

IT'S TIME TO START SHOWING A LITTLE RESTRAINT: IN SEARCH OF A COMPROMISE ON FEDERAL SECLUSION AND RESTRAINT LEGISLATION

Cali Cope-Kasten*

In 2009, the United States House of Representatives heard testimony that hundreds of students had been injured in schools by teachers secluding or physically restraining them. Congress had never legislated on seclusion and restraint, but the alarming allegations of student injuries and deaths prompted many parents to demand a ban on the use of the techniques in schools. In the continuing debate, school officials have protested that seclusion and restraint are important tools for teachers to protect their classrooms from out-of-control students. Torn between these two extreme positions, Congress has twice attempted—but failed—to pass federal legislation regulating seclusion and restraint.

This Note examines the most recent failed legislative attempts and proposes a more moderate statute that has a greater likelihood of passing through a polarized Congress. By banning certain forms of restraint, raising safety standards for seclusion spaces, and broadening grant authority to help schools develop alternatives to seclusion and restraint, this Note's proposed statute would protect both student safety and teacher autonomy.

INTRODUCTION

It is high time members of Congress started showing a little restraint—not with respect to spending or political posturing, but with respect to federal legislation on the use of seclusion and restraint in schools. Such legislation regulating isolation rooms and physical restraints as methods of controlling student behavior in schools has been sitting in Congress for four years, but members have been unable to reach an appropriate compromise. The inability of these members to show a little restraint in approaching this sensitive issue has resulted in gridlock and failed legislation, while the safety of teachers and students alike hangs in the balance.

Seclusion and restraint have become hot-button topics in recent years, particularly with disability rights organizations.¹ Students'

* J.D. Candidate, May 2014, University of Michigan Law School; B.A., 2011, Macalester College. Thank you to Professor Samuel Bagenstos for offering invaluable guidance during our many conversations about this Note. Thank you also to Andrew Tonelli, Annie McGinnis, and A.J. Dixon for their excellent assistance with this piece.

1. See, e.g., NAT'L DISABILITY RIGHTS NETWORK, SCHOOL IS NOT SUPPOSED TO HURT: INVESTIGATIVE REPORT ON ABUSIVE RESTRAINT AND SECLUSION IN SCHOOLS (2009), available at <http://www.napas.org/images/Documents/Resources/Publications/Reports/SR-Report>

and teachers'-rights advocates have been waiting for federal guidance on the issue since 2009. In that year, the House of Representatives Committee on Education and Labor launched the debate onto the national stage by holding a hearing on student injuries and deaths resulting from seclusion and restraint.² During the hearing, testimony revealed hundreds of allegations that students had been harmed in schools—in some cases fatally—because of seclusion and restraint.³

That hearing, however, failed to produce a federal solution. In its wake, many states passed new laws or adopted new guidelines regarding seclusion and restraint in schools.⁴ However, in the absence of national standards, the flurry of state legislative action has produced widely disparate and often insufficient protections for both students and school personnel.⁵ Congress has twice attempted to pass federal legislation remedying this patchwork effect.⁶ Both times, the proposed legislation authorized schools to use seclusion and restraint.⁷ Both times, the bills failed to pass.

In light of the continuing need for standardized federal protections, it is time for Congress to try a little restraint. Many voices in the national seclusion and restraint conversation have called for action on one of two extremes: students' rights advocates have pushed for a near-total ban on seclusion and restraint,⁸ while teachers' rights groups have frequently opposed legislation limiting the

2009.pdf; *Restraint and Seclusion (APRAIS)*, TASH, <http://tash.org/advocacy-issues/restraint-and-seclusion-aprais/> (last visited Aug. 17 2013); *Safe Schools*, COUNCIL OF PARENT ATTORNEYS & ADVOCATES (COPPA), <http://www.copaa.org/?page=RestSeclusion> (last visited Aug. 17, 2013).

2. See *Examining the Abusive and Deadly Use of Seclusion and Restraint in Schools: Hearing Before the Comm. on Education and Labor*, 111th Cong. (2009), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg49597/pdf/CHRG-111hhrg49597.pdf>.

3. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-719T, SECLUSIONS AND RESTRAINTS: SELECTED CASES OF DEATH AND ABUSE AT PUBLIC AND PRIVATE SCHOOLS AND TREATMENT CENTERS 5 (2009), available at <http://www.gao.gov/assets/130/122526.pdf> [hereinafter GAO].

4. Compare *id.* at 33–58 (identifying nineteen states as lacking seclusion and restraint legislation in 2009), with JESSICA BUTLER, HOW SAFE IS THE SCHOOLHOUSE? AN ANALYSIS OF STATE SECLUSION AND RESTRAINT LAWS AND POLICIES 11, 49–54 (2013), available at <http://www.autcom.org/pdf/HowSafeSchoolhouse.pdf> (reporting that, in May 2013, all but five states had a statute, regulation, or guideline in place regarding seclusion and restraint in schools).

5. See BUTLER, *supra* note 4.

6. See Janice LeBel et al., *Restraint and Seclusion Use in U.S. School Settings: Recommendations From Allied Treatment Disciplines*, 82 AM. J. ORTHOPSYCHIATRY 75, 77 (2012); see also Keeping All Students Safe Act, H.R. 1381, 112th Cong. (2011); Keeping All Students Safe Act, H.R. 4247, 111th Cong. (2010).

7. See H.R. 1381 § 5; H.R. 4247 § 5.

8. See, e.g., NAT'L DISABILITY RIGHTS NETWORK, *supra* note 1, at 38–41; *Restraint and Seclusion (APRAIS)*, *supra* note 1; *Safe Schools*, COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, *supra* note 1.

use of the techniques on the grounds that it too severely restricts teachers' ability to manage their own classrooms.⁹

This Note contends that a more moderate approach is necessary in order to pass federal seclusion and restraint legislation. Either too much discretion for schools or too few options for maintaining classroom safety will likely doom a legislative effort. Any proposed legislation on either extreme will not survive in today's polarized Congress. Only a compromise between the two extremes will provide sufficient protections for both students and teachers while remaining workable in a school setting.

Part I of this Note explores the justifications and drawbacks of both extreme approaches and describes the evidence that generated the seclusion and restraint legislation in 2009. Part II illustrates the need for federal legislation by examining the current state of the law on seclusion and restraint in schools. Part III proposes alterations to Congress's most recent failed seclusion and restraint bill that would make it more viable. This Note suggests that, with just five modifications to the 2011 Keeping All Students Safe Act, Congress could produce a bill that would be both more likely to pass and more successful at protecting students' and teachers' rights in schools.

I. ORIENTING A NATIONAL SECLUSION AND RESTRAINT CONVERSATION BETWEEN TWO EXTREMES

“Seclusion” and “restraint” are terms susceptible to multiple definitions, most of which bear little resemblance to the way in which these terms are used in a school environment. Consequently, a discussion about seclusion and restraint in schools should begin by situating the terms in an education context.

A. Understanding the Meaning of Seclusion and Restraint

This Note, unless otherwise specified, adopts the United States Department of Education's definitions of “seclusion” and

9. See, e.g., Noel K. Gallagher, *Maine Teachers Say New Restraint Rule Leads to Assaults by Students*, PORTLAND PRESS HERALD (Nov. 27, 2012), <http://www.pressherald.com/news/Maine-teachers-union-reports-dozens-of-student-on-teacher-assaults.html>; Amy Hetzner, *Student Restraint Measure Stalls*, J. SENTINEL (Mar. 18, 2010), <http://www.jsonline.com/news/education/88300497.html>; Nirvi Shah, *School Boards Group Wants Restraint, Seclusion Proposal Diluted*, EDUC. WK. (Jul. 20, 2012, 9:09 AM), http://blogs.edweek.org/edweek/speced/2012/07/school_boards_group_wants.html.

“restraint,” which are respectively reproduced and explained in the following two subsections.

