



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

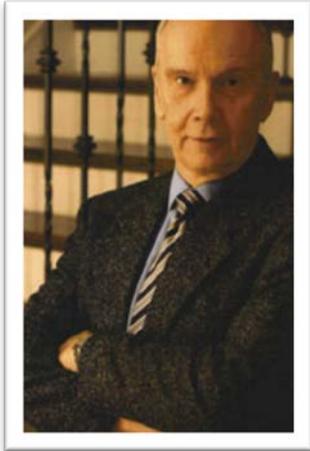


Cover photo 1 by Catherine Avalone/The Middletown Press

Parents protesting the use of “scream rooms” in a Connecticut School. The two women with their backs to the camera are sisters. The woman on the right has a fifth grade son who is in the Special Ed program, but her son was never in the scream room.

Cover photo 2: Picture of Toni Price at May 19, 2009 hearing before the House Education and Labor Committee. Ms. Price’s foster son, Cedric Napoleon, was restrained and killed in a Texas school. Although Cedric’s death was ruled a homicide, the teacher involved went on to teach students with disabilities in Virginia.

A Letter from the Executive Director



A little over three years ago, the National Disability Rights Network (NDRN) published a report entitled, “School Is Not Supposed To Hurt.” This report looked into the growing use of restraint and seclusion in our nation’s schools and called on federal, state, and local entities to make changes in order to protect our school children.

NDRN’s report focused the country on these inhumane practices that were occurring in our nation’s schools, and became a catalyst for change. At the federal level, Representative George Miller requested a Government Accountability Office study and held a hearing on the topic, followed by introduction of legislation with Representative Cathy McMorris Rodgers. Representative George

Miller was then able to pass this legislation through the House of Representatives. Senator Christopher Dodd, along with Senator Richard Burr, introduced a Senate counterpart to Representative Miller’s bill, but that legislation did not pass the Senate. Federal legislation has been re-introduced in both the House and Senate this Congress.

On the state and local level, Protection and Advocacy agencies across the country have worked to enact legislation at the state level and enact policy changes at the local level. This work has been slow, and while there have been some successes, inconsistencies abound between states, and even within states, on how to address the use of restraint and seclusion in schools.

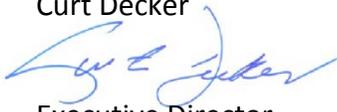
However, while there has been some movement at the state and local levels, the U.S. Department of Education (ED) has been noticeably absent in taking any significant action to protect our nation’s school children from the abuse of restraint and seclusion. In 2009, when the dangers associated with restraint and seclusion first became part of the national consciousness, ED Secretary Duncan made promising statements about preventing and reducing restraint and seclusion and encouraged states to review their current policies and guidance to ensure that every student is safe and protected. The ED Office of Civil Rights also initiated a data collection effort to understand the scope of the problem and where attention needed to be focused.

Since then, however, ED has not provided any meaningful leadership to reduce the use of restraint and seclusion – despite the fact that students are continuing to be confined, tied up, pinned down, battered and nearly killed on a regular basis. Specifically, ED has sent mixed signals about the use of restraint and seclusion. ED has failed to issue clear guidance about when restraint and seclusion might violate the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act (§ 504) or the Individuals with Disabilities Education Act (IDEA). The guidance at a minimum must also limit the use of physical restraint or seclusion to

circumstances when necessary to protect a child or others from imminent physical danger, and not weaken existing protections in the states. ED has also taken too long to publish any of the data it has collected on restraint and seclusion use. Whenever ED publishes such data, ED should immediately begin to analyze the data to determine why certain school districts have higher numbers of restraint and seclusion incidents, analyze the causes of such high usage, and fund demonstration projects and research aimed at reducing – and eventually preventing – restraint and seclusion in those schools.

Recent stories from Connecticut about scream rooms, and Kentucky where a boy was stuffed in a duffel bag, and the examples in this report, show the need for ED to take positive and strong actions. NDRN calls upon ED to take a stand and protect our school children by following the concrete suggestions proposed in this report.

Curt Decker



Executive Director

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P&A/CAP Network

Since it was established by the United States Congress in the mid-1970's, the Protection and Advocacy (P&A) system has been protecting the rights of children and adults with disabilities and their families. The scope of the P&A/CAP network has been expanded over the past three decades to ensure that individuals with all types of disabilities have access to their human and civil rights. Collectively, the P&A/CAP network is the largest provider of legally based advocacy services to people with disabilities in the United States. Go to www.ndrn.org/en/ndrn-member-agencies.html for links to the individual agencies in the Network.

National Disability Rights Network

The National Disability Rights Network (NDRN) is the nonprofit membership organization for the federally mandated P&A and CAP programs.

Through training and technical assistance, legal support, and legislative advocacy, NDRN strives to create a society in which children and adults with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination.

I. EXECUTIVE SUMMARY

Many schools are regularly using restraint and seclusion to control student behavior. Students are suffering, especially very young students. Congress has failed to act. Some states enacted laws and regulations to protect school children, but the progress is slow and the laws are often inconsistent and incomplete.

ED is in the unique position to issue strong national guidance to state education agencies and local school districts about when the use of restraint and seclusion might violate anti-discrimination and education laws, similar to the guidance that the Office of Civil Rights has already issued on bullying and harassment. The guidance at a minimum must also limit the use of physical restraint or seclusion to circumstances when necessary to protect a child or others from imminent physical danger and not weaken existing protections in the states.

ED is also in the unique position to pull together a national summit of researchers, educators, mental health professionals and others to discuss whether restraint and seclusion has any therapeutic value and to develop evidence-based best practices to prevent and reduce the use of restraint and seclusion. ED should collaborate with the Substance Abuse and Mental Health Services Administration (SAMHSA) in this effort because SAMHSA has successfully supported efforts over the last decade to reduce the use of restraint and seclusion in mental health facilities. ED should fund demonstration projects to test what works.

ED can prevent future injuries and deaths by investigating restraint and seclusion (even where there is no individual complaint) and requiring school districts to take appropriate corrective action.

Finally, ED can define the scope of the problem and how to address it by immediately issuing data it has collected for the 2009-2010 school year about the use

of restraint and seclusion. Whenever ED issues such data, it should promptly analyze it to



determine which school districts and schools have unusually high numbers of restraint and seclusion incidents, analyze what might be causing this and then fund demonstration and research projects to reduce – and eventually eliminate – restraint and seclusion in those schools.

II. SCHOOL CHILDREN ARE CONTINUING TO SUFFER

NDRN issued reports about the use of restraint and seclusion in 2009¹ and 2010.² Since then many others, including the Government Accountability Office, have reported on deaths and injuries resulting from the use of restraint and seclusion in schools. Despite the alarms that have been raised, students are continuing to be hurt in our nation’s schools. Below are only a few of the examples that protection and advocacy agencies have collected since NDRN issued its January 2010 report.

ARIZONA – MISUSE OF POSTURAL SUPPORT CHAIRS AS RESTRAINTS

Rifkin, a manufacturer of postural support chairs, has explicitly warned that postural support chairs are not supposed to be used to restrain children and youth to control their behavior. Nevertheless, schools continue to use postural support chairs “off-label.” For example, in 2011, a public school teacher strapped a 7-year old child into a postural support chair and moved him into another room because he was disrupting the class. The child tried to twist out of the chair, ending up with his face against the back of the chair and getting scratched by nails in the chair when the teacher tried to untangle him. The school did not take any corrective action. It could have prohibited staff from using postural support chairs to restrain children. Use of postural support chairs for behavioral reasons violates the IDEA because it is not an evidence-based practice and violates the ADA and § 504 because only students with disabilities are being restrained in postural support chairs.



Image of a postural support chair

COLORADO – DUCT TAPING CHILD TO WHEELCHAIR

The teacher in a public middle school duct-taped a 12-year old student’s only ambulatory arm to his wheelchair, claiming that she was trying to keep him from choking himself, but his grandmother claimed that the reflex in his arm



Image of a roll of duct tape

was the only way for him to communicate. The Legal Center for People with Disabilities and Older People (Colorado P&A) did an investigation and recommended that the school do more training on the state law regarding restraint and seclusion because restraints, such as the duct tape, was a mechanical restraint prohibited under state law.

¹ School Is Not Supposed to Hurt: [Investigative Report on Abusive Restraint and Seclusion in Schools](http://www.ndrn.org/images/Documents/Resources/Publications/Reports/SR-Report2009.pdf) (Jan. 2009)

<http://www.ndrn.org/images/Documents/Resources/Publications/Reports/SR-Report2009.pdf>

² School Is Not Supposed to Hurt: Update on Progress in 2009 to Prevent and Reduce Restraint and Seclusion in Schools (Jan. 2010)

<http://www.ndrn.org/images/Documents/Resources/Publications/Reports/School-is-Not-Supposed-to-Hurt-NDRN.pdf>.

CONNECTICUT – SCREAM ROOMS

According to a complaint filed with the Office of Civil Rights of the U.S. Department of Education, elementary school students with disabilities at Farm Hill School in Middletown, Connecticut, were being held against their will in what administrators called “time out rooms,” but which parents called “scream rooms.”

