

Least Restrained Environment: Amending the IDEA to Require Positive Behavioral Interventions and Supports in IEPs

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Students with disabilities are disproportionately restrained and secluded in schools. Though sometimes these practices are employed as necessary safety measures to de-escalate a behavioral crisis and protect students and staff from injury, they are prone to abusive or unsafe implementation, especially when performed by untrained or inadequately trained staff. In recent years, research has emerged illuminating the risks associated with these practices, which can lead to injury or death when performed improperly.

There is currently no federal legislative or regulatory framework in place addressing the practice of restraint and seclusion in schools, and state practices vary widely. As such, this Note proposes amending the Individuals with Disabilities Education Act, the statute governing the rights of students with disabilities, to affirmatively require the inclusion of positive behavioral interventions and supports in individualized education plans. Additionally, this Note proposes recommendations to bolster protections for students with disabilities at the state level.

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I. INTRODUCTION: THE PRACTICE OF RESTRAINT AND SECLUSION

In 1998, a fourteen-year-old student was restrained by a counselor in his dormitory at a treatment center in Pennsylvania; after approximately fifteen minutes of continuous restraint the boy reportedly yelled “Stop it, I can’t breathe,” to which his counselor responded, “You’ll be able to breathe if you stop struggling.”¹ The boy lost consciousness after several minutes and died a day later due to “hypoxic encephalopathy due to compressional asphyxia, a brain injury sustained as a result of lack of oxygen due to the compression of the student’s chest.”² In 2005, a thirteen-year-old boy with autism was smothered to death by an aide who sat on him in a van when the child unbuckled his seatbelt and began “acting up”; the aides did not attempt to resuscitate the boy after he became unconscious and instead drove to a game store and to the home of one of the aides before returning to school.³ The same student had been removed from his previous facility two years prior after he was subjected to extended forced seclusion in his room, where he had eventually been found covered in bruises and his own urine, having been restrained against his parents’ wishes and repeatedly denied meals.⁴ In Georgia, another thirteen-year-old student, diagnosed with attention-deficit/hyperactivity disorder, hanged himself in a locked seclusion room with a rope provided to him by teachers to “hold up his pants.”⁵ This incident occurred just a few weeks after the boy had verbally expressed suicidal ideation in school.⁶

These tragic stories highlight some of the worst cases of abuse and neglect resulting from the practice of restraint and seclusion in schools. Not all uses of restraint and seclusion techniques are harmful to students, and indeed, sometimes they may be

1. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-719T, SECLUSIONS AND RESTRAINTS: SELECTED CASES OF DEATH AND ABUSE AT PUBLIC AND PRIVATE SCHOOLS AND TREATMENT CENTERS 13 (2009), <http://www.gao.gov/assets/130/122526.pdf> [<https://perma.cc/C3HK-QBAG>] [hereinafter GAO REPORT].

2. *Id.* at 14.

3. *Id.* at 19.

4. *Id.* at 18.

5. NAT’L DISABILITY RIGHTS NETWORK, SCHOOL IS NOT SUPPOSED TO HURT: INVESTIGATIVE REPORT ON ABUSIVE RESTRAINT AND SECLUSION IN SCHOOLS 14–15 (2009), <https://www.ndrn.org/images/Documents/Resources/Publications/Reports/SR-Report2009.pdf> [<https://perma.cc/X3ZG-QS8Y>] [hereinafter NDRN REPORT].

6. *Id.*

necessary to protect staff, other students, or the restrained student himself. However, the lack of uniform federal standards governing the practice leaves students across the country vulnerable to its improper use or implementation. This Note proposes a solution to this problem grounded in amending the statute governing disability education as a whole. It recommends affirmatively amending the Individuals with Disabilities Education Act (IDEA) to require the inclusion of positive behavioral interventions and supports (PBIS) into students' individualized educational plans (IEPs); doing so will achieve internal harmony within the statute and a reduction in the incidence of aversive interventions, including restraint and seclusion. The Note also proposes enforcement and monitoring procedures to improve existing state laws.

This Part introduces the practices of restraint and seclusion in schools, their purported objectives, and the risk of abuse that such practices engender. Part II reviews past legislative and regulatory attempts to remedy this problem, including the Keeping All Students Safe Act. Part III reviews alternative remedial proposals. Finally, Part IV explores an alternative approach to legislating the practice of restraint and seclusion and provides recommendations for intermediary enforcement of existing laws.

A. WHAT IS RESTRAINT AND SECLUSION?

There are varying definitions of “restraint” and “seclusion” in the context of students with disabilities. The National Disability Advocacy Network (NDRN), in a groundbreaking 2009 report on the prevalence of restraint and seclusion in schools (the “NDRN Report”), provided a comprehensive definition of both terms based on the use of these practices in healthcare settings.⁷ The NDRN Report defined “restraint” as, in pertinent part, “(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

7. *Id.* at 5–6.

for the [individual's] condition.”⁸ Similarly, the United States Department of Education's Office for Civil Rights (OCR) has defined “physical restraint” as “a personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs or head freely.”⁹

In addition, the NDRN Report defined “seclusion” as “the involuntary confinement of [an individual] alone in a room or area from which the [individual] is physically prevented from leaving.”¹⁰ The NDRN Report noted that seclusion may only be used for the management of violent or self-destructive behavior.”¹¹ OCR's 2016 Dear Colleague Letter defines “seclusion” as “the involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving.”¹²

OCR's Civil Rights Data Collection (CRDC) indicated that students with disabilities are restrained and secluded by schools more frequently than those without disabilities.¹³ In the 2013–14 school year, nearly 70,000 special education students were restrained and secluded, and the number of individual incidents of restraint and seclusion was in excess of 200,000.¹⁴

8. *Id.* While this definition encompasses physical, mechanical, and chemical restraints, this Note uses the term “restraint” to refer to physical restraints, which excludes the use of mechanical devices, equipment, or medications (chemical restraints). See Cali Cope-Kasten, Note, *It's Time to Start Showing a Little Restraint: In Search of a Compromise on Federal Seclusion and Restraint Legislation*, 47 U. MICH. J.L. REFORM 217, 221 (2013). An outright prohibition of mechanical restraints in schools is critically important, as mechanical restraints are the documented cause of many restraint injuries. *Id.* at 221 n.20 (citing GAO REPORT, *supra* note 1, at 22–25). Thus, this analysis, which acknowledges the occasional necessity of physical restraints, see *supra* Part III.A, is inapplicable to mechanical restraints. Furthermore, chemical restraints are not included in this Note's definition of “restraint,” as chemical restraints have never presented a significant threat to child safety in the educational context (although their use is well-documented in institutions and juvenile detention facilities). *Id.* at 221 n.22.

9. Office of Civil Rights (OCR), U.S. Dep't. of Educ., Dear Colleague Letter: Restraint and Seclusion by Public School Districts 6 (Dec. 28, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-504-restraint-seclusion-ps.pdf> [<https://perma.cc/L969-L7XM>] [hereinafter OCR Letter].

10. See NDRN REPORT, *supra* note 5, at 5–6.

11. *Id.*

12. See OCR Letter, *supra* note 9, at 7. The Letter clarifies that seclusion “does not include a timeout, which is a behavior management technique that is part of an approved program, involves the monitored separation of the student in a non-locked setting, and is implemented for the purpose of calming.” *Id.*

13. *Id.* at 2.

14. Christina A. Samuels, *70,000 Students with Disabilities Secluded, Restrained in Schools*, EDUC. WEEK (May 16, 2017), <https://www.edweek.org/ew/articles/2017/05/17/70000-students-with-disabilities-secluded-restrained-in.html> [<https://perma.cc/YYZ4-9PDP>].

B. WHAT ARE POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS (PBIS)?

To fully understand restraint, seclusion, and their place within the current legal framework, it is important to discuss the evolution of behavioral interventions and the accompanying debate regarding the efficacy and propriety of aversive techniques. An examination of aversive interventions also elucidates the evolution and purpose of their alternatives, positive behavioral interventions and supports (PBIS).

Certain practices implemented in the context of disability education are referred to as “aversive interventions.”¹⁵ The term, which historically included painful and uncomfortable techniques such as “noxious liquids, sprays of water mist in the face, slapping, hitting, physical restraint, or contingent electric shock,”¹⁶ now refers primarily to restraint and seclusion, as older, more controversial “treatments” have been abandoned.¹⁷

In the 1980s, growing concerns about the use and impact of aversive interventions spawned the PBIS movement.¹⁸ PBIS is an “implementation framework for maximizing the selection and use of evidence-based prevention and intervention practices along a multi-tiered continuum that supports the academic, social, emotional, and behavioral competence of all students.”¹⁹ The current PBIS framework, as described at the Department of Education-funded PBIS Technical Assistance Center,

15. Elizabeth A. Shaver, *Should States Ban the Use of Non-Positive Interventions in Special Education? Reexamining Positive Behavior Supports under IDEA*, 44 STETSON L. REV. 147, 158 (2014).

16. *Id.*

17. *Id.* at 170. Today, the only remaining school in the United States to use electric skin shocks as aversive therapy is the Judge Rotenberg Center in Massachusetts, which has been condemned by disability rights groups and investigated by the United Nations Special Rapporteur on Torture; see *NDRN Testifies On the Effectiveness of Aversive Conditioning Devices*, NAT'L DISABILITY RIGHTS NETWORK (Apr. 23, 2014), http://www.ndrn.org/images/Documents/Media/Releases/140422_FDA_testimony.pdf [<https://perma.cc/84NS-HPTW>]; Emily Willingham, *Autism Shock Therapy Practiced in US Is Torture, Says UN Official*, FORBES (Mar. 8, 2013), <https://www.forbes.com/sites/emilywillingham/2013/03/08/autism-shock-therapy-is-torture-says-un-official/#7681b3ae28bc> [<https://perma.cc/R4RS-NJWA>].

18. HANDBOOK OF POSITIVE BEHAVIOR SUPPORT 6–7 (Glen Dunlap et al., eds., 2009). This is also sometimes referred to as “positive behavioral support” (PBS).

19. *PBIS Frequently Asked Questions*, PBIS, <https://www.pbis.org/school/swpbis-for-beginners/pbis-faqs> [<https://perma.cc/ZVJ5-SQJ7>] (last visited Oct. 17, 2018).

incorporates a three-tiered “continuum” targeting practices at primary, secondary, and tertiary levels of support.²⁰

The “primary prevention” zone (Tier 1) includes policies that are applicable to “students without serious problem behaviors,” estimated to represent 80–90% of the student population;²¹ these include programs to “teach appropriate behavior to all children,” the general practice of early intervention, monitoring of student progress, and collection of data for decision-making.²² The objective of primary prevention is “to reduce new cases of problem behavior.”²³

“Secondary prevention” (Tier 2) focuses on “specialized group interventions” for students considered to be “at-risk” who are not currently engaging in problem behaviors (approximately 5–15% of the student body).²⁴ Tier 2 interventions often involve group interventions with ten or more students participating each week, as well as programs like a “social skills club.”²⁵

“Tertiary prevention” (Tier 3; also known as the “red zone”) targets students who currently exhibit chronic or intense problem behaviors (approximately 1–7% of the student population).²⁶

20. *Brief Introduction and Frequently Asked Questions About PBIS*, PBIS (June 29, 2018), <https://www.pbis.org/school/swpbis-for-beginners/pbis-faqs#briefintro> [<https://perma.cc/JA2U-4BEY>].

21. George Sugai et al., *Applying Positive Behavior Support and Functional Behavioral Assessment in Schools*, 2 J. POSITIVE BEHAVIOR INTERVENTIONS 131, 136 (2000).

22. *Tier 1 Supports*, PBIS, <https://www.pbis.org/school/tier1supports> [<https://perma.cc/4JEV-VKCC>] (Oct. 17, 2018). Researchers from the University of Nebraska-Lincoln note that typical Tier 1 interventions include: the establishment of school-wide behavioral expectations such as “Be safe, be respectful, be responsible;” explicit teaching of model behaviors in different school environments; “systematic, consistent reinforcement” of positive behaviors; “consistent, fair and evidence-based consequences for when behavioral expectations are not met” such as time-outs and loss of privileges, and the collection and analysis of behavioral data. SCOTT FLUKE & REECE L. PETERSON, POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS: STRATEGY BRIEF 2–3 (Oct. 2013), <https://k12engagement.unl.edu/strategy-briefs/PBIS%2012-17-15.pdf> [<https://perma.cc/V7WG-3ANK>] (last visited Oct. 17, 2018).

23. *Tier 2 Supports*, PBIS, <https://www.pbis.org/school/tier2supports> [<https://perma.cc/F6NJ-KLEB>] (last visited Oct. 17, 2018).

24. Sugai, *supra* note 21, at 136.

25. *Tier 2 FAQs*, PBIS, <https://www.pbis.org/school/tier2supports/tier2faqs> [<https://perma.cc/LH2N-AQHM>] (last visited Oct. 17, 2018). For example, a Tier 2 social skills club may entail hour-long weekly sessions in which special and general educators engage in teaching and role play of appropriate skills in a group setting. Tim Lewis, *Teaching Social Skills: The Cornerstone of SW-PBS*, PBIS, www.pbis.org/common/pbisresources/presentations/Lewis_BC_SocialSkills.ppt [<https://perma.cc/4ADD-K6FU>] (last visited Oct. 17, 2018).