1. Seclusion

Unless otherwise specified, “seclusion” is defined in this Note as “[t]he involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving.”¹⁰ This definition, which was used by the Department of Education’s Office of Civil Rights Data Collection from 2009–10,¹¹ closely resembles the definition adopted by some states, such as Wisconsin.¹² It also mirrors the definition put forth in 2002 by the American Academy of Child and Adolescent Psychiatry,¹³ and the definition used by the United States Government Accountability Office (“GAO”) in its 2009 investigation into seclusion and restraint.¹⁴ The Department of Education distinguishes seclusion from generic behavior-control mechanisms by noting that its definition “does not include a timeout, which is a behavior management technique.”¹⁵

2. Restraint

In this Note, unless otherwise specified, “restraint” is defined as:

A personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely. The term physical restraint does not include a physical escort. Physical escort means a temporary touching or holding of the hand, wrist, arm, shoulder or back for the purpose of

10. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., OMB NO. 1875-0240, 2009–10 CIVIL RIGHTS DATA COLLECTION: PART 1 AND PART 2, at 37 (2012), available at <http://www2.ed.gov/about/offices/list/ocr/whatsnew.html> (the link labeled “2009–10 CRDC Table Layouts with Definitions”).

11. See *id.*

12. See 2011 Wis. Act 125 § 2(1)(i) (2012) (defining seclusion as “the involuntary confinement of a pupil, apart from other pupils, in a room or area from which the pupil is physically prevented from leaving.”).

13. See V. Susan Villani et al., *A Descriptive Study of the Use of Restraint and Seclusion in a Special Education School*, 41 CHILD & YOUTH CARE F. 295, 296 (2012) (“The [American Academy of Child and Adolescent Psychiatry]’s practice parameters define[] *seclusion* as ‘the involuntary confinement of a person in a room alone so that the person is physically prevented from leaving’”).

14. See GAO, *supra* note 3, at 1 (“Seclusion is the involuntary confinement of an individual alone in a room or area from which the individual is physically prevented from leaving.”).

15. OFFICE FOR CIVIL RIGHTS, *supra* note 10, at 37.

inducing a student who is acting out to walk to a safe location.¹⁶

The House of Representatives, in its version of the 2011 Keeping All Students Safe Act, used a definition matching the Department of Education's definition.¹⁷

A few points about this definition are noteworthy. First, the Department of Education's definition of "physical restraint" is distinct from the Department's definition of "mechanical restraint."¹⁸ Unlike physical restraints, mechanical restraints involve "the use of [a] device or equipment to restrict a student's freedom of movement."¹⁹ For the purposes of this Note, physical restraints are also distinct from chemical restraints.²⁰ Consequently, when this Note addresses whether and to what extent restraint should be used in schools, "restraint" refers only to physical restraint. This Note assumes that mechanical²¹ and chemical²² restraints have no place in schools under any conditions.

16. *Id.* at 36.

17. See Keeping All Students Safe Act, H.R. 1381, 112th Cong. §§ 4(7)–(8) (2011) (defining "restraint" by reference to 42 U.S.C. § 290jj(d)(3) and "physical escort" by reference to § 290jj(d)(2)).

18. See OFFICE FOR CIVIL RIGHTS, *supra* note 10, at 35–36 (defining "mechanical restraint" and "physical restraint" as separate, distinct terms).

19. *Id.* at 35. "Devices" range from duct tape and bungee cords to straitjackets, weighted blankets, and chairs to which students are strapped or belted, such as a Rifton chair. See BUTLER, *supra* note 4, at 2, 27–28; see, also, Birdie Champ, *Restraining and Secluding Children*, AMHERST-PELHAM SPECIAL EDUC. PARENT ADVISORY COUNCIL (Dec. 29, 2011, 6:15 PM), <http://arps-sepac.info/node/48>; Issue Brief, Glen Dunlap et al., *Preventing the Use of Restraint and Seclusion with Young Children: The Role of Effective, Positive Practices*, TECHNICAL ASSISTANCE CTR. ON SOC. EMOTIONAL INTERVENTION FOR YOUNG CHILDREN 1–2 (Feb. 2011), available at http://www.challengingbehavior.org/do/resources/documents/brief_preventing.pdf; Council for Children with Behavioral Disorders, *CCBD's Position Summary on the Use of Physical Restraint Procedures in School Settings*, 34 BEHAV. DISORDERS 223, 224 (2009).