The complaint stated that these are small, cement-walled rooms and that students in regular education report hearing their classmates screaming and banging on the door and school staff have reported having to clean up blood and urine from these rooms. Students with disabilities are apparently being secluded, restrained and injured at school repeatedly. The school has acknowledged publicly that it is treating students with disabilities differently from their non-disabled classmates. The school’s superintendent stated that “unless you have an IEP, this is not part of your plan.” The superintendent later stated that he had directed all staff to cease using the rooms for students who do not have Individualized Education Programs (IEPs) and that the room had been moved to the second floor of the school so general education classes would not be disrupted by the screaming.³

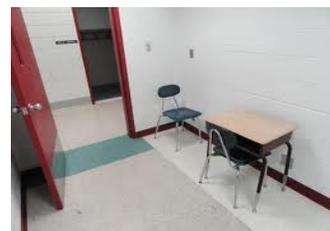


Image of a Scream Room
Credit: Catherine Avalone
middletownpress.com

FLORIDA – RESTRAINING ALREADY TRAUMATIZED STUDENT

A 6-year old, who has autism spectrum disorder and epilepsy, Tourette’s syndrome, and respiratory problems, was traumatized during the fall of 2010 at a charter school as a result of misuse of restraint and seclusion. His parent filed a state complaint against the charter school and settled with the school. His parent subsequently called Disability Rights Florida in the spring of 2011 because of problems with implementing of the settlement agreement. He was attending a different school and despite the Post Traumatic Stress Disorder (PTSD) diagnosis, the school’s plan for him included the use of restraint and seclusion. His mother was concerned because his tantrums and anxiety were increasing. Behavior such as kicking and hiding were increasing and when adults attempted to increase controls, the behaviors worsened. Time out was being frequently used – but without success.

The Florida P&A intervened with the goal of negotiating a new behavior intervention plan that would prevent and preclude the use of any restraint and seclusion. The P&A provided assistance in developing alternative strategies and positive behavior supports, monitoring the efficacy of strategies using Response to Intervention (RTI) principles, and implementing a structured problem solving approach. The P&A continues to monitor implementation and when

³ Superintendent Orders End to ‘Scream Rooms’, The Middletown Press (1-13-12)
<http://www.middletownpress.com/articles/2012/01/13/news/doc4f1096d366216251977720.txt>

his behavior becomes challenging, the P&A assists the district in assessing cause, fidelity of interventions and revising the behavior intervention plan as necessary. The child has many other needs and the case(s) remain active due to those other issues. Until all issues are resolved, the P&A will continue to address restraint and seclusion in terms of monitoring, technical assistance and negotiations on behalf of student and be available to the parent thereafter should new problems arise.

IDAHO - REPEATEDLY SECLUDED, RESTRAINED AND SPRAYED

A middle school child with Asperger’s Syndrome was repeatedly placed in seclusion for non-compliant behaviors – “shutting down” and being generally non-responsive. The child sustained rug burns on his back from being dragged across the floor to the room by his hands and/or feet; he also indicated he was sometimes sprayed by the teacher with a water bottle containing a chemical cleaning solution for the white board. The child’s mother filed complaints with Child Protection Services, the school district and the police, who investigated the allegations. The child was removed from the teacher’s classroom; no other disciplinary action was disclosed by the school, citing “personnel matters.” An advocate from the DisAbility Rights Idaho intervened. Independent behavior consultants were brought in to conduct assessments and draft an appropriate behavior plan, with positive behavior services provided by trained staff.

INDIANA - SUICIDE ATTEMPT WHEN SECLUDED

During January 2011, a child who had been repeatedly placed in a seclusion room, was not allowed to leave the seclusion room to use the restroom. The child subsequently urinated on the floor. Upon his return to school the following day, the school secluded him again for having relieved himself in the room on the previous day. The final incident occurred on January 20, 2011; reportedly, the child had been in seclusion for approximately four consecutive hours. During which the child had been screaming and cursing for not being allowed out to use the bathroom. It is unclear what prompted staff to check on the child, either the child’s sudden silence or the arrival of the child’s guardian. However, when the seclusion room was unlocked staff discovered that the child had attempted to hang himself. Since, school personnel do not actively observe children while they are in seclusion, no one knows for how long the child had been hanging prior to the discovery. The guardian immediately took the child to a local hospital.

IOWA – TIED TO A LUNCH TABLE

The Individualized Education Program of a 15-year old student with autism, cerebral palsy, intellectual disabilities and epilepsy stated that he must have two aides with him at all time, but the school failed to consistently provide the aides. When there was only one aide, the school used a gait belt and other means to restrain the child to the lunch table and a recliner “for his own safety.” Disability Rights Iowa assisted his parents in filing a complaint with the Iowa Dept. of Education. The complaint alleged that the restraint violated state law, the IEP and behavior plan were inappropriate and the school had failed to provide the student with a free and appropriate public education (FAPE). The state ruled in favor of the child on denial of FAPE,

inappropriate restraint and ordered compensatory education for the child and also training for the school district on restraint and seclusion and health programs. The P&A represented the child in the mediation to create a plan for compensatory education.

KANSAS – SECLUDED AS PUNISHMENT

The mother of a 13 year old child with disabilities contacted the Disability Rights Center of Kansas with allegations of extensive improper seclusion. Her son has been diagnosed with intellectual disabilities, speech delays significantly limiting his ability to communicate, and epilepsy. He has no mental health diagnosis, but he has been placed at a school for students with behavior issues. The child has a behavior plan which prohibits him from touching anybody without permission. Impermissible touching includes a hug, high five, or fist bump. If he does not follow the plan, he is sent immediately without warning to the in-school suspension room (ISS) room in the principal’s office. The school also has a separate seclusion room in each classroom which is also called an ISS room. All rooms have no windows and only a door. The mother has learned that during the past several weeks her son has spent 8-1/2 days in a seclusion room. The child has been sent to the room for as long as the entire day and sometimes into the following day. The door is always closed. The mother understands that the school does not record the removals on exclusion report forms, and they are noted only on his daily point sheets which she must sign and return to the school. Her son has been suspended over 10 times and has never had a manifestation hearing. The P&A is currently investigating these allegations.

KENTUCKY - RESTRAINED IN DUFFEL BAGS AND POSTURAL CHAIRS

The school district placed a 9-year old child in a duffel bag after he was allegedly misbehaving at an intermediate county school in Kentucky. His mother said that she witnessed him wiggling inside the bag as a teacher's aide stood by. It was apparently punishment for autistic behavior.⁴ The mother said:

“They pretty much treated him like trash. Put him inside a bag, tied him up and put him in the hallway...If you gave me any child that was in a regular classroom that acted up, they don't get thrown in a bag and put in a hallway.”

- Kentucky mother of child with autism

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⁴ Mother tells horrors of son being left in bag to WHAS11 News (Dec. 28, 2011) <http://www.whas11.com/home/Mother-tells-horrors-of-son-being-left-in-bag-to-WHAS11-News-136343173.html>

hallway.”⁵ The case has received a lot of media attention and approximately 170,000 people have signed a petition in support of the mother.⁶

In another case in Kentucky, a 6-year girl who is diagnosed with autism, fetal alcohol syndrome, shaken baby syndrome, Attention-Deficit/Hyperactivity Disorder, one kidney, and Hoshimoto’s Thyroiditis, sustained bruising on her neck and back when she was improperly restrained in a Rifton chair. Photos below.⁷



Three images of bruises on a girl's back

MAINE – DANGEROUS SECLUSION ROOMS

The Disability Rights Center of Maine filed a complaint, based on state restraint and seclusion regulations, against a school district regarding the use of a designated time out room that did not meet the physical characteristics requirement specified in the regulations. In fact the room posed significant health and safety risks for children. The P&A staff personally viewed the room which was located within the resource room “bathroom changing area.” The wooden door to the room had a rectangular hole cut out on the bottom of the door that was reported to be the required observation window. This is concerning for two reasons; (1) it is impossible to continuously observe the student in the room from the bottom of the door as required, and (2) a student could attempt to climb out of the room through the hole and injure him or herself in the process. In addition, due its original design as a bathroom changing area the room posed other serious risks. The time out area includes an examination table, small metal trash can, and two metal cabinets with locks as well as sink and toilet. A child could be seriously injured by these items and they are not hygienic.

MASSACHUSETTS – BRUISED AND BATTERED

An 11-year old boy with an emotional/behavioral disability was placed in a 3 ½ hour time-out for behavior issues during a dodge-ball game in gym class. When asked to discuss his behavior, he refused and threw a book and a pencil at the teacher. The teacher immediately slammed the boy to the floor and restrained him. During the restraint, the boy was injured and got a fat lip,

⁵ *Id.*

⁶ Mom of Autistic Child Heads to Board with 170,000 Signatures (Jan. 20, 2012) <http://www.whas11.com/home/Mom-of-autistic-child-heads-to-board-meeting-with-170000-signatures-137654408.html>

⁷ Letter sent to Sen. Mitch McConnell by Lucy Heskins, Staff Attorney Supervisor, Kentucky Protection and Advocacy.

abrasions on his shoulder and under his eye, and injuries to his torso. The mother was called by the guidance counselor to report that the boy had assaulted the teacher, but neglected to tell her that he had been injured as a result. When she picked him up, she immediately took him to the E.R. The incident report that the mother received differed greatly from what her son told her. There appears to have been no debriefing of the incident. He never returned to the school.