26. Sugai, *supra* note 21, at 136.

These “intensive supports” often include functional behavioral assessment-based interventions, which may include: “(1) guidance or instruction for the student to use new skills as a replacement for problem behaviors, (2) some rearrangement of the antecedent environment so that problems can be prevented and desirable behaviors can be encouraged, and (3) procedures for monitoring, evaluating, and reassessing of the plan as necessary.”²⁷ Tier 3 supports also may include “emergency procedures to ensure safety and rapid de-escalation of severe episodes” when the students’ behavior presents a risk to themselves or others.²⁸ PBIS is often discussed in the context of “functional behavioral assessments” (FBAs), which the PBIS Technical Assistance Center defines as a “result-oriented process that seeks to identify challenging behaviors, the actions that predict the occurrence and non-occurrence of those behaviors, and how those behaviors vary across time.”²⁹ Ultimately, PBIS is not designed to be a one-size-fits-all formula.³⁰ It is instead an adaptable framework that is designed to fit the needs of both the particular student in question and the student body as a whole.

27. *What is Tier 3 PBIS*, PBIS, <https://www.pbis.org/school/tier-3-supports/what-is-tier-3-pbis> [<https://perma.cc/WCM4-M9MW>] (last visited Oct. 17, 2018).

28. *Id.* While the PBIS Technical Center does not clarify what these emergency procedures may entail — and how they differ from, relate to, include or exclude aversive interventions — one California jurisdiction’s PBIS manual notes that staff responding to behavioral emergencies should be certified in crisis de-escalation that “emphasize[s] the prevention of serious behavior where least restrictive approaches such as non-verbal, para-verbal, and verbal communication are utilized first. Second, as necessary, staff may use personal safety techniques of evasion to get out of holds. Finally, and only as a last resort, physical restraint may be utilized by trained personnel, emphasizing a team-approach.” DMSelpa, *Chapter 10: Positive Behavioral Interventions & Supports* 10 (Oct. 24, 2016), <http://dmselpa.org/common/pages/DisplayFile.aspx?itemId=15063668> [<https://perma.cc/E3WC-WXZW>]. The same district notes that the state education code prevents local educational agencies from using techniques traditionally associated with aversive interventions, such as electroshock, or “interventions . . . that subject[] students to verbal abuse, humiliation or ridicule; that deprives students of any of their senses or of sleep, food, water or shelter or proper supervision; or that involve the use of noxious sprays or substances.” *Id.*

29. Heidi von Ravensberg & Allison Blakely, *When to Use Functional Behavioral Assessment? Best Practice vs. Legal Guidance*, PBIS 3 (2014), https://www.pbis.org/Common/Cms/files/pbisresources/EvalBrief_Oct2015.pdf [<https://perma.cc/3W6X-HP4J>]. For more on functional behavioral assessments, see *infra* Part II.A.

30. *PBIS Frequently Asked Questions*, PBIS, *supra* note 19 (noting that the framework is not designed to be a “packaged curriculum, scripted intervention, or manualized strategy”).

C. WHY ARE RESTRAINT AND SECLUSION PROCEDURES USED?

Restraint and seclusion procedures are typically justified by schools as occasionally necessary to maintain or reestablish classroom safety when a student has spiraled out of control. The Council for Children with Behavioral Disorders has stated that the purpose of physical restraint is to “control the behavior of a student in an emergency situation to prevent danger or possible injuries to that student or others in the environment,” noting that most professionals do not recognize potential property damage as a legitimate purpose of restraint.³¹ The Council describes a variety of apparent purposes for seclusion, including “a consequence or punishment for inappropriate behavior for purposes of changing the behavior,” “removal from a reinforcing environment,” “permitting the student’s emotions to cool down,” and “providing relief for the teacher from managing the student’s behavior,” while noting that “professionals believe that seclusion is warranted only when a student’s behavior is so out of control or so dangerous that the student’s behavior in the current environment poses a risk of injury to the student or others.”³²

Some have criticized the general “safety” justification for the use of these procedures as susceptible to inappropriate conflation with their use as disciplinary measures. This argument is supported by much of the anecdotal evidence and investigative reporting discussed in Part II.³³ However, in some extraordinary cases, restraint and seclusion may be necessary to protect students and staff.³⁴

D. WHAT RISKS DO RESTRAINT AND SECLUSION POSE?

The past few decades have seen increased attention to the risk of injury and death that may result from the practices of restraint and seclusion, particularly when implemented upon students

31. Council for Children with Behavioral Disorders, *CCBD’s Position Summary on The Use of Physical Restraint Procedures in School Settings*, 34 BEHAV. DISORDERS 223, 225 (2009).

32. Council for Children with Behavioral Disorders, *CCBD’s Position Summary on The Use of Seclusion in School Settings*, 34 BEHAV. DISORDERS 235, 236 (2009).

33. Cope-Kasten, *supra* note 8, at 222.

34. For a more detailed discussion on the safety justification associated with the utilization of restraint and seclusion and its potential role in effectively regulating in this arena, see *infra* Part II.A.

with disabilities. In October 1998, *The Hartford Courant* ran a groundbreaking story called *Deadly Restraint*, documenting 142 deaths that had occurred in the United States in the previous decade as a result of physical restraint, and the underreporting and cover-ups that often followed these fatal incidents.³⁵ The report was received with shock by Connecticut policymakers and the general public, and the state's General Assembly enacted the Connecticut Act Concerning Physical Restraints of Persons with Disabilities less than a year later.³⁶

However, this increased awareness did not lead to significant change nationwide. The aforementioned January 2009 NDRN Report, entitled "School Is Not Supposed to Hurt," noted that while some states had indeed "enacted laws, issued regulations and developed policies and guidelines" to address the problem, others had inconsistent laws and some had none at all.³⁷ In May of the same year, the Council of Parent Attorneys and Advocates (COPAA) published a report detailing 185 incidents of abusive restraint and abuse in schools and concluding that the use of such techniques is "extensive."³⁸ The COPAA report also provided statistical information indicating that 71% of schools surveyed did not incorporate a PBIS-based framework.³⁹

In 2009, amid continuing concerns about the prevalence of restraint and seclusion in schools, the Government Accountability Office (GAO) published a report (the "GAO Report") detailing such practices and legislative and administrative mechanisms designed to address and regulate them.⁴⁰ In the report, the GAO found that there were hundreds of allegations of death and abuse

35. Eric M. Weiss et al., *Deadly Restraint*, HARTFORD COURANT (Oct. 11, 1998), http://articles.courant.com/1998-10-11/news/9810090779_1_mental-health-deaths-restraint-policy [https://perma.cc/TC5J-JMR8].

36. Kristi D. Aalberg, *An Act Concerning Physical Restraints of Persons with Disabilities: A Legislative Note on Connecticut's Recent Ban of the Use of Life-Threatening Restraints on the Mentally Ill*, 4 QUINNIPIAC HEALTH L.J. 211, 211 (2001).

37. NDRN REPORT, *supra* note 5, at 9 (describing a "patchwork of inadequate state laws").

38. Jessica Butler, *Unsafe in the Schoolhouse: Abuse of Children with Disabilities*, COUNCIL FOR PARENT ATT'YS AND ADVOCATES, INC. 2 (2009), http://c.ymcdn.com/sites/www.copaa.org/resource/collection/662B1866-952D-41FA-B7F3-D3CF68639918/UnsafeCOPAAMay_27_2009.pdf [http://perma.cc/8R77-RUMV] (documenting 185 reported incidents of restraint and seclusion in a variety of school settings, including regular education classrooms, recess, cafeterias, nurses' offices, buses, and after school programs, as well as specialized settings like segregated disability-only classrooms, private seclusion rooms in residential schools, therapy rooms, and more).

39. *Id.* at 3.

40. *See supra* note 1.

related to the use of restraint and seclusion in schools between 1990 and 2009.⁴¹ The GAO Report described several of these allegations, including a student who died after being put in a prone restraint, a student with autism who was strapped to a toilet training chair for hours at a time, and multiple accounts of students who suffered broken bones as a result of forcible restraints.⁴²

The GAO Report identified several “common themes” that emerged from the cases it studied. The first of these themes was that “children with disabilities were sometimes restrained and secluded even when they did not appear to be physically aggressive and their parents did not give consent.”⁴³ These children, many of whom were diagnosed with autism, post-traumatic stress disorder, or attention-deficit/hyperactivity disorder, were routinely restrained and secluded not as a protective or last-resort measure, but as a matter of discipline.⁴⁴ The second theme the GAO Report addressed was the potentially deadly nature of “facedown or other restraints that block air to the lungs.”⁴⁵ The third theme focused on how teachers and staff in the observed cases were often not trained in the appropriate use of restraint and seclusion techniques.⁴⁶ Lastly, the GAO Report noted that some teachers and staff from these cases continued to be employed as educators following the problematic implementation of restraint or seclusion.⁴⁷

When the GAO Report was published, nineteen states had no laws or regulations regarding the use of restraint and seclusion in schools.⁴⁸ Since its publication, many states have enacted such laws, and today the number of states with no legislation or regulation in this area has decreased to four: Idaho, North

41. *Id.* at 5.

42. *Id.* at 5–7.

43. *Id.* at 7.

44. *Id.* at 8.

45. *Id.*

46. *Id.* at 9. For a more detailed discussion of staff training in the use of restraints and seclusions, see *infra* Part IV.B.

47. *Id.* at 9–10.

48. *Id.* at 4 (noting the absence of legislation and regulation in Arizona, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, New Jersey, North Dakota, Oklahoma, South Carolina, South Dakota, Vermont, Wisconsin, and Wyoming).

Dakota, New Jersey, and South Dakota.⁴⁹ Furthermore, there is still no federal law addressing the practice, and state law and enforcement continues to vary widely.⁵⁰ For example, twenty-two states require that an “emergency threatening physical danger” exist before staff can impose restraints against students with disabilities.⁵¹ Twenty-seven states ban the use of restraints that impede breathing and threaten life for all children, while thirty-three states have a similar ban for children with disabilities.⁵² Ultimately, despite substantial progress in the last decade, many state laws in this arena still fail to adequately protect students from potential abuse.⁵³

In addition, the problem of non-enforcement also persists in states that do have substantive legislation or regulation targeted at restraint and seclusion practices. Ohio is illustrative: though the State’s 2013 regulations have been praised as comprehensive and an appropriate model for federal regulation,⁵⁴ advocacy group Disability Rights Ohio published a 2016 report highlighting “[the absence of a] system for monitoring reports for compliance of the rule, inadequate reporting and notification of incidents, insufficient recourse for parents and students when the rule has been violated, and no coordinated effort among agencies to thoroughly investigate incidents.”⁵⁵

In sum, although the incidence of problematic restraint and seclusion is widespread and often yields injurious and sometimes fatal results, the issue has not received adequate legislative attention at the federal level, and state efforts have achieved

49. Jessica Butler, *How Safe is the Schoolhouse? An Analysis of State Seclusion and Restraint Policies*, AUTISM NAT’L COMM. 20 (Jan. 2017), <http://www.autcom.org/pdf/HowSafeSchoolhouse.pdf> [<http://perma.cc/UZ48-DTSX>].

50. *Id.* at 4.

51. *Id.*

52. *Id.* at 5.

53. Deanna Arivett, Comment, *The Need for Restraints in Public Schools? Keeping Students Safe in the Age of Inclusion*, 40 DAYTON L. REV. 155, 162 (2015) (noting that state laws on restraint and seclusion currently “range from nonexistent to comprehensive”).

54. *Id.* at 161. The Ohio rule prohibited specific practices, including prone restraints, seclusion or restraints of preschool children, chemical restraints, certain mechanical restraints, and seclusion in locked rooms or areas. It also established standards for the implementation of PBIS in all school districts in the state. OHIO ADMIN. CODE 3301-35-15 (2013).

55. *New Disability Rights Ohio Report Highlights Lack of Enforcement of Ohio Department of Education’s Restraint and Seclusion Rule*, DISABILITY RTS. OHIO (Feb. 8, 2016), <https://www.disabilityrightsohio.org/news/new-disability-rights-ohio-report-highlights-lack-of-enforcement-of> [<http://perma.cc/H64X-25EE>].

mixed results with respect to effective legislation, rulemaking, and enforcement efforts. With states regulating restraint and seclusion exclusively, children who move across state borders are vulnerable to losing legal protections, which puts their lives and safety in jeopardy.⁵⁶ Part II describes the limited federal legislative and regulatory framework that does currently exist, and further explains why this framework is inadequate to address the issue of restraint and seclusion.

II. THE CURRENT LEGAL AND REGULATORY FRAMEWORK

Despite the absence of a federal law directly addressing the practices of restraint and seclusion, a web of legislation and regulation does provide for some federal guidance as to the implementation of these policies. This includes the IDEA,⁵⁷ the failed Keeping All Students Safe Act bills,⁵⁸ and various administrative guidance documents interpreting the IDEA and other statutes.⁵⁹ The statutory and regulatory components of this framework provide important baseline protections for students with disabilities in schools, but fall short of directly regulating restraint or seclusion or providing students with meaningful protection from their abusive application.

A. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

The IDEA provides the basic legislative framework addressing protections for students with disabilities. First adopted in 1975 as the Education for All Handicapped Children Act,⁶⁰ the statute

56. See Butler, *supra* note 49, at 10 (“Families who move across a river or down a highway into another state can lose their protections. A child moving from Mississippi to Arkansas loses his protection from restraint; a child moving from Minnesota to North Dakota loses all of her protections. Military families may be transferred between bases in different states. Civilian parents may be transferred by their employers, or move to find better jobs or care for family members.”).