20. Chemical restraints use drugs or medication to restrict a student's movement. See, e.g., H.R. 1381 § 4(1); Perry A. Zirkel & Caitlin A. Lyons, *Restraining the Use of Restraints for Students with Disabilities: An Empirical Analysis of the Case Law*, 10 CONN. PUB. INT. L.J. 323, 324 (2011).

21. See Keeping All Students Safe Act, S. 2020, 112th Cong. § 4(1)(B) (2011); H.R. 1381 § 5(a)(1)(B). Banning mechanical restraints is crucial because they constitute the source of many documented restraint injuries. See, e.g., GAO, *supra* note 3, at 22–25 (documenting injuries due to mechanical restraints, including fastening students to chairs and blackboards with tape, sealing students' mouths shut with tape and gags, tying a student to a cot with a sheet, and binding a student with leather straps to a seat resembling an "electric chair").

22. See S. 2020 § 4(1)(C); H.R. 1381 § 5(a)(1)(B). The ban on chemical restraints is precautionary rather than remedial because chemical restraints have never seriously been an issue in schools the way they have been in institutions, hospitals, and juvenile detention facilities. See also Council for Children with Behavioral Disorders, *supra* note 19, at 224; Naomi Freundlich, "Atypical" Antipsychotics Misused as "Chemical Restraints" for Youthful Offenders, HEALTH BEAT, June 8, 2011, <http://www.healthbeatblog.com/2011/06/atypical-antipsychotics-misused-as-chemical-restraints-for-youthful-offenders/>.

Excluding physical escorts from the definition of restraint is also significant, because it reduces the tendency to equate “restraint” with “any physical contact.” Some school officials argue that placing limitations on restraint has financial, temporal, and safety costs, because teachers are subsequently afraid to make any physical contact with students.²³ By clarifying the circumstances in which a teacher may use light physical contact—such as putting a hand gently on a student’s back—to guide a student to a safe location, this definition avoids the objections that arise when restraint is defined as any physical contact restricting a student’s movement.

*B. The Case for Allowing Some Form of Seclusion or Restraint
in a School Setting*

The intuition to characterize seclusion as a “behavior management technique” speaks to the notion that, in some circumstances, some students lose control of their actions and, when this happens, school staff need mechanisms to help the student regain control. That need to regain control is driven primarily by concerns about safety and classroom disruption.

Although the tenor of the “safety” justification has changed over time, there has long been an argument that seclusion and restraint are necessary tools for protecting classrooms from out-of-control students. When restraint initially became an accepted technique in schools in the 1950s, proponents billed it as a way to control aggressive students.²⁴ While many restraint advocates have since abandoned that broad position, there is still a common—and powerful—argument that restraint is necessary to ensure safety once a student has crossed the line from aggressive or belligerent to physically out of control.²⁵ In this circumstance, restraint is sometimes needed to prevent the student from injuring him- or herself, other

23. See Dan Domenech, *Senate Bill On the Use of Restraint Would Tie School Leaders’ Hands*, ESCHOOL NEWS (May 1, 2012), <http://www.eschoolnews.com/2012/05/01/senate-bill-on-the-use-of-restraint-would-tie-school-leaders-hands-2/>; Ben Hanstein, *New Restraint Regulations Creating Challenges for Teachers, Staff*, DAILY BULLDOG (Oct. 24, 2012), <http://www.dailybulldog.com/db/features/new-restraint-regulations-creating-challenges-for-teachers-staff/>.

24. See Joseph B. Ryan et al., *Reducing Seclusion Timeout and Restraint Procedures With At-Risk Youth*, 13 J. AT-RISK ISSUES 7, 7–8 (2007).

