

A FEDERAL SOLUTION THAT FALLS SHORT: WHY THE KEEPING ALL STUDENTS SAFE ACT FAILS CHILDREN WITH DISABILITIES

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"The restraint or seclusion of children, and the physical and emotional harm which these practices cause, should frighten every parent in America, not only parents of children with disabilities." – National Disability Rights Network, "School is Not Supposed to Hurt", Investigative Report on Abusive Restraint and Seclusion in Schools, January 2009

"As parents, when we send our children to school, we expect they will be safe from danger. And when the very people we entrust with our children's well-being inflict this type of abuse, it's not just the victims and their families who suffer. It hurts their classmates, who witness these terrifying events." – Representative McMorris Rodgers, introducing the Preventing Harmful Restraint and Seclusion in the Schools Act, December 9, 2009

I. INTRODUCTION

School personnel are using the practices of restraint and seclusion as disciplinary techniques on children with disabilities disproportionately in American schools.¹ These cases have included children being isolated from their peers in places such as closets, school basement areas, small wooden boxes, seclusion rooms, and "time out" rooms.² Often children are being denied basic amenities during these periods of seclusion including light, bathroom facilities, and food.³ There have been cases where there has been no supervision of children subjected to these isolated environments, and others where school officials prevented a child from exiting an area by forcing a door shut.⁴ A Connecticut case serves as an example of a child

1. AMERICAN CIVIL LIBERTIES UNION HUMAN RIGHTS WATCH, IMPAIRING EDUCATION CORPORAL PUNISHMENT OF STUDENTS WITH DISABILITIES IN US PUBLIC SCHOOLS 6 (2009).

2. NAT'L DISABILITY RIGHTS NETWORK, SCHOOL IS NOT SUPPOSED TO HURT: INVESTIGATIVE REPORT ON ABUSIVE RESTRAIN AND SECLUSION IN SCHOOLS 15-16 (2009), available at <http://www.ndrn.org/images/Documents/Resources/Publications/Reports/SR-Report2009.pdf>.

3. *Id.* at 16.

4. *Id.*

being subjected to both restraint and seclusion:

When a high school student with autism became frustrated and allegedly struck an untrained aide, the aide pinned him to the floor, leaving him bruised and shaken. Following that incident, the school developed a behavior plan which his parents were told included a provision for him to calm down in a "safe place". However the parents were not told that the "safe place" was a hastily converted closet into which school personnel would routinely put the boy and hold him in isolation, sometimes for extended periods, while he cried and pounded on the door, begging to be let out.⁵

This article explores the avenues available to prevent children from suffering physical, mental, and/or emotional harm as a result of the use of restraint and seclusion practices in educational settings.

One response to this problem is the Keeping All Students Safe Act (HR 4247, S 2860).⁶ On December 9, 2009, the Keeping All Students Safe Act was introduced in the House by Representatives George Miller (D-CA) and Cathy Rodgers (R-WA) as a federal solution to eliminate the harm against children by the use of restraint and seclusion practices in U.S. schools.⁷ Similar legislation was introduced by Senator Christopher Dodd (D-CT) in the Senate.⁸ On March 3, 2010, the U.S. House of Representatives voted 262-153 to pass the Keeping All Students Safe Act.⁹ This article will examine the Keeping All Students Safe Act as a federal solution to the problems created by the use of restraint and seclusion in U.S. schools. While this legislative is considered a monumental development, this article will argue that the definitions proposed in the bill for the key terms "restraint" and "seclusion" are problematic. Classrooms are supposed to be to be places where children are ensured an environment of safety to encourage growth and development, but unless and until appropriate legislative action is taken, children with disabilities will continue to be at risk of becoming victims in those same classrooms.

This article will examine the unique challenges to lawmakers in addressing the legal dilemma created by the increasing use of restraint and seclusion involving children with disabilities in an educational environment. Part II will explain the widespread use of restraint and seclusion by teachers in the American education system on children with disabilities. A variety of constituencies are advocating for the need to develop and utilize a legislative response to these situations. Part III will

5. *Id.* at 17.

6. Keeping All Students Safe Act, H.R. 4247, 111th Cong., (2009).

7. NAT'L DISABILITY RIGHTS NETWORK, NO LONGER WILL OUR CHILDREN BE RESTRAINED OR SECLUDED, available at <http://www.napas.org/media/pr/rs1209.pdf>.

8. *Id.*

9. Press Release, U.S. House of Representatives Committee on Education & Labor, Houses Approves Bill to Protect Schoolchildren from Harmful Restraint and Seclusion (Mar 3, 2010), available at <http://edlabor.house.gov/newsroom/2010/03/houses-approves-bill-to-protect-schoolchildren-from-harmful-restraint-and-seclusion>.

examine the current federal framework regarding the legal protections for children with disabilities to prohibit the use of restraint and seclusion in a school environment. This will include considering if this structure offers anything for federal legal protections for children with disabilities to prevent these practices from continuing. Part IV will turn to what has been done at the state level to protect children with disabilities from restraint and seclusion use in educational settings. This will include a comparison of the differences in legal protections on various issues related to the use of restraint and seclusion available at the state level at this time. This article will then explore any guidance that is offered on this issue in international law.

Part V will examine the proposed federal solution that is being advocated through the Keeping All Students Safe Act evaluating the bill's strengths and weaknesses. Part VI will challenge several portions of the bill, including the key definitions of "seclusion" and "physical restraint," to argue that the bill neglects substantial evidence on these matters originally leading to this movement for legislation. It will also argue that the Individuals with Disabilities Education Act (IDEA) should be amended to deal specifically with issues concerning the Individualized Education Program (IEP) development for children with disabilities receiving special education services. This would include ensuring that restraint and seclusion practices are not implemented into IEP plans unless limited to particularized situations and alternatives for positive behavioral interventions are utilized whenever possible. Amending IDEA in this way is crucial where behavioral issues due to the child's disability require appropriate responses by educators when working with these children on a daily basis. Such amendments would need to mirror federal legislation prohibiting the use of restraint and seclusion practices in all but the very limited circumstances as defined for emergency or safety reasons. Using this proposal for changing the landscape of federal law, this article argues that taking a national approach, especially one that does not appropriately respond to the research and evidence of these harmful practices, risks letting children fall through the cracks, especially in cases involving children with disabilities.

II. THE PROBLEM: WHY IS RESTRAINT AND SECLUSION AN ISSUE?

What initially led to the awareness of the prevalence of the use of restraint, seclusion, and aversive interventions of children with disabilities in the classroom nationally? What prompted concern over the necessity of legislation on the federal level? In order to understand and answer these questions, several documents must be examined to fully grasp the extent of this problem and the immediacy in which a legislative response is demanded. These include a report produced by the U.S. government and the work of several disability advocacy organizations to investigate and

expose these harmful practices against children with disabilities in educational settings. The evidence collected from these investigations largely influenced the current concerns over the use of restraint, seclusion, and aversive interventions against children with disabilities. These reports demonstrated both the severity and frequency of the harm to children through the use of these practices by school officials across the nation. This was magnified by the absence of federal legal protections and the inconsistency of state legal protections for children in the classroom encountering these harmful and sometimes deadly practices.

A. The Debate Over Defining "Restraint" & "Seclusion"

What is clear at the outset is that there is currently a need to define what constitutes "restraint" and "seclusion" in the educational context in order to create a national consensus.¹⁰ Because of this, the National Disability Rights Network ("NDRN"),¹¹ the first entity to release a report on the instances of these occurrences in January 2009, recommended definitions of "restraint" and "seclusion" based on the current federal definitions for purpose of delivering health care to children where federal funding is applicable.¹² The definition of restraint used by NDRN was as follows:

(A) Any manual method, physical or mechanical device, material, or equipment that immobilizes or reduces the ability of [an individual] 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.

(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).¹³

10. See NAT'L DISABILITY RIGHTS NETWORK, *supra* note 2, at 5.

11. NATIONAL DISABILITY RIGHTS NETWORK, <http://www.ndrn.org/> (last visited Nov. 6, 2010) ("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.").

12. See NATIONAL DISABILITY RIGHTS NETWORK, *supra* note 2, at 5-6.

13. *Id.*

The definition of "seclusion" provided by NDRN was:

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.¹⁴

The definitions used by NDRN provide a starting place for thinking about these concepts and the challenges that arise in constructing legal definitions that will succeed in protecting children nationwide.

B. January 2009: The National Disability Rights Network's Report

The first major report on the use of restraint and seclusion on children with disabilities in educational settings was released by NDRN in January 2009.¹⁵ The NDRN report began by indicating the prevalence of stories of children being restrained and secluded appearing in the mainstream media.¹⁶ These incidents were particularly notable in the protection of children with disabilities by Protection & Advocacy agencies¹⁷ which distinguish this as a problem of national significance.¹⁸ The report recognized that the doors of education were opened to children with disabilities by the implementation of special education law on the federal level through the Individuals with Disabilities Education Act ("IDEA").¹⁹ It went on to suggest that the issue of violence in schools has made safety a priority of national importance for ensuring the protection of education for youth.²⁰ However, according to the report, one particular form of harm that has largely gone unnoticed has been the violence inflicted upon children with disabilities who have become victims by the use of restraint, seclusion, and aversive intervention practices.²¹ The report acknowledged the widespread occurrences of these incidents by their impact in every population and educational setting contained in its data, including a "'Chronicle of Harm' detailing treatment of children of all ages and in every corner of the nation - urban, suburban, and rural, in wealthy and poor school districts, as well as in private schools."²² NDRN emphasized that the

14. *Id.*

15. *Id.*

16. *Id.* at 1.

17. *Id.* at 3 ("Since it was established by the United States Congress in the mid seventies, 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.").

18. *Id.* at 1.

19. *Id.* at 1-3.

20. *Id.* at 3.

21. *Id.*

22. *Id.*

use of restraint and seclusion against children with disabilities did not discriminate on the basis of the child's age, location, or socio-economic status.²³

In addressing the use of restraint and seclusion as a problem, the NDRN's report included a compilation of various risks to using these practices that have been identified by a wide range of groups including governmental entities and national organizations, thereby creating a substantial cause for concern.²⁴ Government findings regarding the risks associated with restraint and seclusion practices documented by NDRN included serious injuries or deaths, children with pre-existing traumatic disorders reliving the trauma caused by the experience with restraint or seclusion, loss of dignity, psychological harm, and the possibility of increased agitation for individuals having both addictive and mental health disorders.²⁵ In treatment settings, other government findings included concerns for physical struggles, chest pressure, and other interruptions that could lead to breathing difficulties.²⁶ NDRN cited several national organizations sharing comparable fears.²⁷ Similar risk concerns were also included in the NDRN report regarding both the physical and psychological harms associated with the use of restraint and seclusion practices on children.²⁸ A less noticeable risk the NDRN report identified was the harm that may be imposed on staff in educational settings.²⁹ Although NDRN acknowledged that no reports or studies have been produced showing harm to staff, the risk of harm by the use of these practices on children in the classroom is still relevant in assessing the continued use of these practices.³⁰

An important aspect to this report, which created awareness of the legal issues surrounding restraint and seclusion, is the NDRN's analysis of the current disheveled legal framework.³¹ While federal legal protection exists for children from the use of restraint and seclusion practices through the Child's Health Act of 2000, this protection is limited to federally funded institutions receiving Medicaid or Medicare and has no application to educational settings.³² NDRN pointed out several inadequacies of the nation's federal special education law IDEA in prohibiting the use of restraint and seclusion practices against children with disabilities or regulating them to any degree.³³ On the state level, NDRN observed that,

23. *Id.* at 5, 13-26.