NEW HAMPSHIRE – SECLUDED WHEN ANXIOUS

A child with a disability had a history of bolting out of the room whenever her anxiety increased. Her classroom teachers came up with an informal plan (permitting her to have some 1:1 time with a preferred staff member when she became anxious) but never conducted a functional behavioral assessment. Unfortunately, the school did not implement this plan consistently and the student continued to refuse to do work and bolt out of the classroom when she became anxious. In response, school personnel repeatedly put her into an 8' X 10' seclusion room for about 20 – 30 minutes at a time. Rather than helping the student calm down, secluding her made her even more anxious. After the Disabilities Rights Center, the New Hampshire P&A, investigated, the school agreed to stop using the room for this particular student and developed protocols requiring functional behavioral assessment before seclusion is even contemplated, monitoring during seclusion, and documentation of antecedents and consequences of seclusion.

NEW MEXICO - ALMOST STRANGLER ON A SCHOOL BUS

A six-year old child with Down Syndrome was restrained on a school bus by the school bus driver and attendant. A teacher's aide, who was standing outside, told police that she heard yelling from the bus along with the child hitting the window. When the child threw a shoe out of the window, the aide walked to the bus and returned the shoe. The aide saw that the child was strapped to the seat with the seatbelt wrapped around the child's neck. The aide took pictures and contacted the police. The police referred the call to Disability Rights New Mexico. As a result of the P&A's advocacy, the bus company fired the school bus driver and attendant.

“...the child was strapped to the seat with the seatbelt wrapped around the child's neck.”

NORTH CAROLINA - DEAF STUDENT UNABLE TO COMMUNICATE DURING RESTRAINT

At least two staff members placed a student in prone restraint, pinning her hands beneath her chest. The student, age 14 at the time of the incident, is Deaf, has an intellectual disability and a health condition. She uses American Sign Language as her primary method of communication. The use of prone restraint on this student could have exacerbated her health condition. It prevented her from being able to communicate with staff members while in restraint. The force used in restraining the student resulted in her sweater being torn in several places and deep fingertip bruises on her arms. The school did not investigate or otherwise address the incident.

Staff delayed in reporting the alleged abuse to the local Department of Social Services. Disability Rights North Carolina conducted a thorough investigation into this incident, including document review and interviews with more than 10 staff members. The P&A substantiated the allegation of abuse, as well as allegations of retaliation against the student, her mother, and staff who advocated on the student’s behalf. The P&A released a public report on its findings (available at <http://www.disabilityrightsn.org/intranet/downloadManagerControl.php?mode=getFile&elementID=2295&type=5&atomID=1321>) that resulted in the state Department of Health and Human Services (NC HHS), which oversaw the school, conducting its own investigation and ultimately firing the school director. NC HHS put together a panel of professionals to conduct its investigation, including staff from the state Department of Public Instruction. Shortly after the state completed its investigation, the student’s mother moved out of this school’s catchment area. The student transferred to a different residential school—coincidentally the school where the P&A conducts regular monitoring activities. The student is doing well at her new school. Her communication abilities have improved and she has not been restrained.

OHIO – LOCKED IN A “CLOSET-SIZED” ROOM

An 18-year old student with an intellectual disability was placed in a "locked" closet-sized room with two peep holes on several occasions. One incident occurred after the student was taking too long to leave the bathroom when directed to leave by staff. The student's mother requested that school personnel not use locked time out with the student but instead, use a sensory room to regain control of his behavior. She explained that it traumatized the student to be in this room and, as a result, the student would undress and be incontinent. She further indicated that the student was exhibiting increased loss of behavioral control at home related to the use of the room, and he repeatedly begged not to be put back into the room. She did not send him back to school. The family doctor subsequently found that the student had a staph infection, which was the result of the student lying unclothed in his urine on the floor of the seclusion room.

OREGON – STRAPPED TO THE WHEELCHAIR

A 15-year old girl with autism who is non-verbal is completely mobile and loves elevators. In the fall of 2010, she was strapped to a wheelchair for up to 80 percent of her school day at her local public school to prevent her from leaving the classroom to get on the elevator. Her parents were given no notice of these restraints and are still unclear on how long this was happening. As a result of Disability Rights Oregon’s advocacy, she transferred to a classroom with a higher staff to student ratio and no longer required the restraints. She moved throughout the school even though there was an elevator present and was able to be redirected positively by staff.

UTAH – FECES IN THE SECLUSION BOOTH

A six-year old student in a public non-residential school was placed in a seclusion booth for 45 minutes. The student began defecating in the booth and smearing feces. He was not monitored by an aide or classroom teacher. When his parents arrived, the student was still in the booth and feces were smeared all over the booth and the student. The parent took the child home and cleaned him up. The Utah P&A helped the parent get home

“When his parents arrived, the student was still in the booth and feces were smeared all over the booth and the student.”

instruction for the student until an appropriate Individualized Education Program and Behavior Intervention Plan could be implemented. The P&A and the parents had several discussions with school personnel about using positive interventions and supports prior to moving into crisis intervention. The P&A provided the Utah State Office of Education information about a number of schools, including the school in this incident, that create behavior plans but do not follow them.

WEST VIRGINIA – STRAPPED TO A POSTURAL SUPPORT CHAIR

A 7-year-old child with autism was being restrained in a Rifton chair. While he may have had the chair prescribed for his physical condition, it was clearly being used as a restraint device for behaviors that weren’t being adequately addressed by the school. The West Virginia P&A got involved, intervened with the school, and the situation was resolved.

WISCONSIN - CHILD ABUSE, INCLUDING RESTRAINTS

Disability Rights Wisconsin represents five of the six victims in a case in which a teacher abused children, in Appleton, Wisconsin for at least 6 years. The abuse included the use of restraints. The teacher was subsequently arrested and terminated. The principal of the school is still under investigation for failing to report child abuse. The parents have received a partial settlement which resolved the due process cases by obtaining compensatory education, training, and policy changes at the district level. The parents reserved rights to file a civil lawsuit, and intend to do so if they do not receive monetary compensation and have the school district accept administrative responsibility, possibly through termination of the principal.

III. Congress Has Not Passed Legislation

In January 2009, NDRN issued “School Is Not Supposed To Hurt”, the report included policy recommendations for federal, state, and local policymakers that included banning prone restraint and seclusion and was the catalyst for then Chairman George Miller of the House Education and Labor Committee to request a report from the Government Accountability Office that further documented the abuse, at times deadly, that students have experienced as a result of the use of restraint and seclusion in the nation’s schools.

A hearing was held on May 19, 2009, at which then Chairman Miller stated that the report issued by NDRN was the inciting force behind the development of the legislation to prevent the harmful use of restraint and seclusion in schools. On December 9, 2009, George Miller (D-CA) and Cathy McMorris Rodgers (R-WA) introduced the Preventing Harmful Restraint and Seclusion in Schools Act (H.R. 4247). On the same day, Senator Christopher Dodd (D-CT) also introduced legislation with the same title. The bills would have established minimum federal standards on the use of restraint and seclusion in schools, and limited the use of these practices to situations where students present an imminent risk of harm to themselves or others. The legislation was renamed the Keeping All Students Safe Act, and the House of Representative’s Committee on Education and Labor passed the legislation in February, 2010, and the full House of Representatives passed it by a vote of 262 yeas to 153 nays on March 3, 2010. Right before Congress recessed for the 2010 elections, Senators Christopher Dodd and Richard Burr (R-NC) introduced a new version of the legislation in the Senate (S. 3895). This legislation had many similarities to the version that passed the House of Representatives, but also had some very important differences. Ultimately, time ran out for the Senate to mark-up and bring a bill to the floor to debate in the 111th Congress.

On April 6, 2011, Ranking Member George Miller reintroduced the Keeping All Students Safe Act with Representative Gregg Harper (R-MS) as the lead co-sponsor (H.R. 1381). H.R. 1381 is the same bill that passed the House of Representatives in the 111th Congress, and as of February 22, 2012 has 31 co-sponsors. On December 16, 2011, Senator Tom Harkin (D-IA) introduced a new Senate version of the Keeping All Students Safe Act (S. 2020) with many significant changes; most notable is a prohibition on the use of seclusion.

Even though the stories of abuse and neglect through the use of restraint and seclusion continue to occur on almost a daily basis and some legislators have tirelessly worked to protect school children from restraint and seclusion, others have stopped passage of a federal law based on the misperception that this can be addressed at the state or local level. This ignores the fact that without strong federal leadership on this topic, changes at the state and local level are inconsistent and slow in occurring.