25. See, e.g., Council for Children with Behavioral Disorders, *supra* note 19, at 224; Ryan et al., *supra* note 24; Sarah Marquez, Note, *Protecting Children with Disabilities: Amending the Individuals with Disabilities Education Act to Regulate the Use of Physical Restraints in Public Schools*, 60 SYRACUSE L. REV. 617, 634–35 (2010).

students, or staff.²⁶ When a student is already physically out of control, it is often too late to use other intervention strategies.

Seclusion and restraint have additionally been justified as important for establishing classroom stability. Violent outbursts are a concern in schools not just because they are potentially dangerous, but also because they are substantially disruptive to the classroom environment.²⁷ Other students cannot engage in effective learning while an out-of-control student remains in the classroom.²⁸ Particularly in the case of seclusion, where the out-of-control student is removed from the classroom to a separate location, these mechanisms give teachers a way to minimize the disruption to the classroom and refocus students.

There is also a financial argument for allowing some form of seclusion or restraint in schools. In many states, property damage is a circumstance that permits the seclusion or restraint of students.²⁹ If teachers are not allowed to use seclusion or restraint when a student gets out of control, that student may cause costly property damage while teachers look on helplessly.³⁰ Given the high cost of classroom technology,³¹ the fear of expensive property damage is not unfounded.

*C. The Case for Limiting Unbridled Seclusion and Restraint in Schools:
Evidence of Physical Harm and Death Due to
Seclusion and Restraint*

Although there are clear arguments in favor of allowing some form of seclusion and restraint in schools, the problems with unrestricted seclusion and restraint are just as apparent. The arguments against unbridled seclusion and restraint boil down to two major objections: seclusion and restraint are too often used in circumstances not justified by safety concerns, and too many students—particularly those with disabilities—are injured by the techniques' use.

26. See Council for Children with Behavioral Disorders, *supra* note 19, at 225; Villani et al., *supra* note 13, at 299.

27. See Villani et al., *supra* note 13, at 299; Hanstein, *supra* note 23.

28. See, e.g., Susan McMillan, *Student Restraint Rule May Be Relaxed*, PORTLAND PRESS HERALD (Dec. 30, 2012), <http://www.pressherald.com/news/student-restraint-rule-may-be-relaxed-2012-12-30.html>.

29. See BUTLER, *supra* note 4, at 12–14.

30. See Hanstein, *supra* note 23.

31. See, e.g., *Classroom Technology Costs*, TEACHING TEK (July 9, 2012), <http://www.teachingtek.com/classroom-technology-costs/>.

1. The Dangers of Using Seclusion and Restraint As Disciplinary Measures

While several legitimate rationales weigh in favor of allowing seclusion and restraint in certain circumstances, increasing evidence indicates that these rationales are too often absent when seclusion and restraint are used. In particular, seclusion and restraint have become a convenient means of disciplining students³² for behaviors that do not put student or classroom safety at risk.³³

The use of seclusion and restraint to discipline is concerning because, as Secretary of Education Arne Duncan has cautioned, “there continues to be no evidence that using restraint or seclusion is effective in reducing the occurrence of the problem behaviors that frequently precipitate the use of such techniques.”³⁴ The notion that seclusion and restraint do not “fix” problematic behavior is supported by documented cases of repeated seclusion and restraint. For example, in one instance documented by the GAO, a nine-year-old student with a learning disability was secluded seventy-five times over a six-month period for engaging in behaviors such as “whistling, slouching, and waving hands.”³⁵ Long before the seventy-fifth episode, school staff should have recognized that seclusion was clearly not an effective means of targeting and reducing the student’s undesirable behaviors.

These instances, where seclusion and restraint are used to discipline or manage behavior rather than to provide safety in an emergency, are the most problematic. The potential justifications for seclusion and restraint do not apply when the techniques are employed for the purpose of punishment. Additionally, in these cases, the “[r]isk for adverse effects and abuse increases [because seclusion and restraint are] . . . intermingled with treatment or educational goals, discipline, and punishment”³⁶ Because repeated or long-term exposure to seclusion and restraint raises the risk of

32. See GAO, *supra* note 3, at 8 (“[In many cases, students] were restrained or secluded as disciplinary measures, even when their behavior did not appear to be physically aggressive.”).