57. The IDEA, or Individuals with Disabilities Education Act, is the statute governing special education in the United States. See Cari Carson, Note, *Rethinking Special Education’s “Least Restrictive Environment” Requirement*, 113 MICH. L. REV. 1397, 1401 (2015) (citing 20 U.S.C. §§ 1400-09, 1411-19, 1431-44, 1450-55, 1461-66, 1470-75, 1481-82 (2012)).

58. These bills sought to legislate the use of restraint and seclusion directly. See *infra* Part II.C.

59. See *infra* Part II.E.

60. Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975). Until the passage of this law, many students with disabilities were “considered uneducable” and were thus entirely excluded from the public schooling system. Resulting

is designed to ensure that every student with a disability has access to a “free, appropriate public education” (FAPE), which must be provided in the “least restrictive environment” (LRE) possible.⁶¹ In 1990, the statute was reauthorized, amended, and renamed as the IDEA; the statute was further amended in 1997 and 2004.⁶² The IDEA requires the creation of an Individualized Education Plan (IEP) for every student covered by the statute.⁶³ The provision for the practice of restraint and seclusion may be

remedial legislation thus focused on integration and prioritized educating students with disabilities in the same settings as their nondisabled peers. Curt Dudley-Marling & Mary Bridget Burns, *Two Perspectives on Inclusion in the United States*, 1 GLOBAL EDUC. REV. 15 (2014).

61. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400(d)(1), 1412(a)(5)(A) (2004). States receive funding from the Department of Education when they provide assurances to the Department that they have implemented “policies and procedures” to comply with the statute’s requirements. 20 U.S.C. § 1412(a) (2012).

Like many of the IDEA’s legal concepts, the LRE requirement arose out of the preference for integration that shaped the development of the statute after longstanding exclusion of students with disabilities from public education. *See supra* note 60; *see also* Carson, *supra* note 57, at 1398–99 (“The idea of integration is central to U.S. disability law, including special education law . . . [the] Individuals with Disabilities Education Act . . . requires that students with disabilities be educated in the most integrated, least restrictive environment for those students.”).

62. *See* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 1, 111 Stat. 37 (1997); Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 1, 118 Stat. 2647 (2004). The latter is the most recent reauthorization of the IDEA.

63. 20 U.S.C. § 1414(d)(1)(A) (2012). An IEP is a “written statement for each child with a disability” that includes (among other items): “a statement of the child’s present levels of academic achievement and functional performance,” “a statement of measurable annual goals, including academic and functional goals,” “a description of how the child’s progress toward meeting the annual goals . . . will be measured and when periodic reports on the progress of the child is making toward the annual goals . . . will be provided,” “a statement of the special education and related services and supplementary aids and services” and a “statement of the program modifications or supports for school personnel” to be provided to the child, “an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and . . . activities,” “the projected date for the beginning of the services and modifications” and their “anticipated frequency, location, and duration” and transition services related to set-out “postsecondary goals . . . related to training, education, employment, and, where appropriate, independent living skills” when the child turns sixteen. *Id.* IEPs are legally binding documents; the IDEA imposes a requirement that the local educational agency or state agency ensure that they are in effect as of the beginning of each school year. 20 U.S.C. § 1414(d)(2)(A) (2012).

Children are covered by the IDEA if they have “intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and . . . who, by reason thereof, need . . . special education and related services.” 20 U.S.C. § 1401(3)(A)(i) (2012).

included in a student's IEP, as well as other behavioral interventions.⁶⁴

Yet the IDEA does not directly provide for regulation of restraint and seclusion in schools generally. As some have noted, the combination of these two competing aspects of the IDEA⁶⁵ raises the risk that, without further legislation, such practices might be incorporated into a student's educational plan without meaningful parental understanding of the potential consequences of their inclusion.⁶⁶ Indeed, an "IEP team" may even recommend aversive interventions like restraint and seclusion to parents without clarifying what those interventions entail, muddying the issue of consent regarding their incorporation in the plan.⁶⁷

The 1997 reauthorization of the IDEA introduced PBIS, requiring that the IEP team of "a child whose behavior impedes his or her learning or that of others, *consider*, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior."⁶⁸ The 2004 reauthorization reworded this slightly, deleting the "when appropriate" qualifier, such that IEP teams are now required to always consider PBIS whenever a child's behavior impedes learning.⁶⁹ The 2004 reauthorization mentions functional behavioral assessments (FBAs) only in the context of the placement of a student with a disability in an alternative educational setting for more than ten days after the student has violated the school code.⁷⁰ When such a violation occurs, the student must continue to receive a free and appropriate public education, and "shall receive, as appropriate, a functional behavioral assessment, [and] behavioral intervention services and modifications, that are designed to address the behavior

64. Laura C. Hoffman, *A Federal Solution that Falls Short: Why the Keeping All Students Safe Act Fails Children with Disabilities*, 37 J. LEGIS. 39, 54 (2011).

65. Namely, its provision of IEPs as an educational tool for students with disabilities and concurrent silence regarding the potentially harmful uses of restraint and seclusion.

66. Hoffman, *supra* note 64, at 54. If parents do not provide parental consent to special education-related services (as in those included in IEPs), the local educational agency shall not provide those services. 20 U.S.C. § 1414(a)(D)(ii)(II) (2012).

67. *Id.* (noting that the IEP may "recommend practices of restraint and seclusion without necessarily describing them in those terms to parents").

68. Individuals with Disabilities Amendments Act of 1997 § 614(d)(3)(B)(i), 111 Stat. at 86 (1997) (emphasis added) (current version at 20 U.S.C. § 1414(d)(3)(B)(i) (2012)).

69. Individuals with Disabilities Education Improvement Act of 2004 § 614(d)(3)(B)(i), 118 Stat. at 2712 (2004) (current version at 20 U.S.C. § 1414(d)(3)(B)(i) (2012)).

70. 20 U.S.C. §§ 1415(k)(1)(D), 1415(k)(1)(E) (2012).

violation so that it does not recur.”⁷¹ If the local educational agency, the student’s parents, and the IEP team determine that the behavior was a “manifestation of the child’s disability,” the IEP team shall conduct an FBA.⁷² A behavioral intervention plan (BIP) is then put into place for the student if the agency had not conducted the FBA before the problem behavior occurred.⁷³ The statute also provides for review and modification of an existing behavioral plan to address the behavior in question.⁷⁴ As the PBIS Technical Assistance Center itself notes, the statutory understanding of FBAs is at odds with industry best practices, which suggest that FBAs should be “prescriptive . . . not reactive.”⁷⁵ The delay caused by the statute in imposing the process only after a student has been suspended or moved to another educational setting hinders the ability of schools to establish a truly “function-based, prevention plan.”⁷⁶

The implications of the IDEA’s parameters of regulation of restraints, seclusions, PBIS, and FBA are further explored later in this Note; ultimately, the statute’s failure to regulate the potentially abusive practices of restraint and seclusion, coupled with its limited incorporation of PBIS and FBAs, violates its core tenet that students shall receive a free and appropriate public education in the least restrictive setting possible.⁷⁷ By mandating the inclusion of PBIS in students’ IEPs and thereby including behavioral interventions in student plans prior to the point at which such interventions would be ordinarily be included

71. *Id.* § 1415(k)(1)(D)(ii).

72. *Id.* § 1415(k)(1)(F).

73. *Id.*

74. *Id.*

75. Von Ravensberg & Blakeley, *supra* note 29, at 4.

76. *Id.*

77. Some courts and administrative agencies have ruled that abuse can result in the denial of FAPE. *See Doe ex rel. Doe v. Fulton County School District*, No. OSAH-DOE-SE-1135718-60 (Feb. 1, 2012) (finding that the school district denied student plaintiff FAPE following widespread physical abuse by his teacher). *See also Pullen v. Botetourt County School Bd.*, No. 94-686-R, 1995 WL 738983, at *4 (W.D. Va. Feb. 13, 1995) (“The use of discipline and in-class instruction are closely related in providing a child with a free appropriate public education and are properly within the purview of the IDEA . . .”); *John G. v. Ne. Educ. Intermediate Unit 19*, No. 3:06-CV-01900, 2007 WL 2844828, at *3–4 (M.D. Pa. 2007) (citing *Pullen*, 1995 WL 738983 at *4; *Mallory v. Knox County Sch. Dist.*, No. 3:06-CV-122, 2006 WL 3484015, at *6) (“Other courts have noted that physical and emotional abuse fall within the ambit of ‘the provision of a free appropriate public education.’”).

in the current FBA system, Congress could close the gap between outdated, “reactive” law and “prescriptive” best practices.⁷⁸

B. THE CHILDREN’S HEALTH ACT

The Children’s Health Act of 2000 began to pave the way for legislation targeted at the practices of restraint and seclusion in medical and federally funded residential facilities. The Act did not extend to the use of these practices in schools.⁷⁹ However, its original proponent, Senator Christopher Dodd of Connecticut, was encouraged to pursue advocacy for further legislation related to these practices in the following years, which led to the introduction of the Keeping All Students Safe Act.⁸⁰

C. THE KEEPING ALL STUDENTS SAFE ACT

The Keeping All Students Safe Act (KASSA) was a pair of bills proposed by Congressman George Miller of California and Senator Dodd in 2009 to directly address abusive practices of restraint and seclusion in schools.⁸¹ KASSA was introduced in response to growing concerns about these practices, including the 2009 GAO report.⁸² It passed in the House, but its companion bill ultimately died in the Senate.⁸³ While it is unclear why the bill did not pass the Senate, the Crisis Prevention Institute notes that the “highly sensitive and complex” nature of the issue of restraint and seclusion may have contributed to the inability of advocates to marshal bipartisan support for the bill.⁸⁴ Moreover, the floor comments of objecting members of the House mostly

78. Von Ravensberg & Blakeley, *supra* note 29, at 4.

79. Children’s Health Act of 2000, 106 Pub. L. 310, 114 Stat. 1101 (2000); Hoffman, *supra* note 64, at 60.

80. *Id.* at 61.

81. Keeping All Students Safe Act (KASSA), H.R. 4247, 111th Cong. § 2 (1) (2010). The statute applies to students in public schools, as well as students in private schools to the extent that those students benefit from programs wholly or partly funded by the Department of Education. *Id.* § 4(19), 11(b)(1). The statute does not apply to home schools, regardless of whether state law treats homeschooling as equivalent to attending a private school. *Id.* § 11(b)(2).

82. 156 CONG. REC. H. 1048, 1051.

83. *See id.* at 1063; Keeping All Students Safe Act (KASSA), S. 3895, 111th Cong. (2009) (as referred to S. Comm. on Health, Educ., Labor, & Pensions).

84. Tony Jace, *Why CPI Supports the Keeping All Students Safe Act*, CRISIS PREVENTION INSTITUTE BLOG (Apr. 23, 2015), <https://www.crisisprevention.com/Blog/April-2015/Keeping-All-Students-Safe-Act> [https://perma.cc/LP42-ZFVZ].

focused on how the proposed bill infringed upon states' rights;⁸⁵ it is possible that this concern contributed to the bill's stagnation in the Senate as well.

The House and Senate versions of KASSA differed in some important respects. With respect to physical restraint, both bills barred the practice except in emergency situations presenting an imminent threat of physical injury where less restrictive measures would not provide resolution.⁸⁶ The Senate bill also prohibited the use of restraints that interfere with a student's ability to communicate.⁸⁷

With respect to seclusion, the House bill took the same "emergency exception" approach and added a requirement that staff monitor children in seclusion, while the Senate bill went further, banning seclusion of children altogether.⁸⁸ Both bills also included staff training requirements to ensure that staff implementing these practices had learned "evidence-based techniques" that they could safely use.⁸⁹ Another notable feature of the bills was the prohibition of restraint as a named planned intervention in students' IEPs and similar behavioral and safety plans.⁹⁰ Procedures for the use of restraint or seclusion may be incorporated into school or local crisis plans as long as those plans were not specific to any particular student.⁹¹ Lastly, the bills required immediate verbal notification to parents after an incident of restraint, seclusion, or aversive intervention and written notification "within 24 hours of each such incident."⁹²

The House version of the Bill identified several key purposes, highlighting the need to prevent and reduce the use of restraint and seclusion in schools, while not calling for a total elimination of the practice.⁹³ KASSA's prohibition of certain kinds of

85. Valerie Strauss, *Keeping All Students Safe: A Bill Even this Congress Should Be Able to Pass*, WASH. POST (June 28, 2012), https://www.washingtonpost.com/blogs/answer-sheet/post/keeping-students-safe-a-bill-even-this-congress-should-be-able-to-pass/2012/06/28/gJQAuRkQ8V_blog.html?utm_term=.b29efc629935 [<https://perma.cc/3STC-FGQ5>].

86. See Keeping All Students Safe Act (KASSA), S. 2020, 112th Cong., § 4(2)(A)(i) (2012); H.R. 1381, 112th Cong., § 5(a)(2)(A) (2011).

87. S. 2020 § 4(2)(A)(ii).

88. See H.R. 1381 §§ 5(a)(2)(A), 5(a)(2)(C); S. 2020 § 4(1)(A).

89. See H.R. 1381 § 5(a)(2)(D)(i); S. 2020 § 4(2)(D)(i).

90. See H.R. 1381 § 5(a)(4); S. 2020 § 4(2)(E).

91. H.R. 4247 § 5(a)(4).

92. *Id.* §§ 5(a)(5)(A)(i), 5(a)(5)(A)(ii); S. 2020 § 4(3)(iv).