IV. States are Slow to Put Adequate Protections in Place

The activity on the federal level made states more aware of the dangers of restraint and seclusion and spurred some states to improve their legal protections. In 2009, when NDRN published its first report on restraint and seclusion in schools, the Government Accountability Office reported that state laws and regulations about restraint and seclusion in schools varied widely.⁸ According to the Government Accountability Office, 19 states had no laws or regulations.⁹ Seven states placed some restrictions on the use of restraints, but did not regulate seclusion.¹⁰ Only 17 states required that selected staff receive training before being permitted to restrain children.¹¹ Only 19 states required parents to be notified after restraint had been used.¹²

Unfortunately, almost three years later, there are only 29 states with protections against restraint and seclusion of school children.¹³ Another 7 states have laws that do not create any meaningful protection for children.¹⁴ There are 13 states with voluntary guidelines that are not legally binding.¹⁵ And, 6 states have no protection whatsoever: Arizona, Idaho, Mississippi,

⁸ GAO-09-719T, *Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers* (May 19, 2009), p. 4.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ J. Butler, *How Safe is the Schoolhouse? An Analysis of State Seclusion and Restraint Laws and Policies*, published by the Autism National Committee (Jan. 20, 2012 updated), p. 7.

<http://www.autcom.org/pdf/HowSafeSchoolhouse.pdf>. According to the author, a state has meaningful protection if it falls in one of two categories. First, it provides multiple protections against restraint and/or seclusion for students. Second, it has few protections but strictly limits the intervention to emergency threats of physical harm. *Id.* Some states provide greater protections than others. *Id.* The states are Alabama, Arkansas (seclusion only), California, Colorado, Connecticut, Florida, Georgia, Iowa, Illinois, Louisiana, Massachusetts, Maryland, Maine, Minnesota, Montana, North Carolina, New Hampshire, Nevada, New York, Ohio (executive order limiting physical restraint), Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Washington, West Virginia and Wyoming. Of these, 7 were adopted after the Miller bill was introduced in December 2009 (Alabama, Florida, Georgia, Louisiana, Vermont, West Virginia, and Wyoming), and 3 were substantially strengthened (New Hampshire, Oregon, and Tennessee). *Id.*

¹⁴ *Id.* at 9. They include Alaska, Delaware, the District of Columbia, Hawaii, Michigan, and Missouri.

¹⁵ *Id.* These documents include guidance approved by the State Board of Education; documents authored by/for the State Department of Education or Director of Special Education; and model principles that schools might consider. The 13 states are Indiana, Kansas, Kentucky, Michigan,

North Dakota, New Jersey, and South Dakota, although at least 3 of them have tried to take some action.¹⁶

Thus, with the legislation in Congress blocked by a few members and inadequate and inconsistent state legislation, the only entity that can provide national leadership in protecting school children from the harmful use of restraint and seclusion is the ED, which is in a perfect position to fund demonstration projects, issue strong guidance, and follow through on the recommendations outlined at the end of this report.

Missouri, Nebraska, New Mexico, Oklahoma, South Carolina, Utah, Virginia, Washington, D.C., and Wisconsin. *Id.* at 10.

¹⁶ *Id.* at 10-11.

V. ED's Failure to Protect School Children from Restraint and Seclusion

ED has made some promising statements and taken some promising steps to reduce the use of restraint and seclusion in schools. However, ED has also sent out mixed signals and has not clearly stated what is and what is not permissible under either the Individuals with Disabilities Education Act (IDEA) or Section 504 of the Rehabilitation Act of 1973 (Section 504) or anti-discrimination laws. ED has also failed to issue strong guidance that at a minimum must also limit the use of physical restraint or seclusion to circumstances when necessary to protect a child or others from imminent physical danger.

A. Office of the Secretary

In 2009, after legislation was introduced in the House of Representatives to severely curtail the use of restraint and seclusion in schools, on December 8, 2009, Secretary Arne Duncan issued letters to Representatives George Miller and Cathy McMorris Rodgers supporting their proposed legislation. In his letter, the Secretary noted several "principles" that Congress should consider as it developed legislation:

- Any behavioral intervention must be consistent with the child's right to be treated with dignity and to be free from abuse regardless of the child's educational needs or behavioral challenges;
- Physical restraint and seclusion should never be used as punishment or discipline;
- Physical restraint and seclusion should never be used that restricts a child's breathing;
- Limit the use of physical restraint and seclusion in schools...except when it is necessary to protect a child or others from imminent danger;
- Every instance of physical restraint and seclusion should be appropriately monitored to ensure the safety of the child, other children, teachers, and other personnel;
- Parents should be notified promptly following the use of restraint or seclusion on their child, and any such use should be documented in writing;
- Teachers and other personnel should be trained regularly on the appropriate use of restraint and seclusion and the use of effective alternatives, such as positive behavioral intervention and supports.

Unfortunately, documented in the remainder of this report, ED has not consistently applied these principles in its policy announcements on restraint and seclusion.

On July 31, 2009, the Secretary issued a letter to the Chief State School Officers, requiring them to provide copies of the restraint and seclusion guidelines in their states. ED published the information obtained from the states in response to the letter at <http://www2.ed.gov/policy/seclusion/seclusion-state-summary.html>.

In the letter, the Secretary urged the States to revise their policies and again made some very promising statements concerning limiting the use of restraint and seclusion in schools:

- I am encouraging each State to review its current policies and guidelines regarding the use of restraints and seclusion in schools to ensure every student is safe and protected;
- Help ensure that no child is subjected to the abusive or potentially deadly use of seclusion or restraint in a school;
- The limited circumstances under which these techniques may be used;
- Ensure that parents are notified when these interventions do occur.

The Secretary also emphasized the important role that Positive Behavior Intervention Strategies (PBIS) can provide in limiting the use of restraint and seclusion in schools:

PBIS provides a framework for decision making that guides the implementation of evidence-based academic and behavioral practices throughout the entire school, frequently resulting in significant reductions in office disciplinary referrals, suspensions, and expulsions. While the successful implementation of PBIS typically results in improved social and academic outcomes, it will not eliminate all behavior incidents in a school. However, PBIS is an important preventative approach that can increase the capacity of the school staff to support children with the most complex behavioral needs, thus reducing the instances that require intensive interventions.

Unfortunately, in a letter issued to Weiss on January 26, 2010, the Secretary undercut much of what he had said in his prior letters. The letter starts out promising. The Secretary noted that like her, he was “very concerned that we do all we can to help ensure that schools are places of safety for all our children and that the use of seclusion and restraint is very limited. The Secretary also stated that “no child should be subjected to the abusive or potentially deadly use of seclusion or restraint in a school.

However, the Secretary went on to state that although the “IDEA emphasizes and encourages the use of positive behavioral interventions and supports, [it] does not prohibit the use of other measures, such as seclusion, *non-emergency* restraint, or *aversive* behavioral intervention when appropriate” (emphasis added). By stating that restraint or seclusion may be used in non-emergency situations contradicts the Secretary’s prior statements that these measures should be used in only limited circumstances. Further, by stating that aversives may be used, the

Secretary undercuts his statements that students should be treated with dignity and be free from abuse.

Additionally, with respect to Section 504, the Secretary stated that it “does not expressly authorize us to ban the procedures you describe” – “electric shock, other *painful* and aversive procedures, seclusion, and *unnecessary* restraint, and food deprivation” (emphasis added). In spite of the Secretary’s comment, it is hard to imagine that the infliction of pain and the use of unnecessary restraint is consistent with the basic protections to be free from discrimination under Section 504.

B. Office of Civil Rights

ED’s Office for Civil Rights (OCR) has also taken some promising steps to address the use of restraint and seclusion in schools. OCR added restraint and seclusion to its data collection of 7,000 school districts for the 2009-10 school year. It also maintained restraint and seclusion in its data collection for all school districts in the country for the 2011-2012 school year. However, OCR has taken an exceedingly long time to publish the data from the 2009-10 school year. When ED issues such data, it should promptly analyze it to determine which school districts and schools have unusually high numbers of restraint and seclusion incidents, analyze what might be causing this and then fund demonstration and research projects to reduce – and eventually eliminate – restraint and seclusion in those schools.

OCR has also issued several decisions over the years regarding the use of restraint or seclusion of which NDRN is aware, yet only a handful have found any violation of Section 504. When looking at claims that the use of restraint or seclusion are a violation of Section 504, OCR should adopt the seven principles set out in Secretary Duncan’s letters to Representatives George Miller and Cathy McMorris Rodgers.

In addition, it would be very useful to all stakeholders – students, parents, school personnel and advocates – if OCR provided some clarity about when the use of restraint and seclusion would violate the IDEA, the Americans with Disabilities Act (ADA), Section 504 and other anti-discrimination laws with respect to the following:

i. Safe Environments

In addition, OCR can borrow from principles enunciated in cases involving Peanut and Tree Nut Allergies (PTAs). For example, OCR has said, “As the vast majority of District students without disabilities do not face a significant possibility of experiencing serious and life-threatening reactions to their environment while they attend District schools, Section 504 and Title II of the ADA require that the District provide the Student with an environment in which he also does not face such a significant possibility.” But, such is the case if PTAs are not accommodated.¹⁷

¹⁷ *Saluda (SC) School District One*, 11-06-1102, 47 IDELR 22 (OCR 2006).