33. See Cheryl A. Vital et al., *Strengthening Policies and Practices in the Use and Prevention of Physical Restraint in Schools*, 199 WEST’S EDUC. L. REP. 1, 1 (2005); see also NANCY LEE JONES & JODY FEDER, CONG. RESEARCH SERV., R40522, THE USE OF SECLUSION AND RESTRAINT IN PUBLIC SCHOOLS: THE LEGAL ISSUES 10 (2010) (discussing the dissent in *CJN v. Minneapolis Public Schools*, 323 F.3d 630 (8th Cir. 2003)); Council for Children with Behavioral Disorders, *supra* note 19, at 225.

34. U.S. DEP’T OF EDUC., RESTRAINT AND SECLUSION: RESOURCE DOCUMENT iii (2012), available at <http://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf>.

35. GAO, *supra* note 3, at 28 (internal quotation marks omitted).

36. LeBel et al., *supra* note 6, at 78.

student injury,³⁷ disciplinary strategies that use the techniques as routine procedures should be eliminated. By continuing to use seclusion and restraint to discipline, teachers not only put students at repeated risk for harm but also fail to address the underlying motivations or causes of the undesirable behavior.

These risks are compounded by the fact that seclusion and restraint are disproportionately used on students with disabilities.³⁸ For example, data collected by the Department of Education Office for Civil Rights during the 2009 and 2010 school years found that “[s]tudents with disabilities (under the IDEA and Section 504 statutes) represent 12% of [total] students . . . but nearly 70% of the students who are physically restrained by adults in their schools.”³⁹ Not only are seclusion and restraint disproportionately used on students with disabilities, but students with disabilities “disproportionately suffer[] death, injury, and trauma” when subjected to seclusion and restraint.⁴⁰ With this often-fragile population, schools should be vigilant about minimizing seclusion and restraint rather than using these mechanisms frequently as disciplinary tools.

2. Documentation of Injuries and Death Due to Seclusion and Restraint

The risks that seclusion and restraint pose to students both with and without disabilities are documented and substantial. In 2009, the House of Representatives Committee on Education and Labor asked the GAO to investigate allegations of student abuse and death connected to the use of seclusion and restraint in schools.⁴¹ The GAO “discover[ed] hundreds of such allegations at public and private schools across the nation between the years 1990 and

37. See *infra* Part I.C.2.

38. See GAO, *supra* note 3, at 7–8; Laura C. Hoffman, *A Federal Solution That Falls Short: Why the Keeping All Students Safe Act Fails Children with Disabilities*, 37 J. LEGIS. 39, 39 (2011); LeBel et al., *supra* note 6, at 76–77; Marquez, *supra* note 25, at 618–19.

39. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., CIVIL RIGHTS DATA COLLECTION: DATA SUMMARY 5 (2012), available at <http://ocrdata.ed.gov/Downloads/CMOCRTheTransformedCRDCFINAL3-15-12Accessible-1.pdf>.

40. BUTLER, *supra* note 4, at 8.

41. GAO, *supra* note 3, at 2–3.

2009[,] . . . [a]lmost all of [which] involved children with disabilities.”⁴² The allegations varied with regard to the alleged harm,⁴³ the justification for the restraint or seclusion,⁴⁴ student age,⁴⁵ and school district.⁴⁶

Reports of severe injury or death are more common with restraint than seclusion, because restraint involves direct physical contact between an adult and a student. In the GAO’s study, at least twenty of the allegations of harm “involved restraints that resulted in [a student’s] death.”⁴⁷ The GAO’s report also documented alleged injuries ranging from scratches and bruises to broken bones.⁴⁸ Broken bones and death are particularly common when techniques such as prone (face-down) restraints are used, because such techniques restrict students’ ability to breathe.⁴⁹ In 2009, the National Disability Rights Network released a report that systematically documented, state-by-state, alleged abuses of seclusion and restraint, many of which resulted in the same kinds of injuries found by the GAO.⁵⁰ In another report, the Child Welfare League of America identified joint damage, bite marks, and friction burns as additional injuries to children caused by restraint.⁵¹