24. *Id.* at 7-9.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 9.

29. *Id.*

30. *Id.*

31. *Id.* at 4.

32. *Id.* at 12.

33. *Id.*

while serious cases of injuries and death prompted legislative changes in some states, many states continue to lack any protections from these harmful practices, resulting in a "patchwork of inconsistent policies."³⁴ The NDRN report produced data that 41% of states lack laws, policies, and regulations for restraint, seclusion, and aversive intervention practices against children with disabilities.³⁵ Additionally, the most severe practice of restraint known as prone restraint is still allowed in 90% of states according to NDRN.³⁶ While NDRN does not specify a definition for "prone restraint," some make a distinction between "prone confinement" and "prone restraint" as follows:

Prone containment is the brief physical holding of an individual prone, usually on the floor, for the purpose of effectively gaining quick control of an aggressive and agitated individual. Prone restraint is the extended restraint (either physical or mechanical) of an individual. This may include holding an individual past the time of immediate struggle. It also includes restraint to a bed using restraint devices, such as leather cuffs.³⁷

Another statistical concern discovered was that the legal requirement of parental notification when and if a child is secluded or restrained was only found in 45% of the 56 states and territories included in the study.³⁸ The NDRN's report was significant in creating public awareness of the inadequacy of this legal framework for protecting children with disabilities from being the victims of restraint, seclusion, and aversive intervention practices—all further contributing to the urgency for legislative reform.

C. March-May 2009: COPAA Report Reinforces the Severity of the Use of Restraint and Seclusion Practices

Another report was issued several months later by the Council of Parent Attorneys and Advocates ("COPAA") on May 27, 2009 documenting further evidence of the extensive use of restraint, seclusion, and aversive practices on children with disabilities.³⁹ The involvement of COPAA preceded the development of this particular report by its membership in the Alliance to Prevent Restraint, Aversive Interventions and Seclusion (APRAIS).⁴⁰ COPAA expressed its public opposition to the use of these practices against

34. *Id.* at 10.

35. *Id.* at 4.

36. *Id.*

37. Protection and Advocacy, Inc., *The Lethal Hazard of Prone Restraint: Positional Asphyxiation 6-7*, (2002), available at <http://www.disabilityrightsca.org/pubs/701801.pdf>.

38. NATIONAL DISABILITY RIGHTS NETWORK, *supra* note 2, at 11.

39. JESSICA BUTLER, COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC., *UNSAFE IN THE SCHOOLHOUSE: ABUSE OF CHILDREN WITH DISABILITIES* 1 (2009), available at http://www.copaa.org/pdf/UnsafeCOPAAMay_27_2009.pdf.

40. *Id.* at 1.

children with disabilities in June 2008 by releasing its Declaration of Principles.⁴¹ The report issued by COPAA in May 2009 set out the results of a survey on the use of seclusion, restraint, and aversive intervention practices on children with disabilities in the classroom nation-wide between March and May of 2009.⁴² COPAA documented 185 cases of the use of these harmful practices on disabled children.⁴³ These cases were reported to COPAA by parents and advocates.⁴⁴

While the report documents various instances of the use of seclusion, restraint, and aversive intervention practices on children with disabilities in educational settings, this report does not document every known instance of these practices on children with disabilities during this period.⁴⁵ COPAA also used information obtained from online submissions to conduct its survey.⁴⁶ COPAA noted that although the online submissions did contribute to its survey analysis, it explained that these submissions were not necessarily a fully accurate portrayal of all the potential instances of the use of these practices due to the lack of availability of the Internet to all, particularly, low-income families.⁴⁷ These dynamics serve as the foundation of the COPAA survey. However, COPAA's conclusion about the use of these practices on children with disabilities based on this survey should not be ignored: "The report shows that the use of restraints, seclusion, and aversives is extensive."⁴⁸

It is important to note the various definitions of "restraint," "seclusion," and "aversive intervention" for the purposes of the COPAA survey. The term "restraint" was defined by COPAA as follows: "Restraints consist of the use of physical force, mechanical devices and drugs to prevent or limit freedom of movement or control behavior."⁴⁹ The term "seclusion" is defined as "the confinement of a child in a locked room or space from which he cannot exit."⁵⁰ Finally, in defining "aversive interventions," COPAA distinguishes these practices as follows: "Aversive procedures use painful stimuli in response to behaviors that are deemed unacceptable by their caregivers."⁵¹ These definitions help give perspective on what COPAA's survey determined to be actual instances of restraint, seclusion, and aversive interventions against children with disabilities and will foster further exploration of the actual definitions of the terms in light of the

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 2.

45. *Id.*

46. *Id.* at 2 n.2.

47. *Id.*

48. *Id.* at 2.

49. *Id.*

50. *Id.* It is important to note that COPAA explained that its definition of "seclusion" was to be inclusive of both "seclusion" and "confinement," but not of "time-out" which has been used in some states in defining "seclusion." *Id.* at 2 n.3.

51. *Id.*

Keeping All Students Safe Act.

In the opening of this report, COPAA stated its concern over the use of these practices in the classroom and the need to put an end to these practices in educational settings by issuing a challenge to the federal government to act on this issue legislatively with immediacy.⁵² COPAA also noted the difference between adults and children that further demands the need for a federal legislative response to preventing harm to children – that while adults can decide where they live and what laws impact them, children do not have this same luxury and therefore may be more subject to being victims if they live in states where there are less protections.⁵³ COPAA's position is that there should be no difference in the protections available for children with regard to prohibiting restraint and seclusion based on state lines.⁵⁴

Based on its survey of parents of children with disabilities and advocates during this 2-month period, COPAA compiled various statistical data concerning issues related to the use of restraint, seclusion, and aversive intervention practices on children with disabilities in educational settings.⁵⁵ The first major statistic identified by COPAA through the survey was that 71% of those surveyed responded that the school did not provide positive behavioral support for positive interventions.⁵⁶ Additionally, although 10% of those surveyed reported that a behavioral intervention plan was initiated by the school, this was accompanied by the school's inefficiency in carrying out the plans in either failing to follow them or not appropriately implementing them.⁵⁷ On the basis of this data, COPAA argued that positive behavioral interventions are a means both to eliminate the harmful practices being used on children with disabilities and create a more stable educational environment generally for everyone involved.⁵⁸

Another factor considered by the COPAA survey was the age range of children with disabilities being subjected to restrain, seclusion, and aversive intervention practices.⁵⁹ The largest group of children represented as being harmed by these practices included children between the ages of 6-10 constituting 53% of the reported incidents.⁶⁰ This was followed by those between the ages of 11-13 at 21%.⁶¹ The report further indicated that "86% of the children were under age 14."⁶² Statistics were also compiled for whether or not parents consented to the use of these practices on their children

52. *Id.* at 1.

53. *Id.* at 2.

54. *Id.*

55. *Id.*

56. *Id.* at 3.

57. *Id.*

58. *Id.*

59. *Id.* at 4.

60. *Id.*

61. *Id.*

62. *Id.*

having disabilities.⁶³ Seventy-one percent indicated they did not give parental consent for the use of these practices.⁶⁴ While 16% of the parents surveyed did, these parents understood the use of these practices was to be restricted to very limited circumstances.⁶⁵ The limited circumstances that COPAA indicated parents understood these practices were permissible were those "such as a crisis situation or where healthy/safety were in imminent danger."⁶⁶ COPAA pointed out that these statistics demonstrate that school districts are not following the requirements of special education law of IDEA for parents of children with disabilities regarding informed consent.⁶⁷

Other statistical data demonstrated that most aversive interventions occurred in classroom situations where children with disabilities were in greater isolation from classroom environments with non-disabled children.⁶⁸ Fifty-eight percent of those surveyed reported that these incidents occurred in self-contained classrooms for children with disabilities.⁶⁹ Thirty-five percent of the incidents occurred in private isolation or seclusion rooms.⁷⁰ These percentages are higher than the 26% in the regular classroom and 29% for a category of "other" environments.⁷¹

The report also documented the types of disabilities that had been targeted using these types of practices finding that there was evidence of incidence for nearly every disability.⁷² Autism/Asperger's Syndrome accounted for the most with 68%.⁷³ The other disabilities included ADD/ADHD 27%, speech/language impairment 20%, developmental delay 19%, emotional disturbance 19%, intellectual disability 14%, other health impairments 13%, specific learning disabilities 11%, multiple disabilities 9%, blind/visually impaired 5%, orthopedic impairment 4%, hearing impairment 1%, and various other disabilities not specified 14%.⁷⁴ Other conditions that were specified by parents included Down Syndrome, Epilepsy, Tourette's Syndrome, PTSD, Agenesis of Corpus Callosum, Central Auditory Processing Disorder, and other conditions.⁷⁵ COPAA outlined the following percentages for the harmful practices used against children with disabilities based on the responses received to the survey: 64.4% of the children with disabilities had been harmed by the use of

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

restraints, 58.3% by the use of seclusion, and 30% by the use of aversives.⁷⁶ In reporting more detailed accounts of these incidents, COPAA commented on the lack of legislation to ensure that these instances are recorded and maintained, "There is no national repository or tracking system for the use of aversive interventions, and therefore, incidents are reported anecdotally."⁷⁷

D. May 2009: The U.S. Government Investigation on Restraint, Seclusion, and Aversive Intervention Practices

The U.S. government's own investigation into the incidences of restraint, seclusion, and aversive interventions against children was instrumental in creating public awareness of the need for legislative reform. A report was released on May 19, 2009 by the U.S. Government Accountability Office ("GAO") in conjunction with testimony delivered before the Committee on Education and Labor in the House of Representatives.⁷⁸ The GAO decided to pursue its own investigation after evidence of restraint and seclusion use potentially harming teens in residential facilities and reports of deaths of children as a result of the similar use of these practices in educational settings.⁷⁹ Because of this, the GAO determined it was necessary to examine three primary areas concerning restraint and seclusion: 1) the current laws applicable regarding the restraint and seclusion of children in educational settings, 2) a determination of whether the reported cases of the use of these practices resulting in harm amount to a national problem, and 3) an inquiry into the actual circumstances surrounding cases in which the use of restraint or seclusion resulted in a child's severe injury or death.⁸⁰ The report submitted and testimony delivered echoed the concerns expressed by NDRN in its report concerning the risks imposed on children by the use of these practices. The GAO stated that these practices can lead to actions that can cause difficulties in breathing and that even the absence of physical injury does not mean a child will not be harmed psychologically from the impact of such a traumatic experience.⁸¹ The GAO also indicated that children have been subjected to the practices of restraint and seclusion more than adults and suffer more injuries from the practices.⁸²

During the course of this testimony, the GAO cited both the reports

76. *Id.*

77. *Id.* at 9.

78. Seclusions and Restraints, Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers: Hearing on H.R. 4247 Before the H. Comm. On Educ. & Labor, 111th Cong. (2009) (statement of Gregory D. Kutz, Managing Director, Forensic Audits and Special Investigations), available at <http://www.gao.gov/new.items/d09719t.pdf>.

79. *Id.* at cover.