In the same way, what parent sends a child to school expecting the child will be subjected to dangerous, abusive or traumatic practices, as documented in this report. These practices have nothing to do with whether there is anything in an IEP. Similar to its PTA cases, OCR must look at the nature of the intervention and at some point it becomes discriminatory, regardless of whether it is in the IEP.

ii. Harassment

ED and other federal departments have rightly devoted significant resources to bring attention to bullying and to develop strategies to combat it.¹⁸ ED itself has hosted two summits to discuss strategies to combat bullying.¹⁹ The first summit in August 2010 brought together government officials, researchers, policymakers, and education practitioners.²⁰ ED composed *Anti-Bullying Policies: Examples of Provisions in State Laws*, a guidance document outlining common key components of state anti-bullying laws.²¹ Following the Summit, ED's Policy and Program Studies Service contracted researchers to compile the analysis on state laws and policies.²² The White House held a bullying conference in March 2011.²³ Then, in September 2011, ED held a second summit to discuss continued strategies for combatting bullying.²⁴

As Secretary Arne Duncan said at the White House Summit:

Students should not be threatened physically, isolated socially, or hurt emotionally based on their skin color, their ethnicity, any physical or mental disabilities, their sex, their sexual orientation, their gender identity, religion or any other reason. Through our collective efforts, we're going to be able to reduce this harassment and make schools a better place for students to learn...I start with a simple premise that no school can be a great school until it is a safe school...You cannot do your best or concentrate academically if you are scared.²⁵

¹⁸ See the website www.StopBullying.gov managed by the Department of Health & Human Services in partnership with the Department of Education and Department of Justice.

¹⁹ Federal Partners will Come Together at Second Annual Summit to Discuss Continued Strategies for Combating Bullying, Press Release <http://www.ed.gov/news/media-advisories/federal-partners-will-come-together-second-annual-summit-discuss-continued-str>

²⁰ U.S. Education Department Releases Analysis of State Bullying Laws and Policies, Press Release (Dec. 6, 2011).

²¹ *Id.*

²² *Id.* ED's "Analysis of State Bullying Laws and Policies can be found at <http://www2.ed.gov/about/offices/list/opepd/ppss/reports.html#safe>

²³ <http://www.hhs.gov/secretary/about/speeches/sp20110310.html>

²⁴ *Supra*, note 14.

²⁵ Enough Is Enough: Secretary Duncan's Remarks at the White House Conference on Bullying Prevention (March 10, 2011, <http://www.ed.gov/news/speeches/enough-enough-secretary-duncans-remarks-white-house-conference-bullying-prevention>)

His comments about the harm caused to school children by bullies apply equally to the harm caused by school staff when they restrain or seclude a child. In both cases, students may be threatened physically, isolated socially and hurt emotionally. In both cases, students cannot be expected to learn if they do not feel safe at school.

In fact, ED’s definition of bullying accurately describes instances in which school staff use restraint and seclusion for the purpose of coercion, discipline, convenience or retaliation, rather than to ensure immediate physical safety of the student or others (emergency situations):

Although definitions of bullying vary, most agree that bullying involves:

- **Imbalance of Power:** people who bully use their power to control or harm and the people being bullied may have a hard time defending themselves
- **Intent to Cause Harm:** actions done by accident are not bullying; the person bullying has a goal to cause harm
- **Repetition:** incidents of bullying happen to the same the person over and over by the same person or group.²⁶

Under this definition, the only potential difference between bullying and restraint and seclusion used for non-emergency purposes is the actors. Typically, bullying involves student-on-student abuse while restraint and seclusion in non-emergency situations involves staff-on-student abuse.

As ED states on its StopBullying website:

Everyone can help prevent and stop bullying. Adults have the responsibility to protect and be a role model for kids, teens, and young adults.²⁷

School staff cannot be a role model to stop bullying if staff is simultaneously using violence in the forms of restraint and seclusion in non-emergency situations. Students who witness such violence are traumatized themselves and may believe that violence is an appropriate way to act.

Many of the strategies for stopping bullying are the same strategies for stopping restraint and seclusion. We urge ED to start viewing these acts as being on the same continuum of school safety and take appropriate actions to stop them.

iii. Disparate Treatment

²⁶ What is Bullying, StopBullying.gov
http://www.stopbullying.gov/topics/what_is_bullying/index.html.

²⁷ <http://www.stopbullying.gov/community/>

Another strategy that OCR should use when analyzing restraint and seclusion cases is disparate treatment—whether between students with disabilities and students that do not have disabilities or racial and ethnic minorities with disabilities compared with students that do not have disabilities. Statistically significant discrepancies create a prima facie case of discrimination which the school will have to rebut, including by addressing what efforts they are taking to reduce the need for restraint and seclusion system wide when disparate treatment is found.

iv. Informed Consent

Finally, OCR should uniformly adopt the standard enunciated in a decision from the California Regional Office to analyze whether the parents were properly informed of and consented to the use of restraint or seclusion, even if their use is in an IEP or behavior plan.²⁸ In that case OCR noted that a district “that chooses to educate students in a highly restrictive placement, including seclusion under adverse conditions for extended periods of time, must meet the highest standard of procedural adherence in order to receive deference and comply with Section 504.”²⁹ OCR concluded that the County program did not meet this standard.

C. Office of Special Education and Rehabilitative Services

NDRN is aware of two policy documents issued by ED’s Office of Special Education and Rehabilitative Services (OSERS) concerning the use of restraint and seclusion in schools.

First, in *Letter to Anonymous*,³⁰ staff from the Office of Special Education Programs (OSEP) stated, “While IDEA emphasizes the use of positive behavioral interventions and supports to address behavior that impedes learning, IDEA does not flatly prohibit the use of *mechanical* restraints or other *aversive* behavioral techniques” (emphasis added).

Next, in *Letter to Anonymous*,³¹ the Assistant Secretary for OSERS made the following statements concerning the use of restraint and seclusion:

- Neither “the IDEA nor other federal laws prohibit the use of seclusion and restraint techniques in schools;”
- I believe that we must ensure that schools are places of safety for all our children;
- The limited circumstances under which seclusion and restraint may be used;
- No child should be subjected to the abusive or potentially deadly use of seclusion or

²⁸ *Stanislaus County (CA) Office of Education*, Docket No. 09-07-1110 (OCR Dec. 21, 2007)

²⁹ *Id.* p. 13

³⁰ 50 IDELR 228 (OSEP March 17, 2008)

³¹ 111 LRP 45428 (OSERS December 16, 2010)

restraint in a school;

- IDEA promotes the use of positive behavioral interventions and supports;
- Seclusion and restraint may not be implemented in a discriminatory manner;
- Any behavioral intervention must be consistent with the child’s right to be treated with dignity and to be free from abuse, regardless of the child’s educational needs or behavioral challenges.

While these statements are good in the abstract, they do not go far enough to truly limit the all too frequent uses of restraint and seclusion including those outlined in this report. Like OCR, OSERS should issue revised policies that reflect the seven principles outlined by Secretary Arne Duncan.

i. Free and Appropriate Public Education (FAPE)

The IDEA has other core principles which OSERS should adopt to limit the use of restraint and seclusion in schools. First, the definition of FAPE includes the requirement that services must meet state standards.³² Therefore, although the IDEA provides the basic floor of opportunity, any state law, regulation or policy that creates greater protections is also binding within that state. Therefore, all laws, regulations or policies in a state that provide greater protections on restraint or seclusion are binding on the covered educational programs in that state.

Additionally, OSERS policy should recognize the basic educational principle that behavior is a form of communication. Given school districts’ obligations to ensure that students receive FAPE, when a student’s behavior rises to the point where it is so severe that school staff decide to restrain or seclude the student, the school must take steps to identify the issues giving rise to the behavior and undertake steps to ensure that this behavior does not recur. When less informal measures are not successful in reducing this behavior, these steps must include an Functional Behavioral Assessment (FBA) and meetings with the individualized education program team to address the student’s program.

ii. “Off-Use” of Equipment

OSERS should also flatly prohibit the "off-use" of equipment. A chair is a chair for sitting, not for being tied into. A Rifton chair and wheelchairs are designed for specific types of disabilities and are not intended to be used for restraint other than for the specific purposes for which they are

³² 20 U.S.C. § 1401(9)(B).

designed.

iii. Evidence - Based Practices

The IDEA requires that services be research based to the extent practicable.³³ There is no research to support the use of either restraint or seclusion for therapeutic purposes. Therefore, OSERS should state that they are not permitted for these purposes. Moreover, given the dangers associated with the use of restraint and seclusion, restraint and seclusion should not be permitted as forms of discipline for student misconduct.

iv. Least Restrictive Environment

OSERS should also build into its policy the obligations based on the least restrictive environment requirement—that the IDEA requires that removal “from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”³⁴ Seclusion is most definitely a removal from the “regular educational environment” and, arguably so is a restraint. Therefore, school districts must be required to provide necessary supplementary aids and services to prevent both seclusion and restraint. Supplementary aids and services may include supports for the student, such as an individual aid, and program modifications or supports for the school personnel.³⁵ Such support should include training in how to meet the needs of the student in such a way as to obviate the need for either seclusion or restraint.

v. Monitoring

Finally, to avoid the danger of harm, no seclusion should ever be used where the student is not constantly monitored. Instances of students’ soiling themselves or being traumatized or otherwise harmed by the use of seclusion or restraint as documented in this report are not acceptable and should not be tolerated.