Seclusion can also harm children, but the harm is often self-inflicted by the student while he or she is isolated or unsupervised. The GAO documented one case involving a thirteen-year old boy who died after hanging himself while unobserved in a seclusion room.⁵² The National Disability Rights Network reported that another student attempted to strangle herself while isolated during

42. *Id.* at 5. Although most of the allegations of harm—and all allegations of death—due to seclusion or restraint that the GAO investigated involved students with disabilities, the Office for Civil Rights reported in March, 2012 that special education students accounted for 70% of all students secluded or restrained in schools. *See CIVIL RIGHTS DATA COLLECTION: DATA SUMMARY*, *supra* note 39, at 5.

43. *See* GAO, *supra* note 3, at 5–6.

44. *See id.* at 10–13 (discussing school district rationales for seclusion and restraint ranging from a behavior control for actions such as whistling, slouching, and wiggling a loose tooth, to a safety measure implemented when a student attacked a counselor).

45. *See id.* at 6, 10 (describing allegations of abuse involving students from four to seventeen years of age).

46. *See id.* at 2, 5 (describing allegations of harm occurring at “public and private schools nationwide” and identifying ten case studies from allegations in nine separate states).

47. *Id.* at 8.

48. *See id.* at 5–6.

49. *See id.* at 7–9; NAT’L DISABILITY RIGHTS NETWORK, *supra* note 1, at 13.

50. *See* NAT’L DISABILITY RIGHTS NETWORK, *supra* note 1, at 13–26.

51. *See* CHILD WELFARE LEAGUE OF AM., *Fact Sheet: Behavioral Management and Children in Residential Care*, <http://www.cwla.org/advocacy/secresfactsheet.htm> (last visited Aug. 17, 2013); GAO, *supra* note 3, at 8, 11, 18, 22–23.

52. *See* GAO, *supra* note 3, at 5.

seclusion,⁵³ and also identified multiple cases nationwide of students who injured themselves while left alone in seclusion rooms. One case involved a six-year old boy who cut himself on a glass pane and had to be taken to a hospital. Other examples include a student who bit himself hard enough to leave blood on the floor and walls and a student who severely injured himself and was left to sit in his own blood in the seclusion room.⁵⁴ In some instances, school officials denied students food or bathroom breaks for hours at a time.⁵⁵

Particularly in the case of seclusion, children are also at risk for psychological injuries, such as fear and even post-traumatic stress disorder.⁵⁶ Psychological harm is an especially high risk for young children who do not possess the skills or knowledge to comprehend why they have been secluded or restrained,⁵⁷ or those who have been the victims of neglect or abandonment in the past.⁵⁸ Such reactions and psychological injuries are not surprising in light of the nature of some techniques that have allegedly been used, such as locking students in closets, under stairs, and in storage areas, sometimes in the dark.⁵⁹

These types of documented injuries should raise serious concerns about the continued use of seclusion and restraint in their current form. However, it is important to note that these instances of alleged injury or death do not appear to be a frequent result of seclusion and restraint. Large-scale studies on seclusion and restraint are lacking, but serious injuries and death seem to be much closer to the exception than the rule in schools: the GAO, for instance, found that schools use seclusion and restraint thousands of times each year, but over a twenty-year period there were only a few hundred allegations of harm.⁶⁰ That said, legislative reform could substantially reduce the prevalence of injuries and death. The best way to institute an effective legislative reform is to look first at the current state of seclusion and restraint regulations and then to identify targeted ways to reduce the injuries caused by these mechanisms.

53. See NAT'L DISABILITY RIGHTS NETWORK, *supra* note 1, at 16.

54. See *id.* at 16, 19.

55. See GAO, *supra* note 3, at 6; NAT'L DISