse.[170] In that case, Witt, a student with Tourette's syndrome, sought damages for physical and emotional abuse arising from being force-fed food he was allergic to, denied food, strangled, subjected to physical "take-downs" and being forced to walk and run despite physical disabilities.[171]

Muskrat v. Deer Creek Public Schools

An additional case addressing the exhaustion requirement in an abuse and seclusion case is *Muskrat v. Deer Creek Public Schools*.[172] In *Muskrat*, the parents of J.M. alleged that over the course of five years, their son, who was developmentally delayed and between five to ten years old at the time and who had difficulty with balance, seizures, gross motor delays and fine motor delays, had been physically abused and placed in "time-out" for excessive amounts of time. The parents asserted violations of the child's constitutional rights. As a policy of J.M.'s school, time outs were considered a consequence for out-of-control or unmanageable behaviors and should be limited to no more than twice the student's mental age in minutes. In 2004, the parents notified the school that they no longer wanted their son placed in the time out room as a behavior consequence due to the impact on his anxiety, as well as other physical effects including sleeplessness, vomiting, frequent urges to urinate and an increase in stress. It was documented that J.M. had been placed in the time out room more than 30 times during the 2004-2006 school years. Further, after the many time outs were reported, parents had requested an amendment to their child's IEP to prevent his being put in the time out room. After subsequent reports of physical abuse, parents withdrew J.M. and filed a suit claiming J.M.'s constitutional rights were violated under 42 U.S.C. § 1983. The school argued that the parents had not exhausted all their claims through the process

[169] *Payne v. Peninsula Sch. Dist.*, 598 F.3d 1123 (9th Cir. 2010).
[170] *Witte by Witte*, 197 F.3d 1271.
[171] *Id.* at 1273.
[172] *Muskrat v. Deer Creek Pub. Schs*, 715 F.3d 775 (10th Cir. 2013).

established under the IDEA. The case went to the Tenth Circuit, which focused on IDEA exhaustion and the conscience-shocking test.[173] The court decided that the parents' claims should not be dismissed for lack of exhaustion, and that the parents had adequately pleaded a Fourteenth Amendment claim. With regard to the constitutional claims, the court analyzed the reasonableness of the violation of the child's liberty interests and because the school was following appropriate processes under IDEA and local laws, the Court ruled in favor of the district.[174]

In *Covington v. Knox County School System*, a student was locked unsupervised into a small, dark "time out room" with no heat or ventilation for hours.[175] At times, he was not let out of the room to eat lunch or to go to the bathroom.[176] The United States Court of Appeals for the Sixth Circuit held that "while a claim for money damages does not automatically create an exception to the exhaustion requirement of the IDEA, in this case exhaustion would be futile because money damages, which are unavailable through the administrative process, are the only remedy capable of redressing Jason's injuries."[177] Jason had already graduated; therefore none of the IDEA remedies would have provided relief to him or his family.[178]

VII. Change of Placement and Failure to Conduct Manifestation Determination

A student who is removed from his educational setting for disciplinary reasons has a number of rights under the IDEA, including the right to a manifestation determination, continued educational services, and a behavior intervention plan.[179] Although the IDEA does not explicitly state that the use of restraint may constitute removal from the education environment, at least one student has successfully made that argument, in a written state complaint that was decided in his favor.

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[173] *Id.* at 786.
[174] *Id.* at 792.
[175] *Covington v. Knox Cnty. Sch. Sys.*, 205 F.3d 912, 913-14 (6th Cir. 2000), amended on denial of reh'g (May 2, 2000).
[176] *Id.*
[177] *Id.* at 917.
[178] *Id.*
[179] 20 U.S.C. § 1415(k)

In *Beaverton School District*, a student with an emotional disability claimed that the school district violated his rights by failing to conduct a manifestation determination review after a change in placement occurred.[180] The student's behavior intervention plan allowed for the use of an "alternative room" as either a quiet place to work or a seclusion space. However, as the student's inappropriate behaviors increased, he was increasingly placed in the alternative room for lengthy periods of time, including seven hours during one school day. Ultimately, it was determined in the record that he was in the alternative room for eighty hours. It was during those times in the alternative setting that the student did not receive any educational services. It was alleged that the removal to the alternative room should have been counted as disciplinary removal. The Oregon Department of Education determined that the removals constituted a pattern and triggered disciplinary rights under the IDEA, and that the school district's failure to conduct a manifestation determination violated those disciplinary rights. As a corrective action, revision to the district's seclusion and restraint procedures was required to clarify when the use of such interventions constituted a disciplinary removal.[181]

VIII. State Tort Claims

A student who has sustained injury as a result of the use of seclusion or restraint may seek a remedy for his injury through a tort claim in a civil lawsuit, in which a plaintiff may request monetary damages. The greatest procedural challenge a student might encounter in bringing a tort claim is the IDEA's exhaustion requirement given that many tort claims have been dismissed on the grounds that exhaustion of administrative remedies is required under the IDEA.[182] While actual IDEA claims would first need to be heard in an administrative hearing, additional tort claims—or claims brought pursuant to the U.S. Constitution, as well as ADA and § 504 claims not involving the denial of FAPE—have no such administrative remedy exhaustion requirement.