93. H.R. 4247 § 3(1).

restraint⁹⁴ attempted to further this goal and acknowledged the theme noted by the GAO that these restraints are more empirically dangerous to students.⁹⁵

Since its initial introduction in 2011, KASSA has been reintroduced several times, including in 2015 by Representative Donald Beyer of Virginia; it subsequently was referred to the House Committee on Education and the Workforce's Subcommittee on Early Childhood, Elementary and Secondary Education, but did not advance to the floor.⁹⁶ In November 2018, KASSA was reintroduced by Representative Beyer and Senator Chris Murphy of Connecticut.⁹⁷

D. THE EVERY STUDENT SUCCEEDS ACT (ESSA)

Restraint and seclusion received some legislative attention when the Every Student Succeeds Act, a replacement of the earlier No Child Left Behind Act,⁹⁸ was signed into law in 2015 by President Obama.⁹⁹ While the law focuses primarily on the standardized testing requirements addressed by its predecessor, it also requires states to adopt plans to reduce the use of “aversive behavioral interventions that compromise student health and safety.”¹⁰⁰ This is helpful, but still leaves the historical gap for federal legislation of these practices, as the statute does not detail how such plans should be created or how

94. Specifically, the House bill requires the Secretary of Education to promulgate regulations prohibiting school personnel from imposing mechanical restraints, chemical restraints, physical restraints that restrict breathing, and aversive behavioral interventions that compromise health and safety. H.R. 4247 § 5(a)(1).

95. GAO REPORT, *supra* note 1, at 8–9 (noting the increased occurrence of fatalities in incidents involving prone restraints and restraints that restrict the flow of air to students' lungs).

96. Keeping All Students Safe Act (KASSA), 114 H.R. 927, 114th Cong. (2015) (as introduced in the House). This version of the bill included a provision allowing the Secretary of Education to award grants to state educational agencies to assist in, among other objectives, the implementation of school-wide positive behavioral support approaches to “improv[e] school climate and culture.” 114 H.R. 927 § 7(a).

97. Keeping All Students Safe Act (KASSA), 115 H.R. 7124, 115th Cong. (2018) (as introduced in the House).

98. The No Child Left Behind Act reauthorized the Elementary and Secondary Education Act of 1965, requiring public schools receiving federal funding to administer statewide standardized testing in reading and math and compile data on scoring results for the entire student population as well as particular subdivisions within it, focusing particularly on disadvantaged students. No Child Left Behind Act of 2001 (NCLB), 20 U.S.C. § 6319 (2011).

99. Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015).

100. 20 U.S.C. § 6311(g)(1)(C)(iii) (2012).

new policies should be enforced,¹⁰¹ nor does it define “aversive behavioral interventions”¹⁰² (unlike KASSA, which provided detailed definitions of “restraint” and “seclusion”¹⁰³).

E. ADMINISTRATIVE GUIDANCE

Beyond the legislative acts discussed above, which relate either directly or indirectly to restraint and seclusion in the context of students with disabilities, one must also consider the regulatory context bearing upon these practices. Over the last fifty years, administrative agencies and executive departments have issued documents interpreting both the IDEA and the Rehabilitation Act of 1973, leading to a patchwork of administrative guidance bearing on the provision of interventions and support in student plans. Given the multiplicity of statutory sources for the current regulatory framework, the following discussion outlines Section 504 of the Rehabilitation Act before considering the myriad regulations, which primarily draw upon this provision and the IDEA.

Section 504 of the Rehabilitation Act of 1973 protects students with disabilities,¹⁰⁴ requiring districts to provide FAPE to children with disabilities through the creation of a particularized accommodation plan, known as a “504 plan.”¹⁰⁵ A “504 plan” is distinct from an IEP under the IDEA, as it is much less detailed and less individualized than an IEP.¹⁰⁶ For example, an IEP must include the child’s current level of academic performance, annual education goals, the services the child will receive and the timing of such services, accommodations for the child’s learning environment, modifications to the child’s curriculum, and provisions for how the child will take standardized tests and be

101. *Id.*

102. Pub. L. No. 114-95.

103. See H.R. 1381 § 4(8) (House bill definition of “restraint”); S. 2020 § (2)(8) (Senate bill definition of “restraint”); H.R. 1381 § 4(14) (House bill definition of “seclusion”); S. 2020 § 2(11) (Senate bill definition of “seclusion”).

104. The Rehabilitation Act is a wide-ranging piece of legislation providing accommodation and protection from discrimination for individuals with disabilities in different settings, including education and the workplace. Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. (1973).

105. *Id.*

106. FRED R. VOLKMAR & LISA A. WIESNER, ESSENTIAL GUIDE TO UNDERSTANDING AND TREATING AUTISM 138 (2017).

included in classes and activities.¹⁰⁷ By contrast, a 504 plan generally includes only the child's specific accommodations, supports or services, the names of the individuals providing those services, and the name of the person responsible for ensuring the plan is implemented.¹⁰⁸ Furthermore, while there are rigid requirements regarding the identity of members of a student's IEP team (which must include the child's parent, a general education teacher, a special education teacher, a school psychologist or specialist, and a district representative), a "504 team" has less specific requirements and usually includes the child's parent, general and special education teachers, and the school principal.¹⁰⁹

According to a "Dear Colleague" guidance document issued by the United States Department of Education in December 2016, the implementation of a restraint or seclusion practice against a student may implicate the school's responsibility under Section 504 to evaluate (or re-evaluate) the student's disability status and individualized plan and examine whether less restrictive means could be used to prevent imminent harm to the student or others in times of behavioral crisis.¹¹⁰ The Department clarified that the use of restraint and seclusion does not violate Section 504 in every situation, but may present a violation if it "(1) constitutes unnecessary different treatment . . . (2) is based on a policy, practice, procedure, or criterion that has a discriminatory effect on students with disabilities . . . or (3) denies a student's right to FAPE."¹¹¹

In August 2016, the Department of Education issued a significant "Dear Colleague" guidance document providing that IEP teams, in developing and reviewing a student's IEP, should "determine whether behavioral supports should be provided in

107. *The Difference Between IEPs and 504 Plans*, UNDERSTOOD, <https://www.understood.org/en/school-learning/special-services/504-plan/the-difference-between-ieps-and-504-plans> [<https://perma.cc/B96K-LBL2>] (last visited Oct. 18, 2018).

108. *Id.* See also *Sample 504 Plan for AD/HD*, UNDERSTOOD, <https://www.understood.org/~media/231736e1178c4708b09749acc1e6e3b8.pdf> [<https://perma.cc/BW3D-7XGE>] (last visited Nov. 1, 2018). In this sample 504 plan for a student with attention-deficit/hyperactivity disorder, a chart indicates that the student will receive several accommodations, including an extra set of books to keep at home to help with organizational skills; the chart also indicates that the teacher is the individual responsible for implementing this accommodation. *Id.*

109. *The Difference Between IEPs and 504 Plans*, *supra* note 107.

110. OCR Letter, *supra* note 9, at 10–11.

111. *Id.* at 12.

any of the three areas: (1) special education and related services, (2) supplementary aids and services, and (3) program modifications or supports for school personnel.”¹¹² The Letter defined “behavioral supports” as “generally refer[ring] to behavioral interventions and supports, and other strategies to address behavior,” but did not specifically refer to *positive* behavioral supports in this context, aside from reaffirming the statutory duty to consider such supports in the development of IEPs.¹¹³

Although these documents may provide some degree of protection to students subject to restraint and seclusion in schools, the future of federal regulatory guidance of these practices under the Trump administration is uncertain. As of the time of authorship, Secretary of Education Betsy DeVos has not commented on the policies underlying the use of restraint and seclusion.¹¹⁴ That said, the Obama-era “Dear Colleague” guidance documents addressing these practices were not included in an October 2017 mass rescission of guidance documents related to students’ rights under the IDEA.¹¹⁵ However, the Trump administration’s apparent preference for deregulation as an executive policy¹¹⁶ suggests that further regulatory protections for IDEA beneficiaries are unlikely to follow.

112. Office of Civil Rights (OCR), U.S. Dep’t. of Educ., *Dear Colleague Letter: Inclusion of Behavioral Supports in Individualized Education Plans 6* (Aug. 1, 2016).

113. *Id.* at 2 n.2.

114. Ben Hatttem, *How Washington Winks at Violent Discipline of Special Needs Kids*, POLITICO (Nov. 29, 2017), <https://www.politico.com/magazine/story/2017/11/29/department-education-violent-discipline-special-needs-children-215881> [<https://perma.cc/GXY7-YL66>].

115. Moriah Balingit, *DeVos Rescinds 72 Guidance Documents Outlining Rights for Disabled Students*, WASH. POST (Oct. 21, 2017), https://www.washingtonpost.com/news/education/wp/2017/10/21/devos-rescinds-72-guidance-documents-outlining-rights-for-disabled-students/?utm_term=.05cdbfbf9b91 [<https://perma.cc/89PU-7ZJH>].

116. *See Fact Sheet: President Donald J. Trump is Delivering on Deregulation*, WHITE HOUSE (Dec. 14, 2017), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-delivering-deregulation/?utm_source=link [<https://perma.cc/QGT8-4P5T>] (describing the Trump Administration’s promise to “eliminate regulations at a 2:1 ratio and impose no lifetime net regulatory costs” and noting that the actual deregulatory-to-regulatory ratio by Dec. 2017 was 22:1, far exceeding the President’s initial goal). *See also* Bridget C.E. Dooling, *Trump Administration Picks up the Regulatory Pace in its Second Year*, GEO. WASH. U. REG. STUDIES CTR (Aug. 1, 2018), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs1866/f/downloads/Dooling_Trump%27sFirst18Months.pdf [<https://perma.cc/FHS8-NSBJ>] (finding a regulatory decline of 74% in the Trump administration’s first full year and a decline of 70% compared to the Obama administration in the first 18 months of the presidential term); Connor Raso, *Where and Why Has Agency Rulemaking Declined Under Trump?* BROOKINGS (June 29, 2018), <https://www.brookings.edu/research/where-and-why-has-agency-rulemaking-declined-under-trump/> [<https://perma.cc/ZE5T-DHR8>] (finding significant reductions in rulemaking

The current state of legislation and regulation has yielded an unwieldy framework for the federal management of restraint and seclusion. While the IDEA provides a useful starting point as the governing statute for special education, it does not legislate restraint and seclusion specifically, and recent attempts to pass legislation more directly on point have failed to attract sufficient bipartisan support to be approved by both chambers of Congress. Moreover, while administrative regulations might have the capacity for meaningful regulation, relevant guidance falls short in failing to directly address the inclusion of positive behavioral interventions in IEPs. The guidance that does exist focuses primarily on the provision of FAPE under the less-detailed 504 plans or merely reaffirms elementary statutory obligations under the IDEA. With these legislative and regulatory shortcomings in mind, there remains a need for material federal solutions to the problem of restraint and seclusion.

III. CURRENT PROPOSALS

Facing the daunting challenge of reducing the harmful impact of restraint and seclusion in school settings, scholars and practitioners have proposed various solutions, including banning restraint and seclusion outright and legislating a more moderate version of KASSA. This Part reviews a few of these proposals and offers comments on their propriety, efficacy, and sufficiency as means to redress the harm posed by restraint and seclusion practices discussed above in Part I.

A. A TOTAL BAN ON RESTRAINT AND SECLUSION?

Following the introduction of the Keeping All Students Safe Act,¹¹⁷ some scholars suggested that the bill did not go far enough.¹¹⁸ Indeed, one scholar suggested that any use of

under the Trump administration as compared to 2001, 2009, and 2016, but no significant deregulatory rules in the first year of the Trump presidency); Susan E. Dudley, *Documenting Deregulation*, FORBES (Aug. 14, 2018), <https://www.forbes.com/sites/susandudley/2018/08/14/documenting-deregulation/#54b126371d13> [https://perma.cc/SY54-J6LS] (finding a decline of 63% in the first 18 months of the Trump presidency as compared to the Obama administration, focusing exclusively on “economically significant” final regulations with expected annual impacts of \$100 million or more).

117. See *supra* Part II.C.

118. See Christine F. Nishimura, Note, *Eliminating the Use of Restraint and Seclusion Against Students with Disabilities*, 16 TEX. J. ON C.L. & C.R. 189 (2011); Jennifer Noud,

restraint and seclusion is sufficiently injurious to students' wellbeing that the practice as a whole is unjustified, and the only way to adequately protect students with disabilities from abusive restraint and seclusion is to abandon the practice altogether in favor of PBIS.¹¹⁹ Another advocated for a near-total ban on the grounds that the practices may violate students' procedural and substantive due process rights under the Constitution.¹²⁰

These well-meaning arguments, however, do not acknowledge the reality that, when a students' behavior presents a sufficient risk to themselves or others,¹²¹ interventions involving less interference may not be sufficient to achieve a short-term solution to the present danger.¹²² Yet, given the risk of abuse, there should be strict limitations on the justifications for restraint and seclusion: any such procedures should be used only to protect the immediate safety of the student exhibiting dangerous behavior and other students and staff in the immediate vicinity. Justifications that focus on the efficacy of the technique to broadly reduce problem behaviors in non-crisis situations are inappropriate, as the evolution of state and federal laws and regulations has reflected.¹²³

Unfortunately, studies illustrating the success of school districts that have implemented a total ban on restraint and

Note and Comment, *The Use of Restraint and Seclusion on Disabled Students is a Violation of their Procedural and Substantive Due Process Rights*, 39 NOVA L. REV. 265 (2015).

