



## PREVENTING HARMFUL RESTRAINT AND SECLUSION IN SCHOOLS ACT, S. 2860

### ISSUE BRIEF:

### FEDERAL LAW SHOULD BAR RESTRAINT AND SECLUSION AS PLANNED INTERVENTIONS IN IEPs AND OTHER EDUCATION AND BEHAVIOR PLANS

#### INTRODUCTION

Last spring, Congressional hearings and a GAO investigation revealed that students across America have been abused and neglected in school: they have been locked alone in closets or concrete rooms, tied to chairs, left for hours in their urine or feces, and restrained, sometimes to the point of death. Most are children with disabilities. Congress took action. Senator Dodd introduced S. 2860, the Preventing Harmful Restraint and Seclusion in Schools Act. The House already has passed its version of the bill, H.R. 4247. Both bills direct the Secretary of Education to establish minimum standards regarding restraint and seclusion in schools. These standards:

- \* Permit restraint and seclusion only in cases involving imminent danger of physical injury, if less restrictive interventions would be ineffective, and then only for a very limited time;
- \* Require that restraint and seclusion be applied only by trained, certified staff, except in rare emergencies;
- \* Prohibit all mechanical and chemical restraint, any physical restraint that restricts air flow to the lungs, and any aversive behavioral intervention that compromises health or safety;
- \* Prohibit restraint and seclusion as a planned intervention in students' education plans, including behavior plans and IEPs designed pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1414(d).<sup>1</sup>

The IEP prohibition is critically important. Only students with disabilities have IEPs; this group of students has been disproportionately subjected to the dangers of restraint and seclusion. Without the prohibition, the IEP team would freely be able to add restraint and seclusion to IEPs as a planned intervention. Planned use of restraint and seclusion as an intervention is inconsistent with preventing and reducing their use; including restraint and seclusion in IEPs will increase, rather than decrease their use, thereby undercutting the purpose of S. 2860 and H.R. 4247.

#### BRIEF OVERVIEW OF SPECIAL EDUCATION AND THE IEP PROCESS

<sup>1</sup>Other standards would require states and local education agencies to ensure that a sufficient number of school personnel receive state-approved training and certification in first aid and certain safe and effective student management techniques, and would require schools to establish procedures to quickly notify parents if physical restraint or seclusion is imposed on their child, and to quickly notify the state Protection and Advocacy System if a child is seriously injured or dies from the use of restraint or seclusion.

The IDEA requires that services be individualized and that they be designed to provide the student with an appropriate education, one that will enable him or her to progress in the general curriculum. The IEP must be based on the information that has been gathered about the student through assessments and other sources, and is supposed to be developed by a team of school system professionals and the student's parents. Under the 2004 IDEA amendments, the services to be provided to the student are to be based on peer-reviewed research to the extent practicable.

When enacting the IDEA, Congress envisioned that the educational planning process would be a partnership between school personnel and parents. However, school staff control the entire IEP process, which is complex, even under the best of circumstances, and many parents do not fully understand the process or the rights they and their children have in the process. Further, often, parents are treated dismissively and if they disagree with provisions of their children's IEPs, such as restraint and seclusion, rather than the meaningful discussion Congress intended to occur at the IEP planning meetings taking place, the parents are told the school will call the police if their child has a behavior issue at school or are simply told that they can file for a due process hearing. Other times, restraint and seclusion are added to the IEP disguised as crisis intervention or under an acronym such as PCM, but no explanation is given to the parents as to what the term means.

#### **RESEARCH-BASED REASONS WHY RESTRAINT AND SECLUSION MUST NOT BE INCLUDED AS A PLANNED INTERVENTION IN IEPs AND OTHER EDUCATION AND BEHAVIOR PLANS**

The IDEA requires that to the extent possible, services included on a student's IEP be based on peer-reviewed research. Proponents of restraint and seclusion have cited no research, peer-reviewed or otherwise, to establish that restraint and seclusion serve any legitimate educational purpose or that they are even effective. In fact, the only peer-reviewed research of which we are aware demonstrates that restraint and seclusion do not have any treatment or educational value and that no amount or type of staff training can assure their safe use. (Haimowitz, Urff, and Huckshorn, 2006; Harper, 2003; Nunno, Holden, and Tollar 2006). Indeed, Section 2 of this bill expressly finds, as documented by at least three recent reports, that restraint and seclusion have been responsible for injury and death to children in the education setting, as well as in other settings.<sup>2</sup>

Additionally, a comparison of the settings in which children receive services offers persuasive reasons why restraint and seclusion should be prohibited as a planned intervention in schools. Restraint and seclusion cannot be included as planned interventions in treatment plans in children's mental health and other health care settings; they are harmful and non-therapeutic as planned interventions. Notably, these are settings with clinical staff. Research in these settings has found that seclusion has been used regardless of children's ability to cope with their environment and that seclusion did not positively shape behavior—children spent more time in each subsequent seclusion episode, rather than less. K.H. Millstein & J.S. Cotton, *Predictors of the Use of Seclusion on an Inpatient Child Psychiatric Unit*, 29 *Journal of the American Academy of Child & Adolescent Psychiatry* 256, 256-64 (1990). Rather than calming children, restraint and seclusion have the opposite effect, causing anxiety, fear, and a decreased ability to learn. W.K. Mohr & J.A. Anderson, *Faulty Assumptions Associated With the Use of Restraints*

<sup>2</sup> The reports, prepared by the General Accountability Office, the National Disability Rights Network, and the Council of Parent Attorneys and Advocates, make clear that children have been physically and emotionally injured by the use of restraint and seclusion in the school setting, even when restraint and seclusion were administered by staff who had received training.