Specific Recommendations for Guidance

ED should provide strong guidance to state departments of education, school districts, school personnel, students and families about when restraint and seclusion violates federal anti-discrimination and education laws. The guidance at a minimum must also limit the use of physical restraint or seclusion to circumstances when necessary to protect a child or others from imminent physical danger, and not weaken existing protections in the states. In analyzing whether a restraint or seclusion would violate the federal anti-discrimination and education laws, the decision should not be governed by whether or not their use is in an IEP. The nature of the restraint or seclusion, the effects on the student, and steps taken to obviate the need for

³³ 34 C.F.R. § 300.320(a)(4).

³⁴ 20 U.S.C. § 1412(a)(5)(A).

³⁵ 34 C.F.R. § 300.320(a)(4).

restraint or seclusion need to be independently analyzed. In addition, States can have additional restrictions on the use of either restraint or seclusion.

Specifically, the guidance should state that restraint and seclusion:

- i. Constitutes illegal harassment if it is sufficiently severe, pervasive or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities or opportunities offered by the school, and that such harassment violates the civil rights laws if such harassment is based on race, color, national origin, gender or disability. Cases where students are traumatized to the extent that they are soiling themselves or crying excessively, or where they are physically harmed by the restraint or seclusion would per se meet this definition;
- ii. Constitutes illegal disparate treatment if a student with a disability is restrained or secluded, but not a student without a disability in the same circumstances. Cases in which students with a disability are repeatedly put in "scream rooms," but students without a disability in similar circumstances are not so removed, would constitute illegal disparate treatment;
- iii. Constitutes illegal disparate treatment if a student of a particular race, color, national origin or gender is restrained or secluded, but not a student of a different race, color, national origin or gender in similar circumstances. Cases in which a student of a particular race, color, national origin or gender is placed in prone restraint, but a student of a different race, color, national origin or gender in similar circumstances is not placed in prone restraint would constitute illegal disparate treatment;
- iv. Constitutes illegal discrimination when a school or school district implements restraint and seclusion policies or practices that have a disparate impact on students because of their race, color, national origin, gender, or disability. Statistically significant discrepancies create a prima facie case of discrimination which the school will have to rebut, by addressing the efforts taken to reduce the need for restraint and seclusion system wide when disparate treatment is found. For example, school policies or practices requiring students with disabilities to be secluded if they touch anyone without permission, but students without disabilities who behave in a similar way are not subject to seclusion would violate this standard;
- v. Violates the IDEA unless implemented consistent with the following principles:
 - a) Any behavioral intervention must be consistent with the child's right to be treated with dignity and to be free from abuse regardless of the child's educational needs or behavioral challenges. Examples of a child soiling him or herself, , indicating emotional trauma by significant crying, or experiencing physical harm would not meet this standard;

- b) Physical restraint and seclusion never should be used as punishment or discipline. An example of a student who is secluded as punishment for having urinated in a seclusion room the previous day would not meet this standard;
- c) Physical restraint may not be used in a manner that restricts a child's breathing. An example of a deaf student being restrained so that she cannot use her hands to indicate whether she can breathe would not meet this standard;
- d) Physical restraint and seclusion in schools may only be used when it is necessary to protect a child or others from imminent danger. An example of a student being secluded because she gets anxious doing school work and tries to leave the room would not meet this standard;
- e) Every instance of physical restraint and seclusion should be appropriately monitored to ensure the safety of the child, other children, teachers, and other personnel. An example of a child being placed in seclusion for four hours without being continuously monitored and then being discovered trying to hang himself would not meet this standard;
- f) Parents should be notified promptly following the restraint or seclusion of their child, and any such use should be documented in writing. An example of parents not being notified that their children had been placed in "scream rooms" in Connecticut would meet this standard;
- g) Teachers and other personnel should be trained regularly on the appropriate use of restraint and seclusion and the use of effective alternatives, such as positive behavioral intervention and supports. An example of a teacher placing a child in a duffel bag would not meet this standard;
- h) Students may not be restrained or secluded by using non-evidence based practices, including, but not limited to the "off-use" of equipment and devices. Examples of "off-use" such as duct taping students to chairs, using equipment such as a Rifton chair for something other than its intended use, and the use of aversives, such as spraying a student with white board chemical solutions would not meet this standard;
- i) Students must be provided necessary supplemental aids and services, including individual aids and training to teachers and all other staff interacting with the student to reduce the need for either restraint or seclusion. An example of a student being strapped to a wheelchair for up to 80 percent of her school day to prevent her from leaving the room to get on an elevator would not meet this standard;

j) Schools must take steps to identify and address the issues giving rise to the behavior resulting in the need for a restraint or seclusion, including conducting a functional behavior assessment after the use of restraint or seclusion. An example would be a school's failure to conduct a functional behavior assessment when a kindergartener with a disability is restrained on a daily basis and sometimes several times a day.

k)

VI. ED Should Collaborate with SAMHSA in Preventing and Reducing Restraint and Seclusion

The Substance Abuse Mental Health Services Administration (“SAMHSA”), which is part of the U.S. Department of Health and Human Services, has provided significant leadership in reducing the use of restraint and seclusion practices in mental health facilities. Although advocates would like SAMHSA to do even more than it has already accomplished, SAMHSA is way ahead of the U.S. Department of Education in protecting children from death, injury and trauma caused by restraint and seclusion.

In 2003, SAMHSA developed a national action plan to reduce the use of restraint and seclusion in response to the deaths, injuries and psychological trauma of adults, youth and children being caused by restraint and seclusion use in institutional and community-based mental health settings.³⁶ SAMHSA recognized that restraint and seclusion should be used only as safety interventions to protect individuals and staff.³⁷ SAMHSA focused on identifying and encouraging the application of alternatives to prevent such use.³⁸ SAMHSA initially sought to increase knowledge about restraint and seclusion reduction strategies and to increase the number of states and facilities that implemented best practice prevention and reduction guidelines.³⁹ At the conference kicking off SAMHSA’s National Action Plan, then SAMHSA Administrator Charles G. Curie, M.A., A.C.S.W., said:

“I have made it a priority for SAMHSA to work with states, consumers of mental health services, advocates, service providers, and provider organizations ultimately to eliminate the use of such practices. Today we are launching our national action plan to accomplish that goal.”⁴⁰

To promote the implementation and evaluation of best practice approaches to preventing and reducing the use of seclusion and restraint in mental health settings, SAMHSA’s Center for Mental Health Services (CMHS) developed the Alternatives to Restraint and Seclusion State Infrastructure Grant Project.⁴¹ It awarded the Technical Assistance Coordinating Center

³⁶ Seclusion and Restraint: Statement of the Problem and SAMHSA's Response, SAMHSA National Action Plan on Seclusion and Restraint (Revised and Adopted May 2003)
http://www.samhsa.gov/seclusion/sr_handout.aspx

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ SAMHSA News, Vol. XI, Number 2 (Spring 2003)
http://www.samhsa.gov/samhsa_news/VolumeXI_2/article7.htm

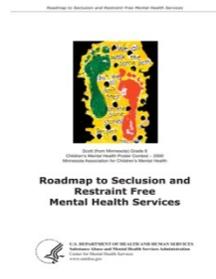
⁴¹ National Coordinating Center for Reduce the Use of Restraint and Seclusion,
<http://www.nasmhpd.org/NTAC-SRcoord.cfm>

contract to the National Technical Assistance of the National Association of State Mental Health Program Directors (NASMHPD).⁴²

Project outcomes included:

- enhancing state efforts to develop, implement, and adopt best practices that reduce restraint and seclusion use in a variety of settings and with a diverse group of service users;
- to improve safe outcomes for persons served and staff by reducing restraint and seclusion use;
- to provide recommendations to SAMHSA designed to inform national policy and develop evidenced based practice, including a successful application to SAMHSA’s National Registry of Effective Programs and Practices.⁴³

The first round of grantees, announced in the fall of 2004, included: Hawaii; Illinois; Kentucky; Louisiana; Maryland; Massachusetts; Missouri; and Washington.⁴⁴ The second round of grantees, announced in the fall of 2007, included: Connecticut; Indiana; New Jersey; New York; Oklahoma; Texas; Vermont; and Virginia.⁴⁵ The projects were designed to run for three years.⁴⁶ The model implemented by the grantee sites was based on the Six Core Strategies for Reducing and Eliminating Seclusion and Restraint©, developed by the Office of Technical Assistance of NASMHPD.⁴⁷ The strategies include 1) Leadership, 2) Debriefing, 3) Use of Data, 4) Workforce Development, 5) Tools for Reduction, and 6) Inclusion of Consumers, Family Members and Advocates.⁴⁸