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[180] *Beaverton School District*, 109 LRP 399 (SEA Ore. 2008).
[181] *Beaverton* at 24-25.
[182] Kristine L. Sullivan, The right to be safe in school: Advocacy and litigation strategies to combat the use of restraint and seclusion (Council of Parent Attorneys and Advocates 2011).

This procedural problem is illustrated by *Dowler v. Clover Park School District No. 400,*[183] a case before the Supreme Court of Washington in which several students with disabilities, along with their parents and guardians, filed suit for intentional torts, negligence, and discrimination under state law, as well as claims under the IDEA. The families appealed an improper grant of summary judgment due to their "failure" to exhaust administrative remedies on state tort, negligence, and discrimination claims.[184] In that case, several students with disabilities and their parents and guardians alleged verbal and physical abuse and discrimination by school officials—as well as a failure to provide services required under the students' IEPs. The Supreme Court of Washington correctly determined that the lower court had improperly dismissed all of the complaints—including the non-IDEA-related claims—on the basis of a failure to exhaust administrative remedies.[185]

Dowler, though correctly decided on appeal, offers a useful reminder for attorneys to use caution and include non-IDEA related claims in a due process claim for denial of FAPE. Those non-IDEA claims would properly be dismissed by an administrative law judge (who can provide only relief from a denial of a FAPE), and the plaintiff would then not have to worry about a district court later dismissing those claims on the basis of a failure to exhaust administrative remedies.

IX. Standards Outlined in Keeping All Students Safe Act

In 2010, Congress introduced, but did not pass, federal legislation to set minimum standards regarding restraint and seclusion in two separate bills titled the Keeping All Students Safe Act.[186] Both bills focused on the most dangerous forms of restraint and "prohibit[ed] all public school personnel from imposing mechanical restraints, chemical restraints, physical restraints that restrict breathing or any 'aversive behavioral interventions that compromise health and safety.'"[187] However, the bill introduced in the

[183] *Dowler v. Clover Park Sch. Dist. No. 400*, 258 P.3d 676 (Wa. 2011)
[184] *Id.* at 678.
[185] *Id.* at 684.
[186] Mulay, *Keeping All Students Safe: The Need for Federal Standards to Protect Children from Abusive Restraint and Seclusion in Schools*, at 359–60.
[187] *Id.* at 360.

Senate permitted schools to include restraint and seclusion in a child's IEP and limited the applicability of the restrictions on private schools, thereby leaving open many opportunities for the continued practice of harmful restraint and seclusion in schools. [188] Although this important legislation was not enacted, it arguably was used as a set of working guidelines for state governments to develop comprehensive laws regarding the use of restraint and seclusion.[189] However, as evidenced by the CDRC data, state action alone has not resulted in reduction of incidents.

Conclusion

There is no evidence that physically, mechanically, or chemically restraining or putting a child in unsupervised, locked seclusion in school provides any educational or therapeutic benefit to that child. To the contrary, use of seclusion or restraints in non-emergency situations poses significant physical and psychological danger to all involved. Unlike the use of seclusion and restraints in law enforcement and mental health facilities, there is currently no federal law or regulation specifically addressing appropriate limitations on the use of these practices in our nation's schools. Further, there is no outright prohibition of these harmful practices under the IDEA, which is meant to protect students with disabilities and afford them a free appropriate public education. Sadly, once restraint or seclusion has been used, claims are likely unsuccessful pursuant to the IDEA, the U.S. Constitution, or tort or criminal law. Federal legislation is urgently needed in this area of the law in order to protect students with disabilities and their nondisabled peers from physical and emotional harm. Effective July 1, 2018, Section 4 of Public Act 18-51, *An Act Implementing the Recommendations of the Department of Education* in Connecticut, for example, revised definitions of restraint and seclusion and introduced a definition for exclusionary time out. [190] While this is a step in the right direction, many

[188] *Id.* at 359-60.

[189] *Id.*

[190] Public Act 18-51 prohibits the use of seclusion as a behavioral intervention in the IEP and requires that no later than January 1, 2019, districts develop policy related to the use of an exclusionary time out. Seclusion is redefined as "the confinement of a person in a room, from which the student is physically prevented from leaving." Further, "[s]eclusion does not include an exclusionary time out." The revisions specify that the use of "emergency" restraint and

states do not have any laws regarding the use of restraint and seclusion. Some states regulate the use of restraint and seclusion in schools but fail to outlaw the most dangerous forms of restraint such as mechanical and physical restraints, which can and have led to death.