119. See Nishimura, *supra* note 118.

120. See Noud, *supra* note 118.

121. Occasionally, students' anger may manifest in violence towards other students or staff (i.e. hitting, biting, kicking, etc.) or self-injury. MO. DEPT OF ELEMENTARY AND SECONDARY EDUC., MISSOURI SCHOOLWIDE POSITIVE BEHAVIOR SUPPORT: TIER 3 TEAM WORKBOOK 154 (July 2016), <http://pbissmissouri.org/wp-content/uploads/2017/06/2016-Tier-3.pdf?x30198> [<https://perma.cc/H9MQ-YJS6>].

122. Council for Children with Behavioral Disorders, *supra* note 31, at 225.

123. This is also supported by research involving individuals with intellectual disabilities. See Douglas J. Gagnon, Marybeth J. Mattingly, & Vincent J. Connelly, *The Restraint and Seclusion of Students with a Disability: Examining Trends in U.S. School Districts and Their Policy Implications*, 28 J. DISABILITY POL. STUDIES 66, 67 (2017) (citing Michael E. May, *Aggression As Positive Reinforcement in People with Intellectual Disabilities*, 32 RESEARCH IN DEVELOPMENTAL DISABILITIES 2214, 2221 (2011), for the conclusion that "[t]he physical nature of restraint and seclusion may actually reinforce nonsocial aggression in students.").

The Department of Education in a 2012 report recognized the ineffectiveness of relying on restraint and seclusion as a disciplinary measure: "[t]here is no evidence that using restraint or seclusion is effective in reducing the occurrence of the problem behaviors that precipitate the use of such techniques." U.S. DEPT OF EDUC., RESTRAINT AND SECLUSION: RESOURCE DOCUMENT 2 (2012).

seclusion have focused on this secondary, inappropriate “disciplinary” justification of the practices. For example, research resulting from the Green Bay Area Public School District’s attempt to eliminate the use of restraint and seclusion indicated that the practices are “harmful techniques that cause an increase in the unwanted behavior instead of a decrease,” and that the use of interventions will only “perpetuate [difficult] behavior.”¹²⁴ While the district’s efforts inspire cause for optimism about the efficacy of non-aversive interventions more broadly, the conclusion that the district “will no longer have a need for such techniques”¹²⁵ does not follow from its reforms. Given that the proper purpose of restraint and seclusion is to de-escalate a crisis rather than correct problem behaviors or discipline children,¹²⁶ it is essentially impossible to guarantee that these practices will never be necessary.¹²⁷ Indeed, it has been argued that a complete ban on non-positive behavioral interventions “violates a core tenet of the IDEA, specifically that each child with a disability is entitled to an individualized education program designed to meet that child’s unique needs.”¹²⁸

Moreover, advocacy for total elimination of restraint and seclusion in favor of PBIS techniques also ignores the fact that the PBIS framework itself allows for the provision of physical intervention in limited emergency circumstances.¹²⁹ The PBIS framework, rather than being wholly incompatible with the provision of restraint and seclusion, focuses on the efficacy of

124. Nishimura, *supra* note 118, at 229.

125. *Id.* at 230.

126. Cope-Kasten, *supra* note 8, at 224 (citing the GAO REPORT, *supra* note 1, at 28 for proposition that “seclusion and restraint do not ‘fix’ problematic behavior” and conclusion that “these instances, where seclusion and restraint are used to discipline or manage behavior rather than to provide safety in an emergency, are most problematic”).

127. See U.S. DEPT OF EDUC., *supra* note 123, at 3 (“While the successful implementation of PBIS typically results in improved social and academic outcomes, it will not eliminate all behavior incidents in a school.”). See also Robert Horner & George Sugai, *Considerations for Seclusion and Restraint Use in School-wide Positive Behavior Supports* (Apr. 29, 2009), http://www.pbis.org/common/cms/files/pbisresources/Seclusion_Restraint_inBehaviorSupport.pdf [https://perma.cc/2NG9-QXLJ] (“The majority of problem behaviors that are used to justify seclusion and restraint could be prevented with early identification and intensive early intervention. The need for seclusion and restraint procedures is *in part* a result of insufficient investment in prevention efforts . . .”) (emphasis added).

128. Shaver, *supra* note 15, at 150.

129. See *What is Tier 3 PBIS*, *supra* note 27 (allowing for emergency procedures to reduce safety); Horner & Sugai, *supra* note 127 (indicating that restraint and seclusion can be used in safety procedures under limited circumstances).

techniques designed to reduce the need for such practices in the first place.¹³⁰ Thus, a call for a total or near-total ban on restraint and seclusion is not an administrable or desirable solution to the problem.

B. A MODIFICATION OF THE KEEPING ALL STUDENTS SAFE ACT

Another alternative proposed by some scholars and activists, in the wake of the failure of the Keeping All Students Safe Act in Congress, is a legislative compromise between those calling for a total ban of restraint and seclusion in schools and those advocating for the unlimited use of the practices.¹³¹ The recommendations include eliminating the use of certain kinds of restraints that impede the student's ability to breathe,¹³² implementing room safety provisions and monitoring for students placed in seclusion rooms,¹³³ and banning the inclusion of restraint and seclusion in a child's IEP.¹³⁴ Additionally, one scholar suggested including a five-year sunset clause to require periodic re-evaluation of KASSA's provisions.¹³⁵

These recommendations would certainly provide important protections for students vulnerable to the abusive implementation of these practices.¹³⁶ However, such legislation would not go far enough in providing adequate protection. For example, banning the inclusion of restraint and seclusion in a child's IEP may be problematic if such procedures are later implemented by necessity in a modified BIP, as the implementation of a BIP does not require parental consent or notification in many states.¹³⁷ In this regard, the IEP may be the

130. Horner & Sugai, *supra* note 127 ("School-wide positive behavior support may be an effective approach for . . . decreasing problem behaviors that may otherwise require seclusion and restraint.").

131. Cope-Kasten, *supra* note 8, at 219.

132. *Id.* at 237.

133. *Id.* at 240–42.

134. Darcie Ahern Mulay, Note, *Keeping All Students Safe: The Need for Federal Standards to Protect Children from Abusive Restraint and Seclusion in Schools*, 42 STETSON L. REV. 325, 370 (2012).

135. Cope-Kasten, *supra* note 8, at 245.

136. *Id.* at 246; Mulay, *supra* note 134, at 371.

137. *Functional Behavior Assessment (FBA) and Behavior Intervention Plan (BIP) Guidance*, BOCES, https://www.colorado.gov/pacific/sites/default/files/FBA%20and%20BIP%20Guidance_2.pdf [<https://perma.cc/KJ3S-RSUQ>] (last visited Nov. 1, 2018) (noting that, for students who already have BIPs as part of their IEPs, modification of the BIPs does not require parental consent unless such modification qualifies as a reevaluation of the students' behavioral problems).

most appropriate avenue for parents to consider the possibility that their children may be subjected to restraint and seclusion, and allows them to tailor (at least somewhat) the circumstances under which such procedures may be used if they believe that their implementation is likely. Ultimately, however, in order to fundamentally change the role of restraint and seclusion and ensure that the practices are not invoked as a first-line response to challenging student behavior, legislative efforts to address the problem must not only target its symptoms, but also its root causes.

IV. PROPOSED LEGISLATIVE AND ENFORCEMENT-BASED SOLUTIONS

Given the inadequacy of the existing proposals detailed in Part IV, alternative solutions are necessary. This Part advances two potential solutions designed to ameliorate the proliferation of abusive restraint and seclusion against students with disabilities. First, it argues that the IDEA should be amended to mandate the inclusion of PBIS in students' IEPs, since a legislative solution that explicitly incorporates alternatives to restraint and seclusion will reduce the prevalence of these measures. This solution comports with the spirit of the IDEA and will benefit both students with disabilities and the student body as a whole. The alternative set of solutions proposed in this Part focuses on bolstering current state and local practices to improve enforcement with existing legislation and regulation. While this will not remedy the flaws inherent in the current IEP design structure, which contribute substantially to the overuse of restraints and seclusions, it is an important consideration in enhancing student safety before the IDEA is next reauthorized.

A. LEGISLATIVE SOLUTION: AMENDING THE IDEA TO REQUIRE PBIS IN IEPs

Given the weaknesses identified in the legislative alternatives proposed in Part IV, this Note suggests that legislators amend the IDEA during its next reauthorization to affirmatively incorporate individualized positive behavior interventions and supports as a mandatory component of the "least restrictive environment" (LRE) aspect of the right to a free and appropriate

public education (FAPE). While this Note acknowledges the argument that a total ban on all non-positive interventions would violate FAPE,¹³⁸ it challenges the claim that the reference to “positive behavioral interventions and supports” should be deleted from the IDEA,¹³⁹ and indeed contends that the current language must be strengthened.

The following discussion focuses on the compatibility of the proposed amendment with the original iteration of the IDEA and its core tenets, and emphasizes the numerosity of groups who will benefit from its implementation. At the outset, however, it is worth pausing to consider why the amendment makes sense in the first place, and identify its specific relationship to restraint and seclusion.

PBIS is best understood as an effective, albeit imperfect,¹⁴⁰ replacement for aversive interventions like restraint and seclusion. Its framework is flexible and can be adjusted to fit the particular needs of an individual student. Indeed, empirical evidence evaluating the effectiveness of PBIS demonstrates that its implementation in schools typically reduces the incidence of restraint and seclusion significantly.¹⁴¹

As the law currently stands, an IEP team is required to *consider* the use of positive behavioral interventions and supports to address behavior that impedes the learning of the student or

138. Shaver, *supra* note 15, at 150 (“[A] complete ban on the use of non-positive behavioral interventions violates a core tenet of IDEA: specifically; that each child with a disability is entitled to an individualized education program designed to meet that child’s unique needs.”).

139. *Id.* at 214.

140. U.S. DEPT OF EDUC., *supra* note 123, at 3 (“While the successful implementation of PBIS typically results in improved social and academic outcomes, it will not eliminate all behavior incidents in a school However, PBIS is an important preventive framework that can increase the capacity of school staff to support all children, including children with the most complex behavioral needs, thus reducing the instances that require intensive interventions.”).

141. See Colin Poitras, *Hands Off: Reducing Restraints in Connecticut Schools*, UCONN TODAY (Jan. 28, 2016), <https://today.uconn.edu/2016/01/hands-off-reducing-restraints-in-connecticut-schools/> [<https://perma.cc/T9GK-Z94G>] (referencing a Connecticut school that saw a 25% drop in restraints and a 59% drop in seclusions in its first year after implementing the PBIS model). See also David N. Miller et al., *Establishing and Sustaining Research-Based Practices At Centennial School: A Descriptive Case Study of Systemic Change*, 42 PSYCH. SCHOOLS 553 (2005); Brandi Simonsen et al., *School-Wide Positive Behavior Support in an Alternative School Setting: A Case Study*, 12 J. POSITIVE BEHAVIOR INTERVENTIONS 180 (2010); TEX. JUVENILE JUSTICE DEP’T, EFFECTIVENESS OF POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS: A REPORT TO THE TEXAS LEGISLATURE 14 (2012).

that of their peers.¹⁴² The team, however, is not required to *include* such strategies in the child's IEP. This leaves an unacceptable source of leeway for individuals in charge of the student's education to construct an IEP that incorporates aversive interventions alone, as long as they claim to have considered (and rejected) PBIS. Given the aforementioned risk that educators may misrepresent the nature of particular interventions in communicating with a student's parents,¹⁴³ this leaves the student vulnerable to an educational plan that does not provide for any preventive measures to redress problem behaviors as a potential alternative to aversive interventions. Part IV.A.1 argues that mandating the inclusion of PBIS in students' IEPs comports with the purpose and spirit of the IDEA, that it benefits both students with disabilities and nondisabled students, and that it is not sufficiently under- or over-inclusive to negate these benefits.

1. *Mandatory PBIS Is Consistent With the Spirit of the IDEA*

Mandatory PBIS as a component of FAPE is consistent with the original and contemporary goals of the IDEA and its reauthorizations. The purpose of the statute is "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 and prepare them for employment and independent living."¹⁴⁴ PBIS, which uses reward-based incentive systems to encourage students to engage in productive behaviors,¹⁴⁵ is consistent with the goal of the IDEA to prepare students for employment and independent living, settings which also contain these incentives.¹⁴⁶ Rewarding students when they engage in productive behaviors that will later be expected of them in different contexts creates a positive association with those

142. 20 U.S.C. § 1414(d)(3)(B)(i) (2012).

143. Hoffman, *supra* note 64, at 54.

144. 20 U.S.C. § 1400(d)(1)(A) (2012).

145. *Tier 1 Supports*, *supra* note 22.