*with Children*, 14 Journal of Child and Adolescent Psychiatric Nursing 141, 141-151 (July-Sept. 2001). Schools are not health care settings and do not have clinicians on staff or, if they do, they are not staffed in the way that mental health and health care settings are. If restraint and seclusion cannot be used as a planned intervention in a setting in which clinical staff are available to assess and intervene if there is a problem, restraint and seclusion have no place on an IEP as a planned intervention in the school setting.

Finally, directly contrary to what many people assume and what some proponents claim, research show that both planning for and using restraint and seclusion actually increases, rather than decreases, the number of incidents involving their use. (Kansas Public Schools Year End Report of Seclusion and Restraint for Students with Disabilities (2008-2009).

### **PRACTICAL REASONS WHY RESTRAINT AND SECLUSION MUST NOT BE INCLUDED AS A PLANNED INTERVENTION IN IEPs AND OTHER EDUCATION AND BEHAVIOR PLANS**

Under H.R. 4247 and S. 2860, restraint and seclusion could only be used in an emergency. In all other situations, less restrictive alternatives should be used. In many states today, restraint and seclusion are often included on IEPs, even over the objection of parents. Once on an IEP, restraint and seclusion are often used in non-emergency situations, simply because they are on the IEP. Interventions included on the IEP become the default and are used as a routine practice. This is inconsistent with the intent of S. 2860 to reduce and prevent the use of harmful restraint and seclusion. It is also inconsistent with the IDEA's requirement that IEP teams consider the use of positive behavior interventions, strategies and supports to address a student's behavior needs and that the student's unique needs be considered in designing his or her IEP.

Parents who oppose the inclusion of restraint or seclusion in their child's IEP may be told they have no choice but to accept the IEP; that their child must attend a more-segregated school or a school far from their neighborhood and friends; that if they do not agree to the use of restraint or seclusion, the school will call the police if their child has a behavior issue at school; or they may be told to ask for a due process hearing, an option that only a very small minority of parents are able to pursue, primarily because of cost or the lack of available advocacy resources.

### **LEGAL REASONS WHY RESTRAINT AND SECLUSION MUST NOT BE INCLUDED AS A PLANNED INTERVENTION IN IEPs**

Two federal appellate court decisions decided against injured children reinforce several of the points discussed above, including the imbalance of power between parents and school officials, and the imprimatur of legitimacy given to dangerous techniques by virtue of their inclusion on an IEP. In *Couture v. Board of Education of Albuquerque Public Schools*, 535 F.3d 1243 (10<sup>th</sup>. Cir. 2008), an elementary school age child with an emotional disability was repeatedly placed in an isolated room from which he could not exit; at times, the door was barricaded shut by school staff. His mother had approved an IEP that included time out as an intervention without understanding that the school was actually placing her son in a room from which he could not exit voluntarily. Although the child's behavior deteriorated even further when he was in the isolation room and the practice was not effective, the court upheld the practice, finding that time out was on the child's IEP, that his mother had approved the IEP, that the educators must be given a chance to implement the IEP, and that in fact, they could be held liable if they did not implement the plan. The court deferred to the child's teachers, finding that the specifics of the use of the isolation room was a pedagogical judgment.

In the second case, *C.N. v. Willmar Public Schools, Independent Sch. Dist. No. 347*, 591 F.3d 624(8<sup>th</sup> Cir. 2010), an elementary school age child with a communication disorder and other disabilities was placed in restraint and seclusion, which were included on her IEP. The lawsuit alleged that C.N.'s teacher physically mistreated her and used restraint and seclusion in improper ways. The court cited the *Couture* case and faulted the parent for not appealing if she objected to the use of restraint with her daughter. The court held that C.N.'s IEP authorized the use of restraint and seclusion and that her IEP set the standard for accepted practice. Failing to acknowledge that the IDEA requires services to be based, to the extent practicable, on peer-reviewed research, the court determined that an authorized professional's treatment of a person with a disability is reasonable if the professional's actions do not substantially depart from accepted professional judgment, practice, or standards.

These two cases vividly illustrate the legal danger inherent in explicitly failing to prohibit restraint and seclusion as a planned intervention in IEPs or in permitting them as a planned intervention. Once restraint and seclusion are included in an IEP, they are given a presumption of legitimacy. It may be difficult for parents to keep restraint and seclusion out of an IEP for the reasons discussed above. Parents who wish to challenge restraint and/or seclusion in an IEP face the hurdles inherent in exercising their due process rights, which include access to experts (whose costs are not reimbursable to parents), access to legal assistance (often beyond many families' financial means and not always geographically available), and the added deference accorded to educators.

Ironically, proponents of restraint and seclusion seek to use the IDEA, a law that requires schools to provide appropriate educational services based on research, to authorize non-research based techniques that have caused injury and death to school children. Instead of the positive interventions and supports encouraged by the IDEA, proponents of including restraint and seclusion in IEPs seek the ability to use aversive interventions.

Especially because H.R. 4247 and S. 2860 are not enforceable through a private right of action, the IEP prohibition is essential to protect schoolchildren with disabilities throughout the nation.

### **LEGISLATIVE REQUEST**

The House has acted and has passed a bill that includes a prohibition against including restraint and seclusion as a planned intervention in any kind of individual education or behavior plan. S2860 must continue to include the same provision. Too many children have sustained injuries, been traumatized, or have died while being restrained or while in seclusion at school. This is simply unacceptable.

Dated: August 19, 2010