In 2010, SAMHSA issued its major findings regarding the first cohort of State Grantees in the Seclusion and Restraint State Incentive Grant Program.⁴⁹ Of the 28 facilities that were able to reach a certain stable level of implementation of the Six Core Strategies, the evaluators found that 20 were able to reduce seclusion hours per 1,000 treatment hours by 19% and the

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

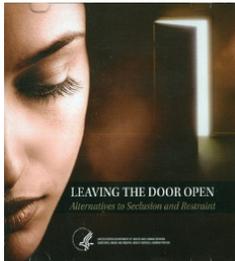
⁴⁶ *Id.*

⁴⁷ Promoting Alternatives to the Use of Seclusion and Restraint, Issue Brief #2, Major Findings from SAMSHSA’s Alternatives to Restraint and Seclusion State Incentive Grants (SIG) Program (March 2010), p.2, <http://www.samhsa.gov/matrix2/IssueBrief2.pdf>

⁴⁸ *Id.*

⁴⁹ *Id.* See also, K. Huckshorn, Creating Violence Free and Coercion Free Mental Health Treatment Environments for the Reduction of Seclusion and Restraint, A Snapshot of Six Core Strategies for the Reduction of S/R ©.

number of individuals secluded by an average of 17%.⁵⁰ More than half of the 28 facilities that reached stable implementation were able to reduce restraint hours per 1,000 treatment hours by an average of 55%.⁵¹ In sum, the demonstration grants showed that the implementation of the Six Core Strategies significantly reduced the use of restraint and seclusion in mental health facilities



SAMHSA has also issued several practical training materials to promote alternatives to the use of restraint and seclusion. In 2006, SAMHSA released a training curriculum, called **Roadmap to Reducing the Use of Restraint and Seclusion** to give mental health providers the latest information on prevention strategies and alternative approaches to avoid and reduce the use of seclusion and restraint.⁵² In 2010, SAMHSA issued a DVD called **[Leaving the Door Open: Alternatives to Seclusion and Restraint \(2010\)](#)**, to train mental health services direct care staff, administrators, and individuals

with mental illness on alternative approaches to seclusion and restraint in the treatment of people with serious mental illness. It emphasizes the consumer perspective.⁵³ In 2011, SAMHSA issued a white paper on **[The Business Case for Preventing and Reducing Restraint and Seclusion Use](#)**. The paper examines the costs, including violence and medical errors, associated with seclusion and restraint use in healthcare settings to control maladaptive behaviors. It considers industry perspectives and the unquantifiable cost of the consumer's experience.⁵⁴ SAMHSA has provided national recognition to facilities demonstrating reduction in use of seclusion and restraint as well as peer involvement.⁵⁵ SAMHSA has continued to take the lead in reducing restraint and seclusion in mental health facilities.⁵⁶ As part of its Trauma and Justice Strategic Initiative, SAMHSA works to reduce and eliminate the use of seclusion and restraint practices for all age groups in



⁵⁰ Issue Brief #2, supra at note, p. 3.

⁵¹ *Id.*

⁵² Roadmap to Seclusion and Restraint Free Mental Health Services (2006), <http://store.samhsa.gov/product/Roadmap-to-Seclusion-and-Restraint-Free-Mental-Health-Services-CD-/SMA06-4055>

⁵³ Leaving the Door Open, Alternatives to Seclusion and Restraint (2010) <http://store.samhsa.gov/product/SMA10-4508>

⁵⁴ The Business Case for Preventing and Reducing Restraint and Seclusion Use (2011) <http://store.samhsa.gov/product/The-Business-Case-for-Preventing-and-Reducing-Restraint-and-Seclusion-Use/SMA11-4632>

⁵⁵ Ending Seclusion and Restraint: Facilities Honored for Leading the Way, SAMHSA News, Volume 18, Number 3 (May/June 2011).

⁵⁶ Leading Change: A Plan for SAMHSA's Roles and Actions 2011 – 2014, <http://store.samhsa.gov/product/SMA11-4629>

institutional and community-based behavioral health care settings.⁵⁷ SAMHSA has incorporated its restraint and seclusion reduction work in the larger issues of trauma-informed care.⁵⁸

Since SAMHSA has already devoted significant resources to reducing restraint and seclusion in mental health facilities, ED could adapt the lessons learned to educational settings. ED should collaborate with SAMHSA as it moves forward to reduce the use of restraint and seclusion in schools.

⁵⁷ <http://www.samhsa.gov/traumaJustice/>

⁵⁸ <http://store.samhsa.gov/shin/content//SMA11-4629/04-TraumaAndJustice.pdf>

VI. Recommendations: The Concrete Steps ED Can Take Now

A. Recommendations for the Office of the Secretary of Education

- i. Convene a White House School Safety Summit, similar to the Summit on Bullying, on restraint and seclusion in the schools with the goal to devising a systemic plan to prevent the use of restraint and seclusion and to require the use of evidence based positive behavioral interventions supports and other best practices. Invite SAMHSA to participate in the summit.
- ii. Ensure compliance with the recommendations listed for the Office of Civil Rights and Office of Special Education and Rehabilitative Services.

B. Recommendations for the Office of Civil Rights

- i. Immediately publish data regarding the use of restraint and seclusion in school districts that has been already collected by OCR and if such data is already published by the time this report is issued, promptly analyze it to determine which school districts and schools have unusually high numbers of restraint and seclusion incidents, analyze what might be causing this and then fund demonstration and research projects to reduce – and eventually eliminate – restraint and seclusion in those schools.
- ii. Provide strong guidance to state departments of education, school districts, school personnel, students and families about when restraint and seclusion violates federal anti-discrimination and education laws. The guidance at a minimum must also limit the use of physical restraint or seclusion to circumstances when necessary to protect a child or others from imminent physical danger, and not weaken existing protections in the states.

Specifically, the guidance should state that restraint and seclusion:

- a) Constitutes illegal harassment if it is sufficiently severe, pervasive or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities or opportunities offered by the school, and that such harassment could violate the civil rights laws if such harassment is based on race, color, national origin, gender or disability. Cases where students are traumatized to the extent that they are soiling themselves or crying excessively, or where they are physically harmed by the restraint or seclusion would per se meet this definition;
- b) Constitutes illegal disparate treatment if a student with a disability is restrained or secluded, but not a student without a disability in the same circumstances.

Cases in which students with disabilities are repeatedly put in “scream rooms,” but students without disabilities are not placed in scream rooms for similar behaviors would constitute illegal disparate treatment;

c) Constitutes illegal disparate treatment if a student of a particular race, color, national origin or gender is restrained or secluded, but not a student of a different race, color, national origin or gender in similar circumstances. Cases in which a student of a particular race, color, national origin or gender is placed in prone restraint, but a student of a different race, color, national origin or gender in similar circumstances is not placed in prone restraint would constitute illegal disparate treatment;

d) Constitute illegal discrimination when a school or school district implements restraint and seclusion policies or practices that have a disparate impact on students because of their race, color, national origin, gender, or disability. Statistically significant discrepancies create a prima facie case of discrimination which the school will have to rebut, by addressing the efforts they are taking to reduce the need for restraint and seclusion system wide when disparate treatment is found. For example, school policies or practices requiring students with disabilities to be secluded if they touched anyone without permission, but students without disabilities who behave in a similar way are not secluded would violate this standard;

iii. Engage in meaningful investigations of incidents of restraint and seclusion that result in physical harm regardless of whether a formal complaint is filed, and make the findings publicly available.

iv. Identify an OCR employee with appropriate decision-making authority that reports to the Assistant Secretary and is responsible for implementing the recommendations in a timely, efficient and effective manner.