146. Common incentive systems may mimic social phenomena in order to teach students particular lessons; for example, that kindness yields social rewards including friendship and reciprocal treatment, or that perseverance often leads to success in school and work.

behaviors, thus incentivizing those students to engage in those behaviors in the future.¹⁴⁷

It is true that these “real life” settings also subject those who experience them to aversive consequences — rudeness may lead to rejection and social alienation, and a lack of attention to detail at work may result in professional failure. Thus, the goals of the IDEA are not wholly incompatible with all aversive interventions, which may prepare students for such real-life consequences, and a ban on all such procedures does not follow from the statute. However, a requirement of PBIS-based strategies that have primacy over aversive interventions is consistent with the statute’s goal of contributing to “positive results” for children with disabilities.¹⁴⁸

The 2004 reauthorization of the IDEA further supports the incorporation of an individualized PBIS assessment as a mandatory component of students’ IEPs. The statute opens with the following passage:

Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.¹⁴⁹

The goals of promoting equality of opportunity and full participation for students with disabilities necessitate the incorporation of individualized PBIS when those goals are considered in conjunction with the statute’s requirement that such students be educated in the least restrictive possible environment.¹⁵⁰ This highlights the statute’s vision of an

147. For a discussion of the theory behind operant conditioning, or the mechanisms of positive or negative reinforcement through which behavior is encouraged or discouraged, see generally B.F. SKINNER, SCIENCE AND HUMAN BEHAVIOR 59–90 (1953).

148. 20 U.S.C. § 1450(1) (2012).

149. *Id.* at § 1400(c)(1).

150. The “least restrictive environment” provision requires that, “to the maximum extent appropriate, children with disabilities . . . be educated with children who are not disabled, and special classes, separate schooling, or other removal of children of disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of

integrated educational system in which children with disabilities may study side-by-side with their nondisabled peers so that they may receive the benefits enjoyed by nondisabled students whenever possible.¹⁵¹ The least restrictive environment provision is flexible, providing for space to cater to each individual's specific needs, and underlying it is a cognizance of the need to acknowledge the appropriate balance for each particular student protected by the IDEA in order to maximize that student's educational achievement. The IDEA's implementing regulations reinforce this mandate, requiring that "to the maximum extent appropriate, children with disabilities . . . [be] educated with children who are non-disabled"¹⁵² and providing that "special classes, separate schooling, or the removal of children with disabilities from the regular educational environment" occur only if the disability is so severe that "education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."¹⁵³ These regulations, as well as the IDEA provision they reference, illustrate a legislative preference for placement in regular educational classrooms wherever possible, and the provision of supplemental aids and supports where necessary, as a key facet of the least restrictive environment provision.

Not everyone agrees that an enhanced integration-based framework is the optimal solution for the intended beneficiaries of statutes like the IDEA. Professor Ruth Colker, writing about the history of "integration absolutism" in the realm of disability rights, critiques scholarship decrying disability-based segregation as resting on a flawed premise: "[t]he overall problem in this area is that integration rather than quality of education is considered the measure of success."¹⁵⁴ However, the PBIS framework is grounded in improving educational and social outcomes for the student for whom the supports and interventions in question are designed, and seeks to decrease the likelihood that this student will be subjected to aversive interventions. The fact that its application may bolster the student's ability to thrive in an

supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5)(A) (2012).

151. Carson, *supra* note 57, at 1398–99.

152. 34 C.F.R. § 300.114(a)(2) (2012).

153. *Id.* at § 300.114(a)(2)(ii).

154. Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415, 1464 (2003).

integrated setting is secondary to this objective. Furthermore, this critique seems to mistakenly assume that “integration” and “quality of education” are distinct objectives. Indeed, it fails to account for the fact that for some students, remaining in an integrated setting and improving educational achievement may be mutually beneficial objectives. As discussed, giving students the tools to thrive in an “integrated” world, while bolstering their current support system as needed, is the most effective way to achieve maximally high-quality educational opportunities for those students.

As Professor Colker points out, for some students, a PBIS-based IEP in a public school may truly be insufficient to address their needs.¹⁵⁵ However, this by itself is not a persuasive reason to discard mandated PBIS and other changes to the IDEA that may bolster the statute’s integrationist framework. As Professor Samuel Bagenstos noted in a response to Professor Colker’s article, “[t]he integration presumption is, after all, just a presumption”;¹⁵⁶ indeed, it would not “prevent a school district from providing a separate placement to a child with a disability when that is truly the best option for her.”¹⁵⁷ Moreover, the continued existence of the presumption incentivizes school districts to resist a sense of “inertia” that might otherwise prevent them from attempting to effectively educate students who often require more care and attention in public schools, rather than simply shirking that responsibility as too difficult.¹⁵⁸ Mandating the application of individualized integrative tools like PBIS supports that objective.

Ultimately, scholarship¹⁵⁹ and caselaw¹⁶⁰ interpreting the LRE requirement focuses strictly on the physical nature of the

155. *Id.* at 1458.

156. Samuel R. Bagenstos, *Abolish the Integration Presumption? Not Yet*, 156 U. PA. L. REV. PENNUMBRA 157, 159 (2007).

157. *Id.* at 158. See 20 U.S.C. § 1412(a)(5)(A) (2012) (“To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and *special classes, separate schooling, or other removal* of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”) (emphasis added).

158. *Id.* at 163.

159. Carson, *supra* note 57, at 1399. See also Theresa M. DeMonte, Comment, *Finding the Least Restrictive Environment for Preschoolers Under the IDEA: An Analysis and Proposed Framework*, 85 WASH. L. REV. 157, 189 (2010) (proposing that for preschoolers,

student's environment; i.e., whether a particular student, given his disabilities, should receive his education in a general education classroom or in a private, special-education only classroom or school. However, the same principles governing the aforementioned legislative framework for the traditional "physical locus" interpretation of the LRE requirement (i.e. the "public school" vs. "private placement" choice) may be just as easily applied to the implementation of behavioral interventions. Just as the LRE requirement espouses a preference for the placement of students with disabilities in public school classrooms over more restrictive settings, it also may be understood to support a preference for positive behavioral interventions and supports over aversive interventions like restraint and seclusion.

This interpretation of the LRE requirement is appropriate. Aversive interventions are more restrictive than PBIS almost by definition.¹⁶¹ This is especially true of restraints, which impede students' movement and physical liberty,¹⁶² and seclusion, which removes students from the classroom and prevents them from being able to receive an education alongside their peers.¹⁶³ Thus, an interpretation of the LRE requirement that accounts for PBIS is consistent with the broader integration and equity-based goals of the IDEA.

the "presumptive" LRE be a preschool that is, "to the maximum extent appropriate . . . designed for nondisabled children").

160. See, e.g., *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1043 (5th Cir. 1989) (holding that the Education for Handicapped Children Act requires schools to provide a continuum of services to meet the needs of handicapped children, including "alternative placements and supplementary services in conjunction with regular class placement"); *Bd. of Educ., Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 1403 (9th Cir. 1994) (establishing a four-pronged test to determine whether the school has complied with the IDEA's mainstreaming requirement).

161. See Shaver, *supra* note 15, at 158 (describing early "aversive interventions" involving physical contact with the student or patient in question, including "use of noxious liquids, sprays of water mist in the face, slapping, hitting, physical restraint, or contingent electric shock"); cf. Jake Olsen, *PBIS Forum 15 Practice Brief: PBIS in the Classroom*, PBIS 2-3 (Dec. 2015), https://www.pbis.org/Common/Cms/files/Forum15_Presentations/RDQ%204%20Brief%20-%20Classroom.pdf [https://perma.cc/5P5K-64DK] (discussing preventive PBIS strategies such as thanking students for engaging in appropriate behavior, tally systems to reward appropriate behavior, and providing verbal reminders when problem behavior arises).

162. OCR Letter, *supra* note 9, at 6.

163. *Id.* at 7.

2. *Framing PBIS: Who Benefits?*

Beyond the LRE requirement specifically, it is worthwhile to analyze the role of PBIS in contributing to the educational experiences of students with disabilities and their nondisabled peers. As discussed earlier, humans are conditioned to respond to both positive and negative consequences resulting from their actions.¹⁶⁴ For some students with disabilities, the motivating academic or social incentives and reinforcements for achievements may be dissimilar to those of their peers, as well as the nature of the achievements themselves. Thus, in order for these students to receive the benefits enjoyed by their peers, the rewards that they receive and the behaviors they are rewarded for must be adjusted with their individual goals in mind. For children with certain disabilities, these rewards may include tokens or treats for focused work and respectful behavior.¹⁶⁵

The inclusion of individualized PBIS in each student's IEP is necessary to ensure equal opportunity for students with disabilities. Though the IDEA requires the *consideration* of PBIS in the development of a student's IEP,¹⁶⁶ more is necessary in order to ensure that students with disabilities receive the full education that the statute bestows upon them. Because nondisabled students have the benefit of receiving positive reinforcement through traditional means, and are not subjected to more restrictive aversive interventions as readily as children with disabilities,¹⁶⁷ the affirmative inclusion of PBIS in a student's IEP is necessary to provide students with disabilities with an equivalent version of the public education that typical students receive.

Most importantly, mandatory PBIS will serve to reduce the incidence of restraint and seclusion. The goal of PBIS is to reduce problem behaviors that may escalate into conduct presenting physical danger and thus requiring more intensive interventions.¹⁶⁸ Empirical research suggests that the

164. SKINNER, *supra* note 147, at 59.

165. See *Tier 1 Case Examples*, PBIS, <https://www.pbis.org/school/tier1supports/case-examples> [<https://perma.cc/XQ7G-VT3R>] (last visited Oct. 16, 2018).

166. 20 U.S.C. § 1414(d)(3)(B)(i) (2012).

167. Nirvi Shah, *Data Reveal Disparities in Schools' Use of Restraints*, EDWEEK (Mar. 13, 2012), <https://www.edweek.org/ew/articles/2012/03/13/24data.h31.html> [<https://perma.cc/VV26-A6EF>].

168. *What is Tier 3 PBIS*, *supra* note 27.

implementation of such programs does in fact lead to a reduction in the incidence of restraints and seclusion.¹⁶⁹ Though, as discussed,¹⁷⁰ it would likely be impossible to guarantee that restraint and seclusion are never necessary, preventive measures grounded in PBIS provide an effective means to reduce the frequency of their use. In addition to being a socially desirable outcome, this reduction in restraint and seclusion incidents will also likely heighten the perceived seriousness of these procedures, and instill caution in those who might otherwise be likely to abuse the practices.

One major criticism of the current PBIS language in the IDEA, articulated by Professor Elizabeth A. Shaver, is that PBIS has no place in the development of a student's IEP because its framework focuses on "school-wide policies" and strategies such as "instituting discipline policies, safe-schools initiatives, social-skills training, and anti-bullying and anti-harassment efforts."¹⁷¹ It is true that such systemic programs are not always relevant to the development of a particular student's plan. However, this argument rests on an unnecessarily narrow interpretation of the boundaries of the PBIS framework. Though the first tier of the PBIS framework endorsed by the Department of Education does focus on school-wide policies,¹⁷² the second and third tiers contain room for individualized assessments where students are at risk of or are currently engaging in problem behaviors.¹⁷³ The PBIS framework simply acknowledges an underlying assumption that most problematic behaviors will be effectively targeted by baseline, school-wide policies, and that more intensive individual (Tier 3) interventions are more effective when such systemic practices are already in place.¹⁷⁴ As earlier scholarship has noted, PBIS may be incorporated into a specific "plan for the systematic implementation of positive behavioral interventions and supports to address [a] student's impeding behaviors."¹⁷⁵

169. See Miller et al., *supra* note 141; Simonsen et al., *supra* note 141.

170. See *supra* Part III.A.

171. Shaver, *supra* note 15, at 214.

172. *Tier 1 Supports*, *supra* note 22.

173. *Tier 2 Supports*, *supra* note 23; *What Is Tier 3 PBIS*, *supra* note 27.

174. *What Is Tier 3 PBIS*, *supra* note 27.

175. H. Rutherford Turnbull, III et al., *IDEA, Positive Behavioral Supports, and School Safety*, 30 J.L. & EDUC. 445, 455 (2001); see also Chris Borgmeier, *Intensive-PBS: Implementing a System of Individual Student Support*, https://www.pbis.org/common/cms/files/pbisresources/E8Borgmeier_Fletcher.pdf [<https://perma.cc/37ES-634R>] (presentation instructing teachers and personnel on the development of "intensive" PBIS at the Tier 3

Thus, the PBIS framework is compatible both with a schoolwide system of support and individualized behavioral plans.

Furthermore, the IDEA does not provide a definition of PBIS,¹⁷⁶ and the contexts in which it appears in the statute suggest that it was intended to be considered as part of “Individualized student assessments.”¹⁷⁷ Indeed, in the two revisions and reauthorizations of the law that have occurred since its original passage, Congress has *strengthened* the language linking PBIS to individualized student assessments, affirmatively requiring IEP teams to consider the use of PBIS in the IEPs of students whose behavior impedes learning, instead of allowing the teams to do so “when appropriate.”¹⁷⁸

Professor Shaver’s criticism of the breadth of the PBIS framework also highlights one of its most important benefits. Indeed, the integrative aspect of PBIS and its facility for application to both the school-wide setting and to individual students has the potential to yield immense benefits to both students with disabilities and those without. As Professor Elizabeth Emens has written:

[T]hree factors . . . affect the extent to which different accommodations produce third-party benefits: (1) *generalizability* (whether others can benefit from the accommodation in the present); (2) *durability* (whether others can benefit from the accommodation in the future); and (3) *visibility* or *notoriety* (whether the accommodation

level within an school that has already developed and internalized “school-wide PBIS” (Tier 1 and 2 supports)).

176. 20 U.S.C. § 1401 (2012).

177. See 20 U.S.C. § 1414(d)(3)(B) (2012) (requiring the consideration of PBIS in the development of IEPs for children whose behavior impedes learning) and 20 U.S.C. § 1414(d)(3)(C) (2012) (requiring the participation of a regular education teacher in the IEP development process, “including the determination of appropriate positive behavioral interventions and supports”).