80. *Id.*

81. *Id.* at 1.

82. *Id.*

from NDRN and COPAA as evidencing numerous cases of the use of restraint, seclusion, and aversive interventions against children with disabilities that resulted in harm.⁸³ The investigation conducted by GAO involved an examination of cases over a two decade period.⁸⁴ In terms of the actual identified incidence of the use of these practices, the GAO offered the following commentary on its investigation:

Although we could not determine whether allegations of death and abuse were widespread, we did discover hundreds of such allegations at public and private schools across the nation between the years 1990 and 2009. Almost all of the allegations we identified involved children with disabilities. While this number represents a small share of all children in public and private schools nationwide over these years, these allegations raise serious issues for a significant number of children, families, and those entrusted with their education and care. Although we continue to receive new allegations from parents and advocacy groups, we could not locate a single Web site, federal agency, or other entity that collects comprehensive information on this issue.⁸⁵

The report and testimony went on to confirm the current disarray of legal protections and lack of a stable legislative framework for dealing with the issues of restraint and seclusion of children in educational settings.⁸⁶ Specifically, the report noted the lack of federal regulations regarding restraint and seclusion in both private and public schools as well as the "divergent laws" existing that provided no further guidance at the state level.⁸⁷ The GAO indicated five states have some law for the purposes of collecting data and reporting requirements when restraint and seclusion practices are used.⁸⁸

Like the NDRN report, the GAO acknowledged that there is some federal protection available through the Children's Health Act of 2000 for children from the use of restraint and seclusion practices but that these legal protections are limited and do not apply in the education context.⁸⁹ The report also discussed IDEA and the protections that are available there as the mechanism of federal special education law to parents but that restraint and seclusion practices can be implemented for use in behavioral interventions in special educational planning.⁹⁰ With regard to state laws on the use of restraint and seclusion, the report identified nineteen states as

83. *Id.* at 1-2.

84. *Id.* at 2.

85. *Id.* at 5.

86. *Id.* at 3.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

having no laws at all for restricting the practices.⁹¹ The report also noted that while some states have regulations, they are not uniformly applied to all schools and vary based on situation; some states may prohibit restraint but allow seclusion.⁹² The GAO's observations again demonstrate and confirm previous reports that state laws on these issues vary considerably and do not provide any consistency suggesting the need for federal attention to these matters.

The investigations conducted and reports prepared by NDRN, COPAA, and GAO were an awakening to the public of the severity of the problem of the use of restraints, seclusion, and aversive interventions on children, in particular, children with disabilities. They created public awareness of the widespread incidence of harm even to the point of death and the inadequacy of the current legal framework on these issues. The rest of this article attempts to dissect the legal framework in place and question what can and must be done to ensure children with disabilities do not continue to be victims by the use of these harmful practices.

III. A FEDERAL FAILURE: WHY THE CURRENT FEDERAL LEGAL FRAMEWORK ON RESTRAINT AND SECLUSION FAILS CHILDREN WITH DISABILITIES

As the reports previously discussed indicate, there is currently no federal legislation in place to protect children with disabilities or children generally from the use of restraint, seclusion, and aversive interventions in educational settings. With the widespread differences in laws on the state level and even the absence of laws in many states, one of the possible solutions being examined is to enact federal legislation that will essentially create national standards for the use of restraint and seclusion. In order to understand these issues and the critical policy decisions being considered, it is important to understand what, if anything, federal law currently contributes to this heated public policy debate that will significantly impact children and their educational experiences throughout America.

A. Introduction to Federal Law—Is There Any Guidance on Restraint and Seclusion?

While there currently is no federal law specific to restraint and seclusion regarding children in educational settings, there are several sources of federal law that can offer some insight on these issues. In particular, the Individuals with Disabilities Education Act ("IDEA")⁹³ and the Children's Health Act of 2000⁹⁴ both involve comprehensive legal considerations of the

91. *Id.* at 4.

92. *Id.*

93. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773-96 (codified as amended in scattered sections of 20 U.S.C.).

94. Children's Health Act of 2000, 42 U.S.C. §§ 290ii, 290jj.

unique needs of children that require ensuring their well-being free from harm. As a more in depth examination of these laws follows, what can be pointed out summarily is that these unique laws were designed to establish national consistency for responding to children. Under IDEA, matters of special education often involve difficult issues in resolving a child's behavior as a result of the manifestation of a child's disability. The Children's Health Act of 2000 deals directly with restraint and seclusion of children but outside of the education context. Both federal laws required lawmakers to address answering serious questions legislatively regarding children that would provide a national workable framework for protecting children's rights and their safety.

B. The Idea of IDEA

While the right to public education for children is not enumerated in the text of the U.S. Constitution, the states have provided for this right traditionally through state constitution or legislation.⁹⁵ The range of each state's protections as far as public education has varied from state to state.⁹⁶ Even with the existence of protection at the state level for children to the right to public education, children with disabilities have not always benefited from this same educational opportunity. In fact, children with disabilities have experienced a history of being discriminated against in acquiring the right to public education. Prior to 1970, the majority of children with disabilities were excluded from public education.⁹⁷ By 1970, only one in five children with disabilities was able to receive public education.⁹⁸ Many children with disabilities continued to be excluded from the classroom based on having specific types of disabilities. Many states prohibited children who were deaf, blind, emotionally disturbed, and mentally retarded from being educated.⁹⁹ In 1975, the U.S. Congress would pass landmark legislation that would forever change the lives of millions of children with disabilities by requiring states to open the classroom doors to children with disabilities putting an end to a long history of discrimination. The Individuals with Disabilities Education Act (IDEA) is a federal law designed to ensure that every child identified with a disability is provided with a "free, appropriate public education" (FAPE).¹⁰⁰ Since IDEA's enactment, all the states and territories have agreed to comply with IDEA's mission to ensure children with disabilities the educational opportunities

95. See generally Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325 (1992).

96. *Id.*

97. U.S. DEPARTMENT OF EDUCATION, TWENTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA (2000), available at <http://www2.ed.gov/policy/speced/leg/idea/history.pdf>.

98. *Id.*

99. *Id.*

100. Individuals with Disabilities Education Act of 2004, 20 U.S.C. § 1400(d)(1)(A) (2006).

they were once denied.¹⁰¹ The structure of IDEA and its protections have changed since its inception in 1975, including an amended version passed in 1997 (IDEA 97)¹⁰² and the law's re-authorization in 2004 with changes becoming effective on July 1, 2005.¹⁰³

IDEA was originally the Education of the Handicapped Act (EHA).¹⁰⁴ The purpose the U.S. Congress articulated for enacting IDEA was "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs."¹⁰⁵ In order to fulfill this purpose, IDEA authorizes the disbursement of funds to state and local agencies to provide educational services to children with disabilities contingent upon the satisfaction of conditions established in the statutory text.¹⁰⁶ IDEA also grants authority to the Secretary of Education to withhold funds from States that fail to comply with the relevant statutory requirements.¹⁰⁷

A primary responsibility in order to receive funding under IDEA is that the State must ensure "[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21."¹⁰⁸ A "free and appropriate public education" (FAPE) is defined under IDEA as "special education and related services" that, among other things, are "provided at public expense, under public supervision and direction."¹⁰⁹ IDEA includes a requirement called "Child Find" that requires school districts receiving its funding to ensure "children with disabilities residing in the State" are "identified, located, and evaluated."¹¹⁰ The disabilities that are covered by IDEA are set out in the Act in thirteen categories that are likewise found in the Act's regulations.¹¹¹ The requirement of a school district's determination of a child's eligibility for special education services is stated that the school district "shall conduct a full and individual evaluation . . . before the initial provision of special education and related services to a child with a disability."¹¹²

When a child is identified as potentially having a disability and evaluation follows determining that a child has a disability that meets eligibility for special education services, the primary vehicle used to

101. U.S. DEP'T. OF EDUC., TWENTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA 2 (2000), available at <http://www2.ed.gov/policy/speced/leg/idea/history.pdf>.

102. Individuals with Disabilities Education Act of 1997, 20 U.S.C. §§ 1400-1487 (2000).

103. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108 – 446, § 302(a)(1), 118 Stat. 2647, 2803 (2004).

104. Education of the Handicapped Act, 20 U.S.C. §§ 1401-1461 (1976).

105. 20 U.S.C. § 1400(d)(1)(A).

106. *Id.* § 1412(a).

107. *Id.*

108. *Id.* § 1412(a)(1)(A).

109. *Id.* § 1401(9).

110. *Id.* § 1412(a)(3)(A).

111. *Id.* § 1401(3)(A)(i); see 34 C.F.R. § 300.8 (2010).

112. *Id.* § 1414(a)(1)(A).

document the child's special education services is the Individualized Education Program or "IEP".¹¹³ The creation of the IEP is done by a group of individuals known as the IEP team and includes the child's parents and/or guardian.¹¹⁴ The NDRN report recognized the significance of this process in providing special education services to children with disabilities.¹¹⁵

It is in the development of the child's IEP that the use of restraint and seclusion can come up in response to addressing a child's behavioral issues.¹¹⁶ Instead of positive behavioral interventions, a school may recommend practices of restraint and seclusion without necessarily describing them in those terms to parents. This may result in parents agreeing to restraint and seclusion as part of their child's IEP unbeknownst to them. The issue of consent was examined by COPAA and documented in its report:

Parental consent is not a justification to use abusive measures on a child. But the absence of parental consent tends to show that districts acted unilaterally, ignoring the informed consent requirements in the Individuals with Disabilities Education Act (IDEA). They also ignored the legal requirement that parents as members of the IEP team should fully participate in making decisions about their children's needs and programming.¹¹⁷

Parents may agree to the use of these practices not knowing or understanding that they may be putting their children at risk of harm.

With the enactment of IDEA, many children with disabilities were able to enter the schoolhouse doors for the first time. But IDEA has not been without its problems. Numerous issues involving congressional silence on critical issues encompassing IDEA and its protections have made their way all the way to the U.S. Supreme Court. Most recently, the Court evaluated whether parents of children with disabilities may proceed pro se in IDEA actions in federal court on behalf of their children in *Winkelman v. Parma City School District*,¹¹⁸ and whether or not school districts are required to pay reimbursement to parents of children with disabilities for placement in private institutions in *Forest Grove School District v. T.A.*¹¹⁹ Similarly, IDEA is silent on the issue of the use of restraint or seclusion.¹²⁰ With no explicit language prohibiting the use of these practices in ways that involve harm, it becomes possible for the use of restraint or seclusion to be used as a mechanism to address the behavioral problems of children with disabilities. The GAO report noted the basic requirements of IDEA and the possibility

113. *Id.* § 1414(d)(1)(A).

114. *Id.* § 1414(d)(1)(B)(i).

115. See NAT'L DISABILITY RIGHTS NETWORK, *supra* note 2, at 11.

116. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 78, at 3.

117. See BUTLER, COUNCIL OF PARENT ATT'YS AND ADVOCATES, INC., *supra* note 39, at 4.

118. 550 U.S. 516 (2007).

119. 129 S. Ct. 987 (2009).

120. See NAT'L DISABILITY RIGHTS NETWORK, *supra* note 2, at 11.

that the practices of restraint and seclusion could be implemented through the special education services for a child with a disability as behavioral interventions that parents agree to without fully understanding the ramifications of these practices.¹²¹

Other concerns exist regarding IDEA's structure with regard to the treatment of behavioral issues.¹²² COPAA's report identified that when IDEA was amended in 2004, it broadened the scope of behavioral interventions available that opened the door for the use of restraint, seclusion, and aversive intervention practices on children with disabilities.¹²³ COPAA pointed out that prior to this, IDEA was more narrowly construed in considering responses to behavioral issues by the requirement of considering positive behavioral interventions only.¹²⁴

Another procedural shortcoming of IDEA that has been identified in relation to behavior is the timing of the implementation of the Functional Behavioral Assessment (FBA).¹²⁵ According to NDRN, the structure of IDEA currently mandates the performance of a FBA only after a child with a disability has had a behavioral outburst.¹²⁶ This sequencing allows the potential for the use of the harmful practices of restraint, seclusion, and aversive interventions on children with disabilities when such situations could have been avoided if behavioral assessments of these children had been performed before the occurrence of an incident.¹²⁷

A potentially even larger problem regarding IDEA beyond the absence of any substantive provisions dealing specifically with the use of restraint, seclusion, and aversive interventions is the law's enforcement.¹²⁸ This is because the governmental entity responsible for IDEA's enforcement has explicitly stated that IDEA does not prohibit these practices.¹²⁹ The Office of Special Education Programs (OSEP) in the U.S. Department of Education was cited in the NDRN report for an opinion it rendered on the question of the use of restraint and seclusion under IDEA.¹³⁰ The OSEP provided the following response on this issue: "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."¹³¹ NDRN criticized OSEP for its unchanged position on the use of these practices that has allowed children with disabilities to be exposed to potential harm and even

121. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 78, at 3.

122. See BUTLER, COUNCIL OF PARENT ATT'YS AND ADVOCATES, INC., *supra* note 39, at 11.

123. *Id.*

124. *Id.*

125. See NAT'L DISABILITY RIGHTS NETWORK, *supra* note 2, at 11.

126. *Id.*

127. *Id.*

128. See *id.* at 12.

129. *Id.*

130. *Id.*

131. Letter to Anonymous, 50 IDELR 228 (OSEP March 17, 2008).

death.¹³²

When Congress enacted IDEA, it did so with the purpose of integrating children with disabilities into the classroom as many never had been before. But like any legislation, there were gaps left in the law such as the silence on the use of restraint and seclusion that could lead to actions inconsistent with the law's purposes. Education of children requires their safety—not that they become the victims of harm. The gap in IDEA's current framework on restraint, seclusion, and aversive practices has contributed to making the classroom an unsafe environment for children with disabilities and increases the need for legislative reform.

C. A Federal Law of Limitation: The Children's Health Act of 2000

While IDEA is silent on the issue of the use of restraint, seclusion, and aversive intervention practices on children with disabilities, the federal government has not been completely silent on this significant issue involving children. The Children's Health Act of 2000 addresses the use of restraint and seclusion on children.¹³³ However, the problem identified with the Children's Health Act is that its scope is limited to certain environments outside the school context: "Although the Children's Health Act of 2000 protects children from abusive restraint and seclusion practices in facilities receiving Medicaid and other federal funding, such as hospitals, residential treatment centers and residential group homes, it does not explicitly protect children from such practices in schools."¹³⁴ NDRN explained how reports of the use of restraint and seclusion practices in residential facilities leading to injuries and deaths alerted the federal government of the need to initiate federal legal protections in these situations.¹³⁵ The actual definitions contained in the Children's Health Act regarding restraint and seclusion will be examined more carefully in analyzing a proposed federal legislative solution.

The current federal legal framework for prohibitions on the use of restraint and seclusion practices is minimal in light of the widespread national problem that has developed in education settings. This lack of federal protection for children in educational settings combined with the evidence of national incidence of children with disabilities being harmed by seclusion, restraint, and aversive intervention practices puts strong pressure

132. See NAT'L DISABILITY RIGHTS NETWORK, *supra* note 2, at 12.

133. 42 U.S.C. §§ 290ii, jj (2006).

134. NAT'L DISABILITY RIGHTS NETWORK, *supra* note 2, at 12.

135. *Id.* ("Federal lawmakers institute protections and oversight in residential facilities only after the Hartford Courant printed an extensive exposé on the deaths of children while being restrained and secluded in the above settings. In a 50-state survey, the Courant confirmed 142 deaths during or shortly after restraint or seclusion in residential facilities the [sic] 1990s. The survey focused on mental health and developmental disabilities facilities and group homes nationwide. The Courant also reported that as many as ten times the 142 reported deaths occurred, but a lack of reporting of injuries or deaths made the exact number impossible to report").

on the U.S. government to seek federal legislation on this matter. However, it must do so with careful consideration of all the issues related to this matter to ensure that the national standards created will not simply address these issues but will aggressively eliminate the occurrence of these harms.

IV. THE INCONSISTENCIES OF STATE LAWS

With the silence in federal law on the issue of the use of restraint, seclusion, and aversive intervention practices in education settings, the question becomes whether state laws provide any consistencies or offer any guidance in creating national standards. Several statistics have already been cited indicating that the current climate of state laws is stormy. Perhaps most startling is that according to the federal government's report previously discussed, nineteen states lacked laws or regulations pertaining to restraint or seclusion as of May 2009.¹³⁶ A closer look at the findings regarding state laws is warranted as a means of both understanding the present inconsistencies at the state level and also looking at trends and/or providing guidance for how addressing the issue should be handled at the federal level.

NDRN's report includes a chart that fleshes out some of the major areas of concern as far as restraint and seclusion in legislation and demonstrates the current diversity and inadequacy of protections at the state level.¹³⁷ The chart includes all fifty U.S. states as well as its territories.¹³⁸ The first major issue addressed by the chart is whether or not there are any statewide restrictions on restraint and seclusion.¹³⁹ NDRN identified thirty-three U.S. states and territories with some type of statewide restrictions on the use of restraint and seclusion practices.¹⁴⁰ However, it is important to note and review this information as these restrictions vary considerably.¹⁴¹ There are states that have legal protections for both restraint and seclusion.¹⁴² Other states have legislation or regulations covering either restraint or seclusion.¹⁴³ They also differ in terms of their force of law and extent of enforceability.¹⁴⁴ For example, the report pointed out that its analysis of these restrictions included state guidelines that do not create legal obligations on school districts.¹⁴⁵ Of the thirty-three U.S. states and

136. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 78, at 4. The states identified by the GAO report included: Arizona, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, New Jersey, North Dakota, Oklahoma, South Carolina, South Dakota, Vermont, Wisconsin, and Wyoming.

137. NAT'L DISABILITY RIGHTS NETWORK, *supra* note 2, app. 1 at 42-45.

138. *Id.*

139. *Id.*

140. *Id.*

141. *See id.*

142. *See id.*

143. *See id.*

144. *See id.*

145. *Id.* at 47 n.10.

territories having statewide restrictions, only ten have actual statutes.¹⁴⁶ Of these thirty-three, only seven have statutes that cover both the practices of restraint and seclusion: Colorado, Connecticut, Massachusetts, Montana, Nevada, North Carolina, and Tennessee.¹⁴⁷ Three locations only have statutes regarding restraints but not seclusion: Hawaii, Puerto Rico, and Utah.¹⁴⁸ No state or territory was reported as having a statute on seclusion but not restraint.¹⁴⁹ The NDRN report also examined whether states in this category had regulations.¹⁵⁰ Of the thirty-three U.S. states having statewide restrictions on the use of restraint and seclusion, sixteen of them had regulations.¹⁵¹ Fifteen of the sixteen had regulations both for restraint and seclusion.¹⁵² Arizona had regulations on seclusion only and the Delaware's regulations were specifically for children with autism.¹⁵³ Thirteen of the thirty-three U.S. states and territories having statewide prohibitions had guidelines.¹⁵⁴ Eight of the thirteen had guidelines for both restraint and seclusion while three states—New Hampshire, New Mexico, and Oregon—had guidelines only for restraint.¹⁵⁵ Kentucky was the only state or territory to have guidelines for just seclusion.¹⁵⁶ Of the thirty-three U.S. states and territories having statewide restrictions, only seven states had more than one type of statewide restriction (i.e. having both a statute and regulations, regulations and guidelines, etc.).¹⁵⁷ The State of Michigan was listed as having "policy standards" for both restraint and seclusion.¹⁵⁸ A total of twenty-three U.S. states and territories had no statewide restrictions in place for the use of restraint and seclusion.¹⁵⁹ A closely related issue examined was whether or not U.S. states and territories had any laws regarding the use of restraint and seclusion for the purpose of ensuring immediate physical safety of students or others.¹⁶⁰ Only fifteen states had legislation for this particular use of restraint or seclusion practices.¹⁶¹ Of these fifteen, four states—Connecticut, Maine, North Dakota, and Washington—had legislation specific to restraint while Michigan had legislation only on seclusion.¹⁶² Twenty-four U.S. states and territories had no legislation on the use of restraint and seclusion when there is an

146. *See id.* at 42-45.

147. *See id.*

148. *Id.*

149. *See id.*

150. *See id.*

151. *Id.*

152. *Id.*

153. *Id.* at 42.

154. *Id.* at 42-45.

155. *Id.* at 43.

156. *Id.*

157. *Id.* at 42-45.

158. *Id.* at 43.

159. *Id.* at 42-45.

160. *Id.*

161. *Id.*

162. *Id.*

immediate risk of harm.¹⁶³ However, this included three states that did not have legislation on seclusion—Connecticut, Maine, and Washington—and one state, Michigan, that did not have legislation for restraint.¹⁶⁴ NDRN listed twenty-one U.S. states and territories as unreported as to whether they had legislation to cover cases of using restraint and seclusion practices in the circumstances of immediate danger.¹⁶⁵ An examination was also conducted in terms of whether U.S. states and territories had legislation banning the most severe form of restraint known as prone restraint.¹⁶⁶ Thirty U.S. states and territories were found to have no legislation banning this practice.¹⁶⁷ Only five states—Colorado, Connecticut, Iowa, Michigan, and Pennsylvania—had legislation banning prone restraint.¹⁶⁸ Twenty-one states were unreported as to whether or not they had legislation in place for banning prone restraint.¹⁶⁹

Another area of consideration in legislation is whether notice is provided after a child has been restrained or secluded and who should receive that notice. Ten U.S. states and territories do not have any legislation requiring automatic notice when a child is restrained or secluded.¹⁷⁰ Twenty-five U.S. states and territories have an requirement that a child's parents be notified when the child is restrained or secluded.¹⁷¹ Of those twenty-five, eight U.S. states and territories have require notification to both the child's parents and the Department of Education.¹⁷² There is a mixture by state of whether automatic notification to either parent or the Department of Education applies in both restraint and seclusion or one or the other.¹⁷³

The final category of legislation on the state level examined by NDRN was whether or not U.S. states or territories have legislation regarding school staff training on the use of restraint and seclusion practices.¹⁷⁴ Twenty-seven U.S. states and territories had legislation for school staff training.¹⁷⁵ Of those twenty-seven, only two states had legislation for school staff training for restraint but not seclusion.¹⁷⁶ Twenty-nine U.S. states and territories had no legislation in place for school staff training on the use of restraint and seclusion practices.¹⁷⁷

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 42-45.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

A major area of concern in drafting legislation is what should be done about documenting the incidence of the use of restraint, seclusion, and aversion intervention practices on children with disabilities in educational settings. COPAA reported on the breakdown of current state legislation regarding data collection:

Data must be reported at the local, state, and federal levels. Currently, over half of the states require some reporting at the local level, either to parents or to school administrators. It would not be difficult to require reporting on up the chain. Yet only six states appear to require data on a state-wide level, California, Kansas, Michigan, Pennsylvania, Rhode Island, and Texas. (We have been informed Vermont has ceased collection). Other states simply give the school district the option of reporting.¹⁷⁸

At the state level, there is clearly variation in terms of the active collection of data of the incidence of harm in these situations.¹⁷⁹

The numbers above indicate that there is inconsistency in state law when it comes to very important issues surrounding the use of restraint and seclusion practices in educational settings. Additionally, the U.S. government has produced more comprehensive breakdowns of the current legislation on the state level regarding restraint and seclusion.¹⁸⁰ To maintain this inconsistency and accept the status quo will lead to the continuing harm of children.