Protection via statute and/or regulation[191]	**State Abbreviations**
Prohibit Seclusion	GA, HI, NV, PA
Prohibit Restraint That Restricts Breathing	AL, AK, AZ, CO, CT, DE, FL, HI, IA, KS, MD , MA,LA, MI, MN, MS, ME,NH, NM, OH, OR, RI, VT, VA, WV, WI, WY
Limit the Use of Restraint to Imminent Danger of Harm	AK, AZ, CO, CT, DE, GA, IN, IL, KS, NM, MD, LA, MI, NH, NJ, NM, OH, OR, RI, UT, VT, WI
Require Parental Notification	AK, AL,[192] AZ, CA, CO, CT, FL, GA, IL, KS,

"emergency" seclusion is restricted to emergency situations in which there is imminent risk of injury by a student to self or others. Further, any school employee who places a student in an emergency restraint or emergency seclusion must have received training related to the proper means of conducting a restraint or seclusion. "Emergency restraint and emergency seclusion are responses to situations in which there is imminent risk of injury by a student to self or others (emergency). The use of these "emergency" responses are not "planned interventions" and are not included in an IEP developed for a student identified as a special education student." An "Exclusionary Time Out" is defined as "a temporary, continuously monitored separation of a student from an ongoing activity in a non-locked setting, for the purpose of calming such student or deescalating such student's behavior. An exclusionary time out becomes a reportable "seclusion" if or when the student is physically or otherwise prohibited from leaving the space." Connecticut State Department of Education, 2019.

[191] Reference: National Association of State Boards of Education, State Policy Database: Restraint and Seclusion, https://statepolicies.nasbe.org/health/categories/physical-environment/restraint-and-seclusion (last visited Dec. 1, 2020).

[192] The Alabama Administrative Code requires parental notification within one school day following the physical restraint of a child. While Alabama prohibits "[u]se of seclusion," it does allow for "time-outs" as behavioral intervention, for which parental notification is not required.

	MD,KY, LA, MA,[193] MI, MS, ME, NV, NH, NJ,[194] NM, NY, NC, OH, OR, PA, RI, , UT, TX, VT, WA, WY, WV, WI
Require Personnel to be Trained	AK, AL, CO, CT, NM, DE, GA, HI, IL, IN, IA, KS, KY, MD, MA, MI, MN, MS, ME, NV, NJ, NY, OH, OR, PA, RI, TN, TX, VT, VA, WI, WV, WY
Provide a Private Right of Action to Parents and Students	WY and IA (NOTE: these statutes/regulations *may* allow in very limited circumstances only.)
Require Data, Monitoring and Enforcement	AK, CO, CT, FL, HI, IL, IN, KS, KY, LA, MD, MA, MI, MN, ME, MS, NV, NH, OH, OR, PA, TN, TX, UT, VT, VA, WA, WI, WY

- *IDAHO, NORTH DAKOTA, OKLAHOMA, AND SOUTH CAROLINA DO NOT HAVE STATUTES, REGULATIONS, OR A BOARD POLICY.*

** Nebraska has a regulation providing that "[e]ach school system has a seclusion and restraints policy approved by the school board or local governing body."

*** Missouri has a statute, but it prohibits only "confining a student in an unattended, locked space except for an emergency situation while awaiting the arrival of law enforcement personnel."

In November 2020 the most restrictive federal law to date was introduced as the Keeping All Students Safe Act. [195]

COPAA reiterates its call for federal legislated standards applicable to all schools that accept federal funds that would at minimum:

[193] The Code of Massachusetts Regulations requires parental notification following the physical restraint of a child. While Massachusetts prohibits "seclusion," the administrative code does allow for "time-outs" for "calming," for which there is no parental notification requirement.
[194] New Jersey statutes require parental notification following the restraint of a child, but not following seclusion.
[195] https://www.murphy.senate.gov/imo/media/doc/KASSA%202020.pdf

- prohibit the seclusion of any child;
- prohibit any type of restraint that would restrict breathing or would otherwise cause serious physical injury or psychological harm or be life-threatening;
- prohibit the planned use of restraint in the form of interventions documented in a child's behavior plan, 504 Plan, or Individualized Education Program (IEP);
- require same-day parental notification if any incident of seclusion or restraint does occur;
- allow a private right of action for families whose child is unlawfully secluded or restrained, including for declaratory judgement, injunctive relief, compensatory relief, attorneys' fees, and expert fees;
- require states to train school personnel so they are equipped to use evidence-based proactive strategies and techniques to address student behaviors;
- require states to collect and report accurate annual data on the use of seclusion and restraint in schools, including the demographic categories of students who have been subjected to these practices; and,
- require states to develop and implement policies and enforcement mechanisms to ensure compliance with federal standards.

Table of Authorities

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