178. Compare 20 U.S.C. § 1414(d)(3)(B)(i) (2012) (“The IEP Team shall . . . in the case of a child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior[.]”), with earlier version, Individuals with Disabilities Education Act Amendments of 1997, Sec. 614(d)(1)(A)(i)(II) (1997) (“The IEP Team shall . . . in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior.”).

can be seen or known about by others, to whom it may signal something positive).¹⁷⁹

Considered in this light, it is clear that PBIS provides significant third-party benefits. The PBIS framework is generalizable by definition, as it provides principles that can be implemented on a schoolwide basis at the first tier; nondisabled students may thus enjoy the social benefits arising from the PBIS focus on communication and productive classroom conduct.¹⁸⁰ The generalizability of PBIS is bolstered by the fact that it is not a “rivalrous” good; that is, unlike certain physical accommodations, there is no limit to the number of people who can utilize and benefit from PBIS at the same time.¹⁸¹ The framework is durable, as the program is not a wasting asset and can be adapted to fit future student populations. While its visibility and notoriety may depend on the publicity afforded to the program within the particular school setting, schools with a well-developed PBIS program may find the implementation of the program produces positive attitudinal shifts among nondisabled students with respect to perceptions of disability.¹⁸²

While Professor Emens’ discussion of third-party benefits focuses on integrating accommodations in the workplace and community context in accordance with the Americans with Disabilities Act (ADA),¹⁸³ PBIS serves a similar function in “desegregating” accommodations in the school context, a phenomenon which serves the purposes of the IDEA.¹⁸⁴ The multi-tiered design of PBIS also insulates it from destabilizing due to what Professor Martha Minow has called the “dilemma of difference.”¹⁸⁵ As Professor Emens explains, the “static model of accommodation,” which views accommodation as a “special thing done for one or more individuals” to make it possible for them to

179. Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 846 (2008) (considering how third-party benefits accruing to nondisabled employees resulting from disability accommodations in the workplace promote the aims of the Americans with Disabilities Act and are advantageous to employees with disabilities).

180. *PBIS Frequently Asked Questions*, *supra* note 19.

181. Emens, *supra* note 179, at 847.

182. *Id.* at 848.

183. *Id.* at 883.

184. *See id.* (“[A]ccessible areas [must] not [be] restricted to use by people with disabilities.”) (quoting ADA STANDARDS FOR ACCESSIBLE DESIGN, 28 C.F.R. ch. 1, pt. 36, app. A, § 5.4 (1994)).

185. MARTHA MINOW, *MAKING ALL THE DIFFERENCE* 20 (1990).

access previously inaccessible spaces, risks stigmatizing people on the basis of those differences.¹⁸⁶ On the other hand, the “dynamic model of accommodation,” which understands accommodation as a “process of interrogating the existing baseline, by focusing on part of the population that was neglected in the creation of that baseline, to make changes to that baseline that may affect everyone,” may neglect those whose differences and individual needs are downplayed in the process of designing universalized accommodations.¹⁸⁷ The PBIS structure minimizes both of these pitfalls. By including a first tier of schoolwide expectations applicable to the entire student population, the structure shifts the “baseline” to account for students who were excluded from educational opportunities under the existing status quo. On the other hand, the second and third tiers mitigate the risk that a flat PBIS program would overlook individual students’ needs. Thus, PBIS effectively accounts for the needs of both individual students with disabilities and the student population as a whole.

3. Possible Objections

i. Considering the Limitations of PBIS

Some students may exhibit behaviors that are too severe to be addressed by PBIS.¹⁸⁸ However, the fact that aversive measures may be necessary in some plans does not mean that the concurrent inclusion of PBIS in the same plans is infeasible. The inclusion of PBIS in an IEP may be as simple as verbally praising, or even smiling at, a student for refraining from engaging in a problematic behavior.¹⁸⁹ There is no justification to categorically exclude these kinds of supports, especially since

186. Emens, *supra* note 179, at 894 (quoting MINOW, *supra* note 185, at 20: “when does treating people differently emphasize their differences and stigmatize or hinder them on that basis? and when does treating people the same become insensitive to their difference and likely to stigmatize or hinder them on *that* basis?”).

187. *Id.*

188. See Shaver, *supra* note 15, at 211 (criticizing the Second Circuit’s holding in *Bryant v. New York States Educ. Dep’t*, 692 F.3d 202 (2d Cir. 2012), which affirmed that the IDEA permits a state agency to ban non-positive interventions, even for students who had historically failed to respond to specified “positive” interventions).

189. Lori Newcomer, *Classroom Positive Behavioral Support*, PBIS (2007), http://www.pbis.org/common/cms/files/pbisresources/B8_Newcomer.pdf [<https://perma.cc/K8FM-96PR>].

they can be individualized based upon the effectiveness of observed results with respect to the student in question.¹⁹⁰

Rather than incorporate PBIS into a student's IEP, Professor Shaver recommends that Congress amend the IDEA to "require that an FBA be conducted and a BIP implemented whenever a child's IEP team determines that the child exhibits behavior that impedes learning," instead of limiting this requirement to situations where the child has been subject to disciplinary proceedings as a result of a behavioral incident.¹⁹¹ This change is indeed necessary to restore harmony between the current legal requirement and the industry standard.¹⁹² If Congress is unwilling to modify the IDEA to strengthen the inclusion of PBIS in student's IEP, modification of the requirements surrounding FBAs and BIPs will provide another source of protection against the arbitrary use of restraint and seclusion, since the provision of approved interventions in writing will discourage staff from deviating from them.¹⁹³

However, the improvement of the FBA/BIP system, without more, is not sufficient to protect students against the possibility of potentially abusive practices like restraint and seclusion. The BIP is not defined in the IDEA.¹⁹⁴ Thus, from the statutory text alone, the FBA/BIP process provides no protection against the possibility of abusive or wrongfully implemented aversive interventions without concurrent protection in the form of PBIS as a first response; unlike the provision regulating the creation of IEPs, the text addressing the creation of BIPs does not even require that the plan creators consider PBIS.¹⁹⁵ The current

190. *Tier 2 Supports*, *supra* note 23; *What Is Tier 3 PBIS*, *supra* note 27.

191. Shaver, *supra* note 15, at 213.

192. Von Ravensberg & Blakeley, *supra* note 29, at 4.

193. Shaver, *supra* note 15, at 213.

194. 20 U.S.C. § 1401 (2012).

195. 20 U.S.C. § 1415(k)(F)(ii) (2012) ("If the local educational agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team shall (i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that had resulted in a change in placement . . . (ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and (iii) except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan."). Nowhere in these provisions does a requirement of consideration for the inclusion of PBIS in such plans appear.

statutory framework, which delays the creation of the BIP until after relatively serious problematic behavior has already occurred and establishes an FBA process often conducted outside of the child's regular learning environment,¹⁹⁶ may even enhance the probability that restraint or seclusion will need to be included in the plan, as previously nonexistent or less severe problem behaviors have arisen in the interim. Even when a BIP is incorporated into a student's IEP, which is neither required nor prohibited by the statute,¹⁹⁷ the protections that accompany this inclusion are limited by the aforementioned shortcomings from which the IEP creation/re-authorization process suffers: only the consideration, not inclusion, of PBIS is required.

Thus, the fact that the inclusion of PBIS strategies in IEPs may not be sufficient to redress behavioral concerns in every individual case is not a persuasive ground for allowing their discretionary exclusion.

ii. *Considering the Concern of Over-inclusiveness*

Another concern implicated by the mandated inclusion of PBIS in IEPs is the possibility that such a requirement might cause undesirable effects for some students whose disabilities do not implicate behavioral concerns (for example, students with learning disabilities who do not exhibit oppositional conduct but still require classroom accommodations). This is an important concern and should not be understated. However, several important features of the PBIS framework mitigate this concern.

First, the aforementioned flexibility of the PBIS framework suggests that students' parents and IEP teams may adjust the particular strategies included in students' plans to suit individual needs. The PBIS inclusion process may thus resemble a sliding scale based on an approximation of students' needs; for some students, extensive PBIS measures may be necessary, and for others such measures may be minimal. Similarly, in addition to the variability of the *extent* of necessary measures, the *nature* of PBIS may also depend on particular students' needs. Thus, for students who require accommodations for learning disabilities but who do not need an individualized disciplinary plan, the PBIS

196. Von Ravensberg & Blakeley, *supra* note 29, at 4.

197. Perry A. Zirkel, *Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 SEATTLE U. L. REV. 175, 187 n.3 (2011).

portion of the IEP may focus on providing positive support for the student to communicate with educators and aides regarding current accommodations and needs, rather than providing for detailed intervention plans.¹⁹⁸

The fear that PBIS may be an over-inclusive solution also raises a related and broader concern: the idea that by demanding the application of the framework to every IEP, educators may be diluting its impact where it is needed most. The fact that PBIS' school-wide application and individual flexibility is a "selling point" for the framework may result from undesirable "interest convergence," wherein excessive focus is levied upon third-party interests (in this case, those of students who do not have disabilities but would still benefit from PBIS in some capacity), instead of the protected beneficiaries of a particular statute (here, students with disabilities).¹⁹⁹ However, these concerns, while important, do not warrant the dismissal of PBIS as an effective remedial mechanism.

With respect to interest convergence, while students with disabilities should remain the focus of IDEA-derived structures like PBIS, it is hard to argue that the breadth of the framework jeopardizes these students' access to its benefits; this is particularly true since PBIS is a non-rivalrous good.²⁰⁰ So long as the second and third tiers of the PBIS framework are appropriately reserved for those students who truly need them, the breadth of the overall pyramid should not disadvantage these individuals. Furthermore, the special quality of the school setting reinforces the unexpected benefits of interest convergence

198. For example, a plan might include a special physical or verbal signal for students with learning disabilities to indicate when they would like a break, or for students with anxiety disorders experiencing a trigger that may be otherwise imperceptible to teachers and aides.

199. Emens, *supra* note 179, at 916–919 (quoting Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 20, 22 (Kimberlé Crenshaw et al. eds., 1995)) (“[Adrienne] Asch sees attention to third-party benefits [to nondisabled people, rather than to other disabled people] as an instance of Derrick Bell’s ‘interest convergence’ principle. In Bell’s words, ‘The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.’”).

For more on the consideration of third-party interests within the special education context as it relates to integrationist policies, see Colker, *supra* note 154, at 1422 (“States do not want to retain expensive disability-only institutions if they are going to be underpopulated . . . The movement towards integration on the part of the states was motivated, in part, by a desire to save money rather than a desire to improve the lives of individuals with disabilities.”).

200. See Emens, *supra* note 179, at 847.

for both students with disabilities and nondisabled students. The classroom is a place where children come to learn, among other things, appropriate social conduct and productive communication skills. Thus, the uniformity of the “language” that the entire student body is taught to speak at a young age in this setting may contribute to significant benefits for students with disabilities by narrowing the gap between “inside” and “outside” perspectives on disability in the classroom.²⁰¹ In this context, it is especially helpful to consider these benefits through the lens of “coalition building” rather than “interest convergence.”²⁰² Doing so highlights the fact that a broader application of PBIS could improve educational environments for students with disabilities by changing “the institutional structure and underlying attitudes” of the schoolhouse from the inside out.²⁰³

Lastly, doctrinal drift is unlikely in this setting; typically, this concern arises where one might imagine a lack of third-party benefits being “held against an accommodation.”²⁰⁴ Here, as discussed, there is no such lack of third-party benefits, as PBIS may be used to improve communication and social skills for the entire student body. Nor should policymakers be too concerned about an excessive focus on third-party costs; given its flexibility, PBIS is not costly to implement.²⁰⁵ Moreover, as with the ADA, the IDEA’s “individualized focus should help bolster it against undue narrowing through the mechanism of third-party benefits.”²⁰⁶ Ultimately, neither interest convergence nor doctrinal drift are sufficiently persuasive concerns to dismiss the consideration of mandated PBIS inclusion in IEPs.

For these reasons, in order to reduce the arbitrary and abusive implementation of restraint, seclusion, and other aversive interventions at the expense of students with disabilities, the IDEA must be amended to affirmatively require the inclusion of whatever positive behavioral interventions and supports are possible for a particular student in his or her IEP. This change

201. Elizabeth F. Emens, *Framing Disability*, 5 U. ILL. L. REV. 1383,1389 (2012).

202. Emens, *supra* note 179, at 917–18 (“Even if the benefit to disabled people is sufficient to get the accommodations put in place, it may nonetheless be constructive to build coalitions among people with diverse interests. . . . Promoting broader benefits seems more appealing when understood as coalition building rather than interest convergence.”).

203. *Id.* at 917.

204. *Id.* at 919.

205. *Id.* at 920.

206. *Id.*

would be consistent with the purpose and spirit of the IDEA in providing rich educational opportunities for students with disabilities, and is consistent with the principle of the least restrictive environment as provided in the statute. Furthermore, this solution addresses the root of the problem underlying excessive and problematic uses of restraint and seclusion by encouraging the use of non-aversive interventions more broadly and creating a culture of positive support within schools, while allowing for the employment of restraint and seclusion when necessary. Finally, criticisms of strengthening the current language to mandate the inclusion of PBIS in IEPs are unavailing, as the PBIS framework is flexible enough that it may be individualized to accommodate all students, regardless of their specific disabilities, behavioral patterns, or goals.

B. ENFORCEMENT-BASED SOLUTIONS: IMPROVEMENT AT THE STATE LEVEL

Though many states still fail to provide meaningful protections for students with disabilities, a great deal of progress has been made in the last two decades. With this in mind, in the absence of major federal legislative or regulatory protections of students from restraint and seclusion,²⁰⁷ states may seek to improve their existing laws by strengthening their enforcement and monitoring mechanisms. The following discussion focuses on two illustrative examples of state innovation and deficiency in monitoring and enforcement: camera surveillance and staff training. However, local remedial frameworks may consist of other protective mechanisms, including the creation of statewide systems for reporting problematic events,²⁰⁸ the development of

207. See *supra* Part II.

208. Though this discussion focuses on state agencies and school districts, local protection and advocacy agencies (“P&As”) also contribute to important reporting and monitoring functions within states. P&As are congressionally mandated organizations that operate at the state level to provide legal assistance and investigate the conditions of facilities serving individuals with disabilities. *Protection and Advocacy (P&A) System and Client Assistance Program (CAP)*, NDRN, <https://www.ndrn.org/about/paacap-network.html> [<https://perma.cc/NJ3V-LT29>] (last visited Oct. 18, 2018). For an example of a P&A using its reporting function to unveil widespread enforcement deficiencies of a state restraint and seclusion regulation, see *New Disability Rights Ohio Report Highlights Lack of Enforcement of Ohio Department of Education’s Restraint and Seclusion Rule*, *supra* note 55. For a report addressing violations of federal and state law in a public elementary school in Colonie, New York, see *DISABILITY RIGHTS NEW YORK, INVESTIGATORY REPORT: COMPLAINTS OF ABUSE AND NEGLECT AT BLUE CREEK*

standardized sanctions and restrictions of power for teachers who wrongfully implement restraints and seclusions in violation of state law, and more.

1. *Camera Surveillance*

One mechanism for monitoring enforcement of existing state laws is the passage of state laws or regulations requiring camera surveillance of special education classrooms or classes wherein students with disabilities are enrolled. Texas is the first state to have passed a law to this effect, requiring the installation of cameras in classrooms at the request of a parent.²⁰⁹

The benefits of surveillance laws are multi-fold. They may incentivize teachers to more carefully evaluate the risk of imminent harm posed by a student's behavior; this may help to counter the "trend toward teacher victimization" that may contribute to what one scholar has called the "blurring of the line" between safety control and disciplinary measures.²¹⁰ Moreover, camera surveillance may be used to supplement reporting requirements, which may be critical if underreporting is as rampant as some officials claim.²¹¹

Some disability rights advocates have criticized the installation of surveillance cameras in schools as likely ineffective and potentially even counterproductive to the espoused objective

ELEMENTARY SCHOOL IN THE NORTH COLONIE SCHOOL DISTRICT: FINDINGS AND CORRECTIVE ACTION (2017).

209. TEX. EDUC. CODE 29.022; John Bair, *Texas Law on Cameras in Special Needs Classrooms Inspired Heated Debate*, LEGAL EXAMINER (Apr. 20, 2017), <http://milestone.legalexaminer.com/miscellaneous/texas-law-on-cameras-in-special-needs-classrooms-inspired-heated-debate/> [<https://perma.cc/TUZ2-5F66>]. See also Sara C. Heintzelman & Justin M. Bathon, *Caught on Camera: Special Education Classrooms and Video Surveillance*, 12(6) INT'L J. EDUC. POL'Y & LEADERSHIP 10 (2017) (noting the different features of the Texas law and potential problems, including a provision allowing parents to file an objection when other parents have requested the installation of cameras, and the lack of a conflict-resolution mechanism in the law to address this issue).

210. Lanette Suarez, Comment, *Restraints, Seclusion, and the Disabled Student: The Blurred Lines Between Safety and Physical Punishment*, 71 U. MIAMI L. REV. 859, 863–64, 870 (2017) (citing a disparity between teacher reports of feeling threatened by students and actual physical attacks by students as a potential cause of excessive use of restraints and seclusions in schools and arguing that the use of such procedures has "blurred into a form of corporal punishment that infringes upon the students' ability to receive an inclusive education").

211. Heather Vogell, *Violent and Legal: The Shocking Ways School Kids Are Being Pinned Down, Isolated Against Their Will*, PROPUBLICA (June 19, 2014), <https://www.propublica.org/article/schools-restraints-seclusions> [<https://perma.cc/2CEM-QUEQ>].

of serving the needs of students with disabilities, as it serves to further segregate them and may only provide a false sense of security without actually curtailing abusive practices.²¹² The experiences of schools in Texas, which saw the implementation of its surveillance law in the fall of 2017, may provide a useful picture as to the efficacy of these laws.

2. *Staff training*

Many states with laws targeting restraint and seclusion impose a requirement that staff be trained in crisis intervention and restraint.²¹³ However, such laws vary widely in their internal requirements and comprehensiveness.²¹⁴ For example, twenty-eight states currently require training in conflict de-escalation and prevention of seclusion and restraint, but only fifteen include training in positive behavioral support as a required component of their programs, and only eight require training on the dangers of restraint and seclusion.²¹⁵

The importance of substantive staff training requirements cannot be understated. First, multiple reports detailing abusive or negligent implementation of restraints and seclusions reveal that such incidents often involve untrained staff.²¹⁶ Furthermore, even in cases where the educator in question has received training, the educator may underestimate the severity of the pressure imposed on the student by the restraint, and thus fail to recognize the dangers and appropriate limitations of these practices, as well as when medical assistance is needed.²¹⁷ Another potential risk that may persist even among trained staff is the inability to appropriately assess when restraint or seclusion is actually necessary, as opposed to when a less intrusive intervention may suffice.²¹⁸ Thus, adequate laws and

212. Pat Amos et al., *Will Cameras in Classrooms Make Schools Safer?*, TASH (Jan. 2015), <https://tash.org/wp-content/uploads/2015/01/Cameras-in-School-Final.pdf> [<https://perma.cc/4F7M-Q6Y5>].

213. Butler, *supra* note 49, at 99.

214. *Id.*

215. *Id.* at 100.

216. See GAO REPORT, *supra* note 1, at 9, NDRN REPORT, *supra* note 5, at 3–4.

217. See GAO REPORT, *supra* note 1, at 15–16.

218. CMS RESTRAINT TRAINING REQUIREMENTS HANDBOOK, HCPRO 8–9 (2016). (“Restraint should not be used when less-restrictive interventions would be effective . . . de-escalation [steps] . . . are heavily dependent on proper staff training to recognize the situation and deal with it.”).

regulations must require that staff be trained to both safely implement restraints and seclusions when necessary and recognize and respond to signs of medical or respiratory distress, and it is critical that such trainings highlight the inherent danger associated with these practices.

Furthermore, even in states with adequate staff training legislation or regulation, monitoring and investigation of specific training programs is necessary to ensure that such protections are honored. States must be cognizant of the fact that not every training program for staff in the field of special education is equal.

Many states have lists of approved de-escalation trainings or aversive reports. However, these differ in quality and level of state engagement. Consider the Connecticut Department of Developmental Services' "Approved Training Curricula in the Use of Aversive and Physical Restraint Procedures," a list of twelve approved training programs pertaining to the use of physical restraint.²¹⁹ The list, in addition to naming the training programs and the organizations that oversee them, also includes notes excepting certain procedures and mechanisms taught in the training program that are not approved by the State.²²⁰ For example, the Department approves Cornell University's Therapeutic Crisis Prevention program, but specifically excepts the "Team Prone Restraint" and "Three Person [Prone] Restraint" techniques included in the trainings from being taught in programs funded by the Department.²²¹ The document also clarifies at the top of the list that "The use of prone (face-down) restraint is prohibited in programs funded or licensed by DDS."²²² By contrast, North Carolina's "Approved Curricula for the Use of De-Escalation Strategies and Restrictive Interventions" provides no similar internal prohibitions regarding higher-risk strategies taught at the endorsed programs, some of which are the same as those mentioned in modified form in the Connecticut document.²²³

219. CONN. DEP'T OF DEVELOPMENTAL SERVS., I.D.PR.009 ATTACHMENT J, APPROVED TRAINING CURRICULA IN THE USE OF AVERSIVE AND PHYSICAL RESTRAINT PROCEDURES (2014).

220. *Id.*

221. *Id.*

222. *Id.*

223. N.C. DEP'T OF HEALTH AND HUMAN SERVS., APPROVED CURRICULA FOR THE USE OF DE-ESCALATION STRATEGIES AND RESTRICTIVE INTERVENTIONS (2018), https://files.nc.gov/ncdhhs/APPROVED%20CURRICULUMS%20LO_2.pdf?as9HRZB3Xz.1JQeTfEohqv8z6Bd9ZxgG [<https://perma.cc/MRV5-J9DQ>].

The Mississippi Department of Education has an even sparser list, entitled “Approved Vendor List for Restraint Training,” which also includes some of the same programs named by the Connecticut DDS without similar curtailments on particular prone restraint techniques.²²⁴ This is so despite the fact that Mississippi is one of the few states to bar all restraints that restrict breathing for children, including prone restraints.²²⁵ An apparent willingness to accept these programs on an all-or-nothing basis is cause for concern, particularly since even the most widely utilized programs, including those of the Crisis Prevention Institute, may teach techniques involving prone restraints.²²⁶ Therefore, a case-by-case evaluation of each program to delineate the parameters of acceptable training is necessary to achieve symmetry between a state’s declared goals (such as banning prone restraints outright) and the achievement of those goals in practice.

Even more problematic is the complete absence of such guidance in states that have implemented a ban on certain restraints. For example, Georgia bans the use of prone restraints in its public schools;²²⁷ however, there are no restrictions on the use of other restraints that can impede breathing.²²⁸ The Georgia Department of Education, in published guidance for the implementation of the state’s restraint and seclusion rule, declined to “endorse a particular training program” for the use of physical restraints by staff.²²⁹ This lack of clarity may lead to serious confusion in the enforcement of the rule.

States must be vigilant about monitoring the effectiveness of their enforcement policies, and must be actively involved in assessing the quality of their approved staff training programs. This should begin with a cognizance of the fact that not all training laws and crisis prevention programs are equal. Local

224. MISS. DEP’T OF EDUC., MDE APPROVED VENDOR LIST FOR RESTRAINT TRAINING, <http://www.mde.k12.ms.us/OSOS/mde-approved-vendor-list-for-restraint-training> [https://perma.cc/VCJ8-TBY2] (last visited Oct. 18, 2018).

225. 7 MISS. ADMIN. CODE PT. 3, CH. 38 R. 38.13 4(b).

226. I.D.PR.009, *supra* note 219.

227. GA. COMP. R. & REGS 160-5-1-.35(1)(d) (2010).

228. Butler, *supra* note 49, at 66.

229. GA. DEP’T. OF EDUC., GUIDANCE FOR STATE BOARD OF EDUCATION RULE 160-5-1-.35 “SECLUSION AND RESTRAINT FOR ALL STUDENTS” 12 (2010), <http://archives.gadoe.org/DMGetDocument.aspx/Guidance%20Seclusion%20and%20Restraint%20Vers%201%2007-08-10.pdf?p=6CC6799F8C1371F636C8688673FE1F3EF851D2A3B84B400A0326534AB0075B6A&Type=D> [https://perma.cc/9URC-M4FK].

educational agencies must also conduct independent review and monitoring to ensure compliance with local restraint and seclusion laws. States must also seek to find new and innovative ways to improve their own enforcement policies, whether through camera surveillance laws, monitoring and information collection, or other mechanisms. Ultimately, even where states have implemented laws or regulations designed to limit the incidence of restraint and seclusion, they can and should do more to ensure that these protections are enforced and have a meaningful effect.

V. CONCLUSION

The practices of restraint and seclusion, while necessary in rare crises, are often abused to improperly discipline or punish students with disabilities. In the absence of federal legislation directly addressing the problematic use of these practices, this important issue has been largely relegated to the states, resulting in an undesirable patchwork of varying standards in local laws and enforcement. Efforts to pass federal legislation have stalled, likely due to the sensitive and complex nature of the problem and legislators' concerns over states' rights in the realm of education.

Given the difficulty and potential infeasibility of devising a bright-line rule to address this problem, alternative solutions must be considered which focus on its causes. State-level improvement of monitoring and enforcement policies may provide meaningful protections envisioned by already-existing laws and regulations. More fundamentally, however, amending the IDEA to require the inclusion of positive behavioral interventions and supports as a part of a student's individualized educational plan will reduce the incidence of problematic behaviors often used to justify restraint and seclusion, and will also reinforce the role of such practices as strictly a last resort. Instead of focusing on new, polarizing legislation targeting the incidence of restraint and seclusion itself, this solution simply suggests that preexisting language in the governing statute be strengthened to accord more fully with its purpose and legislative scheme: to provide a free and appropriate public education to students with disabilities in the least restrictive possible setting. Given the flexibility of the PBIS framework, the amendment would provide an administrable alternative to unworkable calls to ban the practices of restraint and seclusion outright. Mandating PBIS in

IEPs will decrease the incidence of problematic instances of restraint and seclusion by encouraging the use of non-aversive interventions wherever possible and promoting an environment of positive support among students and staff. In doing so, the amendment will unite the law with existing best practices, which are prescriptive in nature and seek to prevent problematic behavior rather than react to it. Most importantly, such an amendment will affirm the dignity and equality of students with disabilities, as envisioned by the IDEA in all its iterations.