V. A PROPOSED FEDERAL SOLUTION: IS THE KEEPING ALL STUDENTS SAFE ACT THE ANSWER?

The Children's Health Act of 2000 was originally proposed by Senator Christopher Dodd in reaction to his learning of an incident of an 11-year-old child's death in a psychiatric facility due to the physical restraint of the child facedown that caused the restriction of the child's breathing.¹⁸¹ As previously discussed, the Children's Health Act of 2000 was critical in providing some legal protections to children to prevent them from harm in medical and residential facilities receiving federal funding but did not include educational settings.¹⁸² The realization of the nationwide epidemic of children being harmed by restraint, seclusion, and aversive intervention

178. BUTLER, COUNCIL OF PARENT ATT'YS AND ADVOCATES, INC., *supra* note 39, at 13.

179. *Id.*

180. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 78, app. 1 at 33. See also U.S. Dep't of education, 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 (2010), available at <http://www2.ed.gov/policy/seclusion/summary-by-state.pdf>.

181. PARTNERS IN EDUCATION ADVOCACY, PREVENTING HARMFUL RESTRAINT AND SECLUSION IN THE SCHOOLS ACT 1 (2010), available at <http://www.peapods.us/UserFiles/File/Senate%20Bill%20Summary.pdf>.

182. See *supra* note 31 and accompanying text.

practices in the classroom, combined with the lack of uniformity of legislation on the state level, encouraged Senator Dodd's further involvement in seeking protection for children through the Keeping All Students Safe Act.¹⁸³ The Act was originally proposed on the floor of the House of Representatives on December 9, 2009.¹⁸⁴

A. Findings and Purposes of the Act

HR 4247 devoted separate sections to the congressional findings and purposes for this bill. This implies that this federal legislation was so important that this structural division was framed specifically both to educate the public of the severity of the problem and clearly set out what this landmark legislation would attempt to accomplish. The findings section identified that children in both "public and private schools" had been harmed by "physical injury, psychological trauma, and death."¹⁸⁵ A further elaboration was provided on the reasons the practices of restraint and seclusion were used on children "as a means of discipline, to force compliance, or as a substitute for appropriate educational support."¹⁸⁶ Another provision in the findings pertains to the promotion of the child's "dignity."¹⁸⁷ The bill characterizes dignity to mean that "all children have the right to be free from physical or mental abuse, aversive behavioral interventions that compromise health and safety, and any physical restraint or seclusion imposed solely for purposes of discipline or convenience."¹⁸⁸ Another finding focused on the adoption and use of evidence-based practices as well as school staff training on the harm caused by the use of restraint and seclusion practices, positive behavioral supports, and de-escalation among other things.¹⁸⁹ The findings include the recognition that training on the use of restraint and seclusion is necessary for the safety of school personnel.¹⁹⁰ The bill includes a finding specific to the current lack of uniformity in state and local law in protecting both children and school staff in these situations, recognizing that the safety of the school environment is dependent on the existence of these legal protections.¹⁹¹ The findings further point out that the incidence of harm to children is greater than that of adults from the use of restraint and seclusion.¹⁹² The findings present two situations in which children are at a greater risk of harm: 1) where a child is physically restrained to the point of impacting the child's breathing or

183. NAT'L DISABILITY RIGHTS NETWORK, *supra* note 7, at 2.

184. *Id.* at 1.

185. H.R. 4247 § 2(1).

186. *Id.*

187. *Id.* § 2(2).

188. *Id.*

189. *Id.* § 2(3).

190. *Id.* § 2(4).

191. *Id.* § 2(5).

192. *Id.* § 2(6).

"other body trauma", and 2) where a child is secluded in the absence of "continuous face-to-face monitoring."¹⁹³ The findings also acknowledge that children are currently protected from harm in the use of restraint and seclusion practices in other settings indirectly referencing the Children's Health Act of 2000.¹⁹⁴ Included with this finding is the recognition that there are no similar protections in the education environment and that this environment requires unique considerations: "Similar protections are needed in schools, yet such protections must acknowledge the differences of the school environment."¹⁹⁵ Additionally, the findings confirm that the use of restraint and seclusion practices is more detrimental than beneficial to both creating a calmer environment and promoting learning.¹⁹⁶ Finally, the findings emphasize the multiple benefits of implementing positive behavioral reinforcements in the classroom: "The effective implementation of school-wide positive behavior supports is linked to greater academic achievement, significantly fewer disciplinary problems, increased instruction time, and staff perception of a safer teaching environment."¹⁹⁷ The congressional findings described in the bill's actual text are consistent with the various reports previously discussed that led to the initial discovery of the need for legislative reform on this issue. The question then becomes whether or not the bill as drafted is appropriately designed to respond to these findings in a way that truly protects children.

The identified purposes of the bill give some insight as to the extent of its protections. The first listed purpose is to "prevent and reduce the use of physical restraint and seclusion in schools."¹⁹⁸ Notice that this does not call for the complete elimination or prohibition on the use of restraint and seclusion practices. This means that the bill should identify instances of permissible use of restraint and seclusion. In considering the drafting of this proposed legislation, a significant question arises of whether or not these practices should be allowed at all. The second purpose goes to the maintenance of order in the school environment to ensure that it is a safe one for everyone.¹⁹⁹ The student protections identified under the purposes section are aimed at preventing: 1) both physical and mental abuse, 2) the use of aversive interventions resulting in potential risk of harm and/or safety, and 3) the use of restraint or seclusion "imposed solely for purposes of discipline or convenience."²⁰⁰ These protections highlight the legislative effort to eliminate instances of the use of restraint, seclusion, and aversive intervention practices when the use is considered unnecessary but not in all instances. Another purpose makes the specific distinction when uses of

193. *Id.*

194. *Id.* § 2(7).

195. *Id.*

196. *Id.* § 2(8).

197. *Id.* § 2(9).

198. *Id.* § 3(1).

199. *Id.* § 3(2).

200. *Id.* § 3(3).

restraint and seclusion are permissible.²⁰¹ The bill states this purpose as follows: to "ensure that physical restraint and seclusion are imposed in school only when a student's behavior poses an imminent danger of physical injury to the student, school personnel, or others."²⁰² The final purpose goes to the bill's impact on providing assistance at the state and local levels on a number of issues including creating "policy and procedures" to ensure the safety of both the students and school personnel, providing school personnel the resources and training necessary to promote a safe environment in the classroom, maintaining a record of the incidence of the use of restraint and seclusion in schools through data collection, and the implementation of evidence-based methods to foster a reduction in the occurrence of the use of restraint and seclusion.²⁰³

The fundamental question becomes whether the congressional findings and the purposes outlined are appropriately incorporated into the proposed federal legislation through the Keeping All Students Safe Act.

B. What Makes the Keeping All Students Safe Act Desirable?

The Keeping All Students Safe Act offers valuable legal protections to children to prevent harm to them from the use of restraint, seclusion, and aversive intervention practices. Among those protections are the broad coverage of the Act to all children, visual monitoring when restraint and seclusion are used, training requirements for school personnel, keeping restraint and seclusion out of special education plans, encouraging of positive behavioral interventions in the school environment, requiring parental notification, and national reporting instances of restraint and seclusion practices. A more detailed exploration of each of these legal protections will further assist policy considerations regarding the Act's benefits.

C. Who are the Children Protected?

A primary consideration to note in analyzing the Keeping All Students Safe Act is that it is designed and intended to protect all children, and is just not limited to children with disabilities. "H.R.4247/S.2860 applies to all children, not just children with disabilities or IEPs."²⁰⁴ In its definitional section, the bill defines "student" as follows:

The term "student" means a student enrolled in a school defined in paragraph (11), except that in the case of a private school or private

201. *Id.* § 3(4).

202. *Id.*

203. *Id.* § 3(5).

204. Jessica Butler, Preventing Harmful Restraint and Seclusion in Schools Act: *What Does It Mean For Children with Disabilities?*, THE SPECIAL ED ADVOCATE NEWSLETTER (December 14, 2009), <http://www.wrightslaw.com/info/restraint.hr4247.butler.pdf>.

program, such term means a student enrolled in such school or program who receives support in any form from any program supported in whole or in part, directly or indirectly, with funds appropriated to the Department of Education.²⁰⁵

The application to all students is further emphasized in the bill's first major section following the definitions that outlines the bill's minimum standards.²⁰⁶ In clarifying the bill's minimum standards, there is reference to the bill's application based on the definition of "student" that has no exclusionary language associated with it and can be presumed to apply to all children.²⁰⁷ The requirement of the implementation of the bill's minimum standards must occur within 180 days after its passage which is mandated "in order to protect each student."²⁰⁸ The section continues by indicating that the prohibitions are placed on school personnel "from imposing on any student" the specified forms of restraint, seclusion, and aversive intervention practices.²⁰⁹

Even though this author supports the choice to provide broad coverage for protection to all children in this bill, the question can still be raised as to whether specific protections may be warranted legislatively for children with disabilities. While broadening the class of individuals protected under this proposed federal legislation to all children surely creates greater protection, the research and evidence discovered, and concerns expressed leading to the movement towards federal legislation were based overwhelmingly on cases involving children with disabilities, not children in general. This suggests that there is a greater risk of harm to children with disabilities in the use of restraint, seclusion, and aversive intervention practices that may require specific legislative considerations that would not necessarily apply to non-disabled children in the same way. These legislative considerations may be so specific that it would be more beneficial to create some type of legislative framework on this issue particular to children with disabilities. The policy recommendations made by COPAA regarding these issues first presented the unique characteristics of children with disabilities that create a special need to address the use of these practices legislatively in ways that fully address the differences between disabled and non-disabled children:

Children with disabilities are a vulnerable population, at special risk of being subject to aversive interventions. Their disabilities may manifest in what appears to be misbehavior, or they may have great difficulty following instructions. Rather than provide positive behavioral interventions, schools may react with aversive interventions. In addition, children may have communication,

205. Keeping All Students Safe Act, H.R. 4247, 111th Cong. § 4(19) (2010).

206. *Id.* § 5.

207. *Id.* § 5(a).