C. Recommendations for the Office of Special Education and Rehabilitative Services

i. Publish any joint projects undertaken with SAMHSA that apply lessons learned in mental health field to education.

ii. Provide guidance to state departments of education and school districts stating that the IDEA is violated unless implemented consistent with the following principles:

a) Any behavioral intervention must be consistent with the child's right to be treated with dignity and to be free from abuse regardless of the child's educational needs or behavioral challenges. Examples of a child soiling him or

herself, , indicating emotional trauma by significant crying, or experiencing physical harm would not meet this standard;

- b) Physical restraint and seclusion never should be used as punishment or discipline. An example of a student who is secluded as punishment for having urinated in a seclusion room the previous day would not meet this standard;
- c) Physical restraint may not be used in a manner that restricts a child's breathing. An example of a deaf student being restrained so that she cannot use her hands to indicate whether she can breathe would not meet this standard;
- d) Physical restraint and seclusion in schools may only be used when it is necessary to protect a child or others from imminent danger. An example of a student being secluded when she gets anxious doing school work and tries to leave the room would not meet this standard;
- e) Every instance of physical restraint and seclusion should be appropriately monitored to ensure the safety of the child, other children, teachers, and other personnel. An example of a child being placed in seclusion for four hours without being continuously monitored and then being discovered trying to hang himself would not meet this standard;
- f) Parents should be notified promptly following the use of restraint or seclusion on their child, and any such use should be documented in writing. An example of parents not being notified that their children had been placed in "scream rooms" in Connecticut would meet this standard;
- g) Teachers and other personnel should be trained regularly on the appropriate use of restraint and seclusion and the use of effective alternatives, such as positive behavioral intervention and supports. An example of a teacher placing a child in a duffel bag would not meet this standard;
- h) Students may not be restrained or secluded by using non-evidence based practices, including, but not limited to the "off-use" of equipment and devices. Examples of "off-use" such as duct taping students to chairs, using equipment such as a Rifton chair for something other than its intended use, and the use of aversives, such as spraying a student with white board chemical solutions would not meet this standard;
- i) Students must be provided necessary supplemental aids and services, including individual aids and training to teachers and all other staff interacting with the student to reduce the need for either restraint or seclusion. An example of a

student being strapped to a wheelchair for up to 80 percent of her school day to prevent her from leaving the room to get on an elevator would not meet this standard;

- j) Schools must take steps to identify and address the issues giving rise to the behavior resulting in the need for a restraint or seclusion, including conducting a functional behavior assessment after the use of restraint or seclusion. An example would be a school's failure to conduct a functional behavior assessment when a kindergartener with a disability is restrained on a daily basis and sometimes several times a day.
- iii. Fund replicable demonstration projects that would document best practices in preventing and reducing the use of restraint and seclusion in schools.
- iv. Identify an OSERS employee with appropriate decision-making authority that reports to the Assistant Secretary and is responsible for implementing the recommendations in a timely, efficient and effective manner.
- v. Fund through demonstration projects, the Protection and Advocacy agencies to investigate allegations of restraint and seclusion in schools.

VII. APPENDIX

A. Glossary

ADA -- The Americans with Disabilities Act was enacted into law in 1990 and is a broad-based law focused on the protection of the civil rights of individuals with disabilities. It is similar to the civil rights laws which protect people based on race, sex, national origin, or religion.

BIP – A Behavioral Intervention Plan is to be developed for a child based on a Functional Behavioral Assessment (FBA).

CMS – The Centers for Medicare and Medicaid Services is part of HHS and responsible for the administration of the Medicaid program and ensuring that entities (hospitals, institutions, individual providers, community settings, group homes, schools, etc.) which receive Medicaid funding comply with federal civil rights laws, such as Section 504. <http://www.cms.hhs.gov/>

ED – The United States Department of Education oversees the provision of special education services. <http://www.ed.gov>

Due Process – The due process provisions of IDEA are designed to provide the child/family with the legal right to appeal any decision regarding any portion of the special education process, i.e. evaluation, eligibility, the IEP, progress, concerns related to the child’s safety and well being.

FAPE – Each child with a disability (age three through 21) is entitled to a Free, Appropriate, Public Education.

FBA -- The 2004 IDEA reauthorization included the requirement of a Functional Behavioral Assessment prior to the development of a Behavioral Intervention Plan (BIP) for students with disabilities who have behavioral challenges that impede functioning in the educational environment. An FBA is an evaluation using several methods to determine the causal and maintaining factors for a behavior that lead to the development of intervention strategies to meet the individualized and unique needs of the student.

IDEA – The Individuals with Disabilities Education Act (IDEA) was amended in 2004 by the Individuals with Disabilities Education Act.

HHS – The United States Department of Health and Human Services oversees the implementation of the P&A programs which focus on the rights of individuals with developmental disabilities, mental illness, and traumatic brain injury. It also oversees the provision of the majority of federally funded health programs <http://www.hhs.gov/>

LEA – Local Educational Agency -- local school district.

LRE - Each child with a disability is entitled to be educated in the Least Restrictive Environment. This is a concept which is prevalent in disability law beyond education, i.e. a person is entitled to live in the least restrictive environment in the community.

NDRN – The National Disability Rights Network is the nonprofit membership organization for the federally mandated Protection and Advocacy (P&A) Systems and Client Assistance Programs (CAP) for individuals with disabilities. Through training and technical assistance, legal support, and legislative advocacy, NDRN strives to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination. www.ndrn.org

OSEP – The Office of Special Education Programs is directly responsible for the oversight of the implementation of special education laws. <http://www.ed.gov/about/offices/list/osers/osep/programs.html>

OSERS – The Office of Special Education and Rehabilitative Services is the headquarters in the United States Department of Education that is responsible for disability and special education services. <http://www.ed.gov/about/offices/list/osers/index.html>

P&A/CAP Network – The federally mandated Protection and Advocacy (P&A) programs and Client Assistance Program (CAP). Collectively, the P&A/CAP network is the largest provider of legally based advocacy services to people with disabilities in the United States. <http://www.ndrn.org/>

Positive Behavioral Interventions and Supports – Positive Behavioral Interventions and Supports are also called positive behavior supports (PBS) and is an approach to changing behavior that encourages positive behaviors rather than just punishing negative behaviors. Positive behaviors and supports are most effective when implemented school-wide, but may be used to support positive behavior in individual students.

Positional Support Chair – Positional support chairs are designed to offer additional support to children and adolescents when seated at home or in a classroom environment. They are intended to be therapeutic and not disciplinary.

Prone Restraint - A physical restraint in which an adult holds a child’s face on the floor while pressing down on the child’s back. Sudden fatal cardiac arrhythmia or respiratory arrest due to a combination of factors causing decreased oxygen delivery at a time of increased oxygen demand can occur through prone restraint.⁵⁹

Protection and Advocacy System -- There is a P&A program in every state and territory. There also is a P&A program in the District of Columbia and one in the Four Corners area of the American Southwest, which addresses the needs of Native Americans with disabilities. P&A

⁵⁹ The Lethal Hazard of Prone Restraint: Positional Asphyxiation, published by Protection and Advocacy, Inc. (2002). <http://www.pai-ca.org/pubs/701801.pdf>

programs provide services to people with all types of disabilities – intellectual, mental, sensory, physical, as well as focusing on the voting rights of people with disabilities and their access to assistive technology. <http://www.ndrn.org/>

Restraint - (A) Any manual method, physical or mechanical device, material, or equipment that immobilizes or reduces the ability of [an individual]⁶⁰ (C) A restraint does not include devices, such as orthopedically prescribed devices, surgical dressings or bandages, protective helmets, or other methods that involve the physical holding of [an individual] for the purpose of conducting routine physical examinations or tests, or to protect the [individual] from falling out of bed, or to permit the [individual] to participate in activities without the risk of physical harm (this does not include a physical escort). to move his or her arms, legs, body, or head freely; or (B) A drug or medication when it is used as a restriction to manage the [individual’s] behavior or restrict the [individual’s] freedom of movement and is not a standard treatment or dosage for the [individual’s] condition.⁶¹

SAMHSA – The Substance Abuse and Mental Health Services Administration is part of HHS and is responsible for the administration of federal mental health and substance abuse programs, including the P&A program for individuals with mental illness. SAMHSA has responsibility for the oversight (along with CMS) of Residential Treatment Centers (RTC), hospitals and other settings which provide supports and services to children and adults with mental illness. <http://www.samhsa.gov/>

Seclusion – The involuntary confinement of [an individual] alone in a room or area from which the [individual] is physically prevented from leaving. Seclusion may only be used for the management of violent or self-destructive behavior.⁶²

⁶⁰ The CMS conditions of participation use the term “patient.” For the purposes of this report, the more generic term “individual” has been substituted for “patient.”

⁶¹ 42 C.F.R. § 482.13(e)(1)(i). Note that CMS does not define the term “physical escort,” but it is defined in the Children’s Health Act as “the temporary touching or holding of the hand, wrist, arm, shoulder or back for the purpose of inducing a resident who is acting out to walk to a safe location.” 42 U.S.C. § 290ii(d)(2) and 290jj(d)(2). Under the Children’s Health Act, physical escorts are not considered to be a type of physical restraint. *Id.* The examples in this report do not include physical escorts, but much more extreme ways of forcing children into seclusion rooms, e.g. dragging, carrying, pushing, etc.

⁶² 42 C.F.R. § 482.13(e)(1)(ii). Note that the Children’s Health Act of 2000 defines “seclusion” as “any behavior control technique involving locked isolation,” 42 U.S.C. 290ii(d)(2) and 290jj(d)(4), but CMS has recognized that individuals can be forcibly confined in a room or area without the room being locked. In this report, we will use the term seclusion to mean both locked and unlocked rooms or areas where an individual is forcibly confined. The terms “seclusion” and “time-out” have erroneously been used to mean the same thing. While seclusion is the forcible confinement to a room or area from which the person is physically

prevented from leaving, “time-out” is a “behavior management technique that is part of an approved treatment program and may involve the separation of the individual from the group, in a non-locked setting, for the purpose of calming.” 42 U.S.C. § 290ii(d)(4) and 290jj(d)(5).

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