208. *Id.*

209. *Id.* § 5(a)(1).

emotional, cognitive, or developmental impairments that may impede understanding or the ability to effectively report what happened to them. Moreover, they may be unable to comply with instructions that are made a condition for ending the abusive intervention and unable to communicate pain or danger while in the intervention. Children with these kinds of impairments are frequently segregated in self contained classrooms with other children with disabilities, and few witnesses who can describe the occurrence.²¹⁰

As Congress felt the injustices to children with disabilities were so severe to require the creation of separate educational protections for children with disabilities to special education through IDEA, it seems that the unique and grave circumstances detailed in the cases of children with disabilities being restrained, secluded, and subjected to aversive interventions may demand a similar special consideration in the legal framework. It is curious that Congress found the educational structure for children with disabilities so distinct as to require federal law to address it but felt that this same group of children should be included in a more generalized law aimed at limiting the instances of the use of restraint, seclusion, and aversive intervention practices against children in general.

D. Legislative Requirements for Monitoring Children Who are Being Restrained or Secluded

One of the previous dilemmas with the current legislative landscape on these issues of the use of restraint, seclusion, and aversive intervention practices on children with disabilities has been that children have been left unattended, leaving the potential for them to experience significant harm without anyone's knowledge. Because of this, the Keeping All Students Safe Act includes several provisions in its minimum standards to address this by preventing a child that has been restrained or secluded from being left unattended. Under its minimum standards, the bill requires that in the event that a child is restrained or secluded in order to prevent immediate harm or danger, school personnel must continuously monitor the child face-to-face.²¹¹ The following benefits occur from requiring face-to-face monitoring:

Face-to-face monitoring ensures safety and allows staff to identify distress, physical danger and the need for medical assistance. Its use reduces seclusion and restraint, according to the National Technical Assistance Center for State Mental Health Planning. Unlike remote cameras, in-person monitoring ensures that interventions end when

210. BUTLER, COUNCIL OF PARENT ATT'YS AND ADVOCATES, INC., *supra* note 39, at 9.

211. H.R. 4247, § 5(a)(2)(C)(i).

the emergency ends and respects a child's dignity. Face to face monitoring also protects against dangerous face-down restraints.²¹²

Even if the child presents an immediate danger to school personnel, the child must still be observed by school personnel as the bill requires that in this case that there must be "direct visual contact" between the child and school personnel.²¹³ The legislative protection created by these provisions to ensure constant monitoring of children where restraint and seclusion are necessary lessens the likelihood that children will be harmed because no one knew they were being harmed or in danger.

E. Training School Personnel

Another set of protections available under the bill are those related to the training of school personnel actually carrying out the restraint and seclusion practices on children when necessary.²¹⁴ One of the provisions requires that these practices can only be performed by school personnel who have been specifically trained.²¹⁵ One exception to this requirement is provided for school personnel who have not been trained to use restraint and seclusion practices if there is an immediate danger and it is not possible for trained school personnel to come to the danger immediately.²¹⁶ The bill also mandates that States are required to have a certain number of trained and certified school personnel depending on the school's population.²¹⁷ However, the bill does not prescribe what this number of trained and certified school personnel is stating, "a sufficient number of personnel are trained and certified by a State-approved training program."²¹⁸

F. Preventing Restraint, Seclusion, and Aversive Intervention Inclusion in Special Education Planning

Another benefit of the bill as proposed is its attention to ensuring that children with disabilities are not subjected to the use of restraint, seclusion, and aversive intervention practices in any student educational plans.²¹⁹ The educational plans covered by the provision include the following:

The use of physical restraint or seclusion as a planned intervention shall not be written into a student's education plan, individual safety plan, behavioral plan, or individualized education program

212. Butler, *supra* note 204.

213. H.R. 4247, § 5(a)(2)(C)(ii).

214. *Id.* § 5(a)(2)(D)(i).

215. *Id.*

216. *Id.* § 5(a)(2)(D)(ii).

217. *Id.* § 5(a)(3).

218. *Id.*

219. *Id.* § 5(a)(4).

(as defined in section 602 of the Individuals with Disabilities Act (20 U.S.C. 1401)). Local educational agencies or schools may establish policies and procedures for use of physical restraint or seclusion in school safety or crisis plans, provided that such school plans are not specific to any individual student.²²⁰

Specifically, this includes children with disabilities who receive special education services through IDEA and have an IEP developed.²²¹ This eliminates some of the concerns expressed earlier in the current framework of IDEA that parents of children with disabilities may end up inadvertently agreeing to the use of restraint and seclusion practices against their children where the use of these practices were being incorporated into their special education services. IDEA should also be amended to implement a similar change to create consistent federal legislative practices regarding this issue.

In addition to the prohibition described above of keeping the practices of restraint and seclusion out of the educational setting, the bill also proposes rewarding schools that actively integrate positive behavioral interventions.²²² Educational agencies can be awarded grant money under the bill for "improving school climate and culture by implementing school-wide positive behavior support approaches."²²³ This reinforces the bill's finding of the effectiveness of positive behavioral interventions.²²⁴

G. Providing Parental Notification

A concern raised over these issues has been ensuring that parents are properly notified when a child is involved in an incident where restraint, seclusion, or an aversive intervention is used against their child. The Keeping All Students Safe Act does include specific requirements for prompt parental notifications when these incidents occur that strengthens the law.²²⁵ The bill requires parental notification through "an immediate verbal or electronic communication on the same day as each such incident"²²⁶ and "within 24 hours of each such incident, written notification."²²⁷ It also provides for parents to receive "any other procedures the Secretary determines appropriate."²²⁸ These parental notification safeguards provide some assurance that schools cannot use these practices without some formal documentation and accountability legally.

220. *Id.*

221. *Id.*

222. *Id.* § 7(a)(2).

223. *Id.*

224. *Id.* § 2(9).

225. *Id.* §§ 5(a)(5)(A)(i) & (ii).

226. *Id.* § 5(a)(5)(A)(i).

227. *Id.* § 5(a)(5)(A)(ii).

228. *Id.* § 5(a)(5)(B).

VI. CHALLENGING THE KEEPING ALL STUDENTS SAFE ACT AS PROPOSED: A GAP-FILLED FEDERAL SOLUTION

A closer examination of the legislation's text reveals that there are several substantive provisions and policy decisions that suggest that the minimum protections provided by the bill are insufficient to achieve its ultimate goal of preventing harm to children from the use of restraint, seclusion, and aversive intervention practices.

A. Narrowing "Seclusion" at the Risk of Children's Harm

The Keeping All Students Safe Act includes the prohibition of the use of seclusion against children with the exception of those instances in which the bill permits the use of these practices.²²⁹ Seclusion is identified in the Act as: "[having] the meaning given the term in section 595(d)(4) of the Public Health Service Act (42 U.S.C. 290jj(d)(4))."²³⁰ This already raises the question of why the Keeping All Students Safe Act does not specifically provide a definition of seclusion in its own text when it is a critical term to the bill. This reference to the Public Health Service Act is actually the Children's Health Act of 2000 (CHA)²³¹ and its definition of seclusion: "The term 'seclusion' means a behavior control technique involving locked isolation. Such term does not include a time out."²³² This definition is potentially troublesome in that it restricts seclusion to only instances of "locked seclusion." Advocates for children with disabilities have responded that the definition of seclusion should be broadened: "The bill does nothing to protect children who are placed in other spaces or rooms from which they cannot exit, even if unlocked."²³³ Furthermore, almost half of the states having prohibitions on the use of seclusion practices have broader definitions than the "locked isolation" definition contained in both the CHA and the Keeping All Students Safe Act as proposed.²³⁴ This demonstrates that the reports that helped lead to the movement to initiate legislation at the federal level may not have been seriously considered in ensuring that any federal legislation would adequately address these problems:

NDRN reported on several such cases, including a California school that forced children into an unlit padded seclusion room, with the door held shut by staff. Another school barricaded a child by putting a table against a door and covering his only window with paper. Other children, because of their age, size, or disabilities, are

229. *Id.* § 5(2).

230. *Id.* § 4(14).

231. Children's Health Act of 2000, Pub. L. No. 106-310, 114 Stat. 1101; 42 U.S.C. 201 (2006).

232. 42 U.S.C. 290jj(d)(4) (2006).

233. Butler, *supra* note 204, at 5.

234. *Id.*

unable to exit spaces even if they are unlocked. A doorknob placed at four to five feet or inside inexpensive child-proofing covers may be inaccessible to a child with motor disabilities. A child unable to operate his wheelchair or who has other motor disabilities, can be secluded in a wide-open space. From all of the reports, it is clear that some staff will modify equipment so as to use it inappropriately. It is not too hard to go from adding straps to a therapy chair to putting child-proofing on a door or blocking it with furniture and then walking off. Major organizations, including the Council for Children with Behavioral Disorders (association of teachers and others working on severe behavioral issues) and NDRN have issued reports stating that seclusion includes any space from which children cannot exit.²³⁵

The NDRN report recognized practices of seclusion beyond simply the "locked isolation" identified in the definition of "seclusion" in the CHA and the proposed Keeping All Students Safe Act to promote a broader definition of seclusion.²³⁶ NDRN used the following definition in its report for "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."²³⁷

NDRN was also critical of the definition used by the Children's Health Act of 2000 of "seclusion" that has been incorporated into the Keeping All Students Safe Act reflecting, "but CMS [Centers for Medicaid Services] has recognized that individuals can be forcibly confined in a room or area without the room being locked."²³⁸ The COPAA report also recommended expanding the restrictions on seclusion beyond "locked" places, stating that schools should:

[p]rohibit the use of locked seclusion rooms and spaces from which children cannot exit, as noted above. If, in order to allow a child to de-escalate, timeout or cooling-off spaces are used, children must be able to exit them, they must be supervised at all times. The rooms must not be used for other purposes (e.g., punishment) or in place of providing appropriate related services and behavioral supports in the classroom. A child's legal right to learn with her peers in the least-restrictive environment must be respected and enforced.²³⁹

Finally, in the testimony provided by the GAO on the issue of restraint and seclusion before the Committee on Education and Labor in the House of Representatives, Gregory D. Kutz testified using the following definition of

235. *Id.* at 5-6 (citations omitted).

236. NAT'L DISABILITY RIGHTS NETWORK, *supra* note 2, at 5.

237. *Id.*

238. *Id.* at n.4.

239. BUTLER, COUNCIL OF PARENT ATT'YS AND ADVOCATES, INC., *supra* note 39, at 11.

"seclusion": "Seclusion is the involuntary confinement of an individual alone in a room or area from which the individual is physically prevented from leaving."²⁴⁰ This is the same definition of "seclusion" that was proposed by NDRN as previously discussed.²⁴¹ Also, the GAO report identified that in the absence of any definition of "seclusion" in federal law prohibiting the use of restraint and seclusion in the school environment, this definition promulgated by the Centers for Medicaid and Medicare Services ("CMS") has been used in hospitals.²⁴²

If the research, evidence, and multiple policy recommendations support a broader definition for "seclusion," why would the federal government simply ignore it? While it is true that often definitions for key terms of legislation are taken from other current legislation to provide consistency, when the current definition being utilized is problematic such as the case here, it certainly suggests that the time has come to change that definition rather than copying and pasting for consistency. An argument has been suggested that this definitional gap could be filled by the Department of Education in providing regulations interpreting the bill once it is enacted but the bill does not delegate authority to the Department in crafting a definitional section that the bill already provides. The gap created by the definition for seclusion as proposed by this federal legislation is too significant in light of the documented instances of seclusion of children with disabilities to be ignored. It is also surprising to say the least that Congress took this definitional route even when the GAO chose to use the definition of "seclusion" used by CMS rather than the definition used under the Children's Health Act of 2000. This suggests that the definition used by the Children's Health Act of 2000 was not seen by the GAO, a federal government body that was called upon to investigate these matters, as the proper legislative definition to serve the needs of children who have been the victims of these practices based on the reported instances of harm.

In addition to the definition of "seclusion," there are some other important considerations as far as the circumstances surrounding the use of seclusion practices that are necessary to address. The bill does not provide any requirement of providing an automatic lock in emergency situations. "Three states that permit locked seclusion use a more modern approach, requiring that any lock automatically open in an emergency, such as a fire or staff incapacitation. This protects both the children and staff in the room with them."²⁴³ The states taking this approach to ensuring emergency protections are Iowa, Illinois, and Connecticut.²⁴⁴ The failure to take

240. *Seclusions and Restraints, Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers: Hearing Before the H. Comm. on Education and Labor, 111th Cong., 1* (2009) (statement of Gregory D. Kutz, Managing Director Forensic Audits and Special Investigations, Gov't Accountability Office), available at <http://www.gao.gov/new.items/d09719t.pdf>.

241. See *supra* notes 234-35 and accompanying text.

242. See *id.* at n.1.

243. Butler, *supra* note 204, at 3.

244. Jessica Butler, *Table A: State Laws (Statutes & Regulations) on Restraint/Seclusion Updated*

proactive legislative measures for emergency cases leaves children still vulnerable to significant harm even to the point of death should an emergency situation arise. Secondly, several states have also legislated the actual conditions of the rooms used for seclusion that is absent from the proposed federal legislation.²⁴⁵ Some of these basic requirements include enacting regulations under delegated congressional authority that ensure that "rooms are adequately heated and air conditioned, ventilated, free of unsafe objects, of sufficient size, lit (not dark) and comply with building and fire codes, etc. Steps should also be taken to ensure children have access to bathroom facilities, food, and water."²⁴⁶ Some states already have requirements for seclusion rooms in place and the reports discussed previously leading to the movement for federal legislation on restraint and seclusion in schools also evidence this necessity.²⁴⁷ Again, while the Keeping All Students Safe Act attempts to protect children and prevent them from being harmed from seclusion practices, the concerns described regarding the Act's definition of "seclusion," a requirement for automatic locks to enable children and school staff easy access to leave in an emergency, and the absence of requirements for rooms used for seclusion regarding basic necessities suggest that the bill as drafted does not address the needs that have been identified by various agencies based on the data collected on the incidence of seclusion and the circumstances of those situations.

B. The Absence of "Body" In "Physical Restraint"

Another area of potential concern regarding the Keeping All Students Safe Act is the definition of "physical restraint". The definition of "physical restraint," similar to that of "seclusion," relies upon the definition provided by other federal legislation: "The term 'physical restraint' has the meaning given the term in section 595(d)(3) of the Public Health Service Act (42 U.S.C. 290jj(d)(3))."²⁴⁸ Physical restraint is defined as:

[A]ny physical restraint that is a mechanical or personal restriction that immobilizes or reduces the ability of an individual *to move his or her arms, legs, or head freely*, not including devices, such as orthopedically prescribed devices, surgical dressings or bandages,

Through November 2009, WRIGHTSLAW.COM (November 2009), <http://www.wrightslaw.com/info/restraint.regs.tablea.pdf>.

245. Butler, *supra* note 204, at 3-4.

246. *Id.* at 6.

247. *Id.* at 6-7. "Several states have such rules, including Illinois, Maine, Minnesota, North Carolina, New York, Washington, Arkansas, and Maryland, but others do not. It would be best if a federal rule protected all children. COPAA received numerous reports of children being secluded in darkened closets and bathrooms, or rooms with unsafe furnishings. NDRN reported on children isolated in locked boxes and of children in seclusion rooms who were denied food, water, and bathroom access," *Id.* at 3-4.

248. H.R. 4247, § 4(8) (2010).

protective helmets, or any other methods that involves the physical holding of a resident for the purpose of conducting routine physical examinations or tests or to protect the resident from falling out of bed or to permit the resident to participate in activities without the risk of physical harm to the resident (such term does not include a physical escort).²⁴⁹

The immediate concern with this definition of "physical restraint" is that it fails to include language applicable to the entire body in stating, "the ability of an individual to move his or her arms, legs, or head freely."²⁵⁰ NDRN's report adopted the definitions used by the CMS.²⁵¹ The definition by CMS for restraint and used by NDRN includes "body":

A restraint is—

(A) Any manual method, physical or mechanical device, material, or equipment that immobilizes or reduces the ability of [an individual] 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.

(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).²⁵²

In section (A) the language specifies "body" as part of the prohibition of restraint. Similarly, the testimony of the GAO and the GAO report also utilized the CMS definition of restraint and provided that: "In the context of this testimony, a restraint is defined as any manual method, physical or mechanical device, material, or equipment that immobilizes or reduces the ability of an individual to move his or her arms, legs, body, or head freely."²⁵³ Again like in the case of the definition of "seclusion", the GAO relied on the definition of restraint created by the CMS rather than the definition provided by the Children's Health Act of 2000.²⁵⁴ It is interesting to point out from a legislative standpoint that both NDRN and the GAO

249. 42 U.S.C. 290jj(d)(3) (2006) (emphasis added).

250. *Id.*

251. NATIONAL DISABILITY RIGHTS NETWORK, *supra* note 2, at 5.

252. *Id.*

253. Kutz, *supra* note 240 at 1.

254. *Id.* at 1, n.1.

relied on the CMS definition as opposed to the Children's Health Act of 2000 definition.

There is also evidence on the state level that the definition of "physical restraint" includes the entire body making it curious as to why the proposed definition in the Keeping All Students Safe Act does not.²⁵⁵ As inconsistent as state laws are, this issue of the scope of "physical restraint" is actually one that provides very little controversy compared to several of the other major issues surrounding the use of restraint, seclusion, and aversive intervention practices.²⁵⁶ Specifically, all states except for Connecticut define "physical restraint" to include reference to the entire body or torso.²⁵⁷ An argument can be made that while not including the term "body" in the definition of "physical restraint," the bill's protection still shields children from harm by also prohibiting "physical escort" and that both practices cannot be used to the extent that they interfere with a child's ability to breathe.²⁵⁸ However, advocates for children with disabilities have noted that this protection for breathing does not prevent a child from being physically harmed otherwise by restraint practices:

Interestingly the bill prohibits physical escort that impairs breathing, which includes temporary touching of the back or shoulders but only to get a person to walk to a safer place. But if a child is restrained by the back and shoulders and breathing is impaired, this would not be included. Breathing is not the only risk; there are other injuries to the chest and kidneys that can be sustained by the use of improper force.²⁵⁹

If Congress chooses to advance the language as proposed in this bill for "physical restraint", it is leaving open opportunities for children to be physically harmed in similar ways to those already documented and leaving school personnel a defense for those harms because the legislation does not cover the entire body. For Congress to take this narrow approach to physical restraint in light of the evidence of physical harm and the consistency of states on this issue would be a disservice to the children the bill intends to protect. There will be numerous court battles over whether or not a child who was physically harmed was harmed illegally based on the definition of "physical restraint" as proposed.

C. The Absence of Corporal Punishment

While the Keeping All Students Safe Act will provide national minimum standards for the use of restraint and seclusion practices against

255. Butler, *supra* note 204 at 2.

256. *Id.*

257. *Id.*

258. H.R. 4247, § 5(a)(1)(C).

259. Butler, *supra* note 204, at 3.

children in educational settings, another practice being used to "correct" problems in the classroom is causing significant harm to children and being used disproportionately on children with disabilities: corporal punishment.²⁶⁰ These concerns were brought to light most notably by a 2008 report prepared by the ACLU and Human Rights Watch and released in August 2009 documenting the current lack of federal and state regulations on corporal punishment in educational settings and outlining the impact of the use of these practices on children with disabilities.²⁶¹ It seems illogical that a federal bill being proposed to prohibit the misuse of the practices of restraint and seclusion on children in American schools would neglect corporal punishment. The use of corporal punishment in the classroom continues to be legal in twenty states.²⁶² According to the ACLU/Human Rights Watch report, the definition of "corporal punishment" also remains largely undeveloped in both federal and state law.²⁶³ The most common form of corporal punishment is paddling, which is not addressed in the definition of "restraint" in the Keeping All Students Safe Act. This form of corporal punishment is described as follows: "Corporal punishment most often takes the form of paddling: a wooden board swung repeatedly against the child's buttocks, causing immediate pain and sometimes lasting injury."²⁶⁴ The ACLU/Human Rights Watch report acknowledged that instances of corporal punishment often occur while a school official is restraining a child with a disability:

According to interviews conducted for this report, students with disabilities have been subjected to a wide range of corporal punishment, including hitting children with rulers; pinching or striking very young children; grabbing children with enough force to bruise; throwing children to the floor; and bruising or otherwise injuring children in the course of restraint.²⁶⁵

Some other examples of corporal punishment include hitting, slapping, spanking, pinching, grabbing, and bruising.²⁶⁶ In addition to incorporating into the definition of corporal punishment the type of harms that are at issue, it may be necessary for legislators to get into the dynamics of defining the actual practices themselves such as paddling, "Paddling (also commonly called "swats," "pops," or "licks") usually means hitting a student three or more times on the buttocks and upper thighs with a wooden paddle."²⁶⁷

260. AMERICAN CIVIL LIBERTIES UNION & HUMAN RIGHTS WATCH, IMPAIRING EDUCATION: CORPORAL PUNISHMENT OF STUDENTS WITH DISABILITIES IN U.S. PUBLIC SCHOOL 3-6 (2009), available at <http://www.hrw.org/node/84950>.

261. See generally *Id.*

262. *Id.* at 2.

263. *Id.* at 15.

264. *Id.*

265. *Id.* at 3.

266. *Id.* at 19-20.

267. *Id.* at 16.

This notable absence of corporal punishment in the Keeping All Students Safe Act is evidenced by the recent activity of Congress by the Healthy Families and Subcommittee of the House Committee on Education and Labor, which heard testimony on corporal punishment on April 15, 2010.²⁶⁸ Since the introduction of the Keeping All Students Safe Act, separate federal legislation known as the Ending Corporal Punishment in Schools Act²⁶⁹ was proposed in June 2010 in an attempt to ban corporal punishment in schools.²⁷⁰ The Ending Corporal Punishment in Schools Act gives a broad definition of corporal punishment as "paddling, spanking, or other forms of physical punishment, however light, imposed upon a student."²⁷¹ As the use of corporal punishment in educational settings shares similarities to the use of restraint and seclusion, the Keeping All Students Safe Act should be amended to address corporal punishment rather than creating separate federal legislation.

D. What About Children with Disabilities?

A major gap in the Keeping All Students Safe Act is that while training and certification is mandated for school personnel who may need to use the practices of seclusion and restraint, there is nothing written into the law requiring all school personnel to be educated on different types of disabilities that children have, particularly those that may involve behavioral or emotional outbursts that are manifestations of the disabilities. From the bill, it is not clear whether the required training and certification process includes training in the actual practices of seclusion and restraint only or whether these trainings would require any instruction on types of disabilities as well. It cannot be assumed that all school personnel, including those who may be required to participate in training for restraint and seclusion practices, will have adequate knowledge and experience with children with disabilities to realize that these children are not being purposely disruptive in the classroom even though the minimum standards for the bill prohibit the use of these practices "imposed solely for purposes of discipline or convenience."²⁷² However, because the bill allows restraint or seclusion "when the student's behavior poses an imminent danger of physical injury to the student, school personnel, or others," there is potential for misuse.²⁷³ School personnel who are not trained in disabilities, and who

268. *Corporal Punishment in Schools and its Effect on Academic Success: Hearing Before the Subcomm. On Healthy Families and Communities on the H. Comm. On Ed. & Labor*, 156 Cong. Rec. D393, (daily ed. Apr. 15, 2010), available at <http://edlabor.house.gov/hearings/2010/04/corporal-punishment-in-schools.shtml>.

269. Ending Corporal Punishment in School Act, H.R. 5628, 111th Cong. (2nd Sess. 2010).

270. Rachel Goldstein, *Classroom Paddling Still Allowed in a Lot of States*, TIME NEWSFEED, Aug. 7, 2010, <http://newsfeed.time.com/2010/08/07/classroom-paddling-still-allowed-in-a-lot-of-states/>.

271. H.R. 5628, § 12(1).

272. H.R. 4247, 111th Cong. § 5(a) (2010).

273. *Id.* § 5(a)(2)(A).

do not feel comfortable working with children with disabilities (particularly those who may act out due to the disabilities) may end up using restraint and seclusion practices when they should not. The fact that a school employee may feel uncomfortable based on lack of knowledge about disability and a misperception that a child is about to cause harm could still force many children with disabilities to become victims. It would be in the best interest of everyone involved for the federal legislation to address this issue specific to children with disabilities.

E. Monitoring, Reporting, and Enforcement Mechanisms Leave Room for Improvement

One of the strengths of the Keeping All Students Safe Act is that it does require the implementation of regular monitoring and reporting.²⁷⁴ A few difficulties arise regarding the reporting requirements, however, the bill requires states to report a number of important items including incidents of restraint,²⁷⁵ incidents of seclusion,²⁷⁶ incidents that resulted in injury,²⁷⁷ incidents that resulted in death²⁷⁸ incidents of restraint or seclusion that were performed by school personnel not trained or certified,²⁷⁹ and demographic information,²⁸⁰ including age²⁸¹ and disability status²⁸² of the students. While these reporting mandates are significant, a noticeable omission is that there is no requirement having to do with when an individual child has been the subject of restraint, seclusion, or aversive intervention practices multiple times. The following observation was made regarding this issue:

The GAO, COPAA, and NDRN reports documented that some children have been subject to these techniques more than 50-80 times or for hours at a time. They include a boy secluded in a dirty room 75 times over 6 months, a 12 year old girl with autism restrained on the ground 44 times, often for 22 minutes at a time, and a gifted child who spent 78 days a year in a seclusion room and ended up with only a special diploma.²⁸³

In light of the overwhelming consistency of these reports on this issue, it seems odd the federal government would not find this to be an important or necessary reporting requirement. This demonstrates another example of

274. *Id.* § 6(a)(1)(B) & 6(b).

275. *Id.* § 6(b)(2)(A)(i).

276. *Id.* § 6(b)(2)(A)(ii).

277. *Id.* § 6(b)(2)(B)(i)(I)(aa).

278. *Id.* § 6(b)(2)(B)(i)(I)(bb).

279. *Id.* § 6(b)(2)(B)(i)(I)(cc).

280. *Id.* § 6(b)(2)(B)(i)(II).

281. *Id.* § 6(b)(2)(B)(i)(II)(bb).

282. *Id.* § 6(b)(2)(B)(i)(II)(cc).

283. Butler, *supra* note 204, at 8.

where there seems to be a national consensus on something that, for whatever reason, the federal government is avoiding taking any proactive measure legislatively to address when the instances of the same children being victims of restraint and seclusion practices has been prevalent.

Another aspect of the bill's reporting requirements is a final provision in the section that essentially gives a State a way out of having to report "in a case in which the number of students in a category would reveal personally identifiable information about an individual student."²⁸⁴ It has been suggested that this protection may be included due to rural areas where there may be far less information that would lead to individual identification for reporting purposes.²⁸⁵ However, this could result in not keeping track of injuries and even deaths that would basically assist places in potentially hiding the occurrences of these damaging events to children and their families. If the purpose of establishing a reporting system is to ensure that these incidents are being prevented, providing a mechanism this broad to allow the removal of the requirements will adversely impact the purposes of establishing this law to begin with. Certainly, items as personal as name and other specifics can and should be protected, but more consideration should be given as to what extent an exception to reporting should function and what, if anything, can be done to further protect a child's personal identification without compromising the needs and function served by the establishment of a reporting system.

A final issue regarding the bill involves its enforcement. In general, the enforcement provisions are fairly detailed, especially in providing monetary incentives for States to comply with the mandates of the bill including the withholding of funding for failure of compliance²⁸⁶ and procedures for awarding grants to States in order to carry out the Act's requirements.²⁸⁷ However, the bill lacks the statutory authority for a child that is harmed to bring a cause of action under the bill as its relief seeking structure is described as follows:

The bill is similar to the Family Education Rights and Privacy Act (FERPA) in its enforcement. The language used is similar to the form of the language used in the FERPA and No Child Left Behind, rather than rights-creating language, a point Chairman Miller confirmed at the press conference. This does not mean that children will not have new protections created by the statute, but rather, means that parents could not use 42 U.S.C. § 1983 to enforce this particular statute. Miller explained that this was necessary in order to get a bill passed promptly, "We would like to get to the preventing of these activities as quickly as we possibly can. . . .[W]e

284. H.R. 4247, § 6(b)(2)(B)(ii)(II).

285. Butler, *supra* note 2, at 11.

286. H.R. 4247, § 6(c)(1)(A)(i).

287. *Id.* § 7(a)(1).

owe it to the children to consider effectiveness and speed."²⁸⁸

Instead, the bill defers to other remedies already available under federal or state law to students or parents.²⁸⁹ But the rationale of this approach to enforcement is questionable in light of the existing federal legislation, considering there is no current federal law on the use of restraint, seclusion, and aversive intervention practices on children in schools as it has been previously discussed. Any remedial actions available under other laws will not cover these incidents unless these other laws are amended to implement legal protections available in cases of harm due to restraint or seclusion practices. This is why NDRN's policy recommendations included not simply creating federal legislation for the use of restraint and seclusion practices on children, but also challenged the Obama Administration to act swiftly to amend current federal law.²⁹⁰ It is evident that current federal legislation does not adequately address these issues. It can only be hoped that the intent would be for the Obama Administration to ensure that if the Keeping All Students Safe Act was enacted, that the other current federal law already in place would be amended accordingly. Otherwise, the risk is great that the legal protections being created by the Keeping All Students Safe Act could become meaningless in providing children a direct route to seeking legal redress in cases where it is necessary.

VII. INTERNATIONAL LAW'S VIEW OF RESTRAINT & SECLUSION

Does international law offer anything regarding the use of the practices of restraint and seclusion on children in educational settings? One major development in international law was the UN Convention on the Rights of the Child.²⁹¹ Adopted by the UN in 1989, this Convention was signed by the U.S. but has never been ratified.²⁹² Although the Convention does not specifically address restraint and seclusion, there are several notable provisions suggesting a position. Article 19, Section 1 encourages State Parties to protect children from these types of harms:

States Parties shall take all appropriate legislative, administrative,

288. Butler, *supra* note 204, at 10.

289. H.R. 4247 § 11; *See also* Butler, *supra* note 204, at 10. (noting that such a savings clause is typical. It means that parents and students can continue to use their state laws, IDEA, Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and the Constitution in restraint, seclusion, and aversive cases. Due to potential defenses and other issues, using these laws would not be as strong as having a right to enforce the statute under 42 U.S.C. §1983.)

290. NATIONAL DISABILITY RIGHTS NETWORK, *supra* note 10, at 38 ("Propose and support the inclusion in any appropriate legislative vehicle, including, but not limited to, the Individuals with Disabilities Education Act (IDEA), No Child Left Behind (NCLB) and Substance Abuse and Mental Health Administration (SAMHSA) reauthorizations languages to. . .").

291. United Nations Convention on the Rights of the Child, opened for signature Nov. 20, 1989, 144 U.N.T.S. 123 (entered into force Sept. 2, 1990), available at <http://www2.ohchr.org/english/law/crc.htm>.

292. *See* UNICEF, *Convention on the Rights of the Child—Path to the Convention on the Rights of the Child*, http://www.unicef.org/crc/index_30197.html.

social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.²⁹³

Additionally, Article 23 specifically addresses issues related to children with disabilities.²⁹⁴ Under this Article, the dignity of the human person of the child with a disability is advocated for, implying that the Convention would be against practices such as restraint and seclusion that threaten the child's dignity. The Convention states: "States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community."²⁹⁵ Similarly, Article 28, regarding the education of children expresses this same commitment to protecting children's dignity by speaking directly to discipline issues in school: "States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention."²⁹⁶ Additionally, the UN Convention on the Rights of People with Disabilities was adopted in May 2008.²⁹⁷ This Convention also promotes respect for the human rights of children with disabilities under Article 7.²⁹⁸ Based on these provisions, it would seem that those State Parties accepting the principles of both the UN Convention on the Rights of the Child and the UN Convention on the Rights of People with Disabilities would support legislation similar to that being proposed by the U.S. Congress to prohibit the use of restraint and seclusion practices on children in educational environments.

VIII. CONCLUSION

Proposing federal legislation to tackle the difficult issues raised by the use of restraint, seclusion, and aversive intervention practices on children is a first major step by the federal government to eliminate the harm and even death of children from these practices. The Keeping All Students Safe Act makes significant progress in providing a national response and guidance to issues that have had very scattered and haphazard legislative responses on the state and local levels. As the evidence mounted originally to bring these issues to the table involved a class of children more than others—

293. *United Nations Convention on the Rights of the Child*, *supra* note 291, art. 19 § 1.

294. *Id.* art. 23.

295. *Id.* art. 23, § 1.

296. *Id.* art. 28, § 2.

297. Convention on the Rights of Persons with Disabilities, UNITED NATIONS ENABLE, G.A. RES 61/106 U.N. Doc. A/RES/61/106 (Dec. 13, 2006), available at <http://www.un.org/disabilities/default.asp?navid=13&pid=150>.

298. *Id.* art. 7, available at <http://www.un.org/disabilities/default.asp?id=259>.

children with disabilities — the question is also raised whether this proposed legislation is really going to protect these children and their unique needs as well as the knowledge required of the school personnel working with them. However, this close examination of the proposed federal legislation makes it clear there are some serious flaws in the legal protections as drafted that could without a doubt continue to jeopardize the lives of children in the classroom across the country that goes to even the basics of the bill in defining key terms such as "seclusion" and "physical restraint." In its minimum standards, the Keeping All Students Safe Act may not in fact protect the very children who have consistently been the victims. In an effort to create a quick fix, the federal government may be causing more harm than good by opening windows for the use of restraint and seclusion practices that will result in continuing the incidence of children being victims. When a child's life is at stake, the federal government would be wise to err on the side of caution than allowing another child to suffer simply by going to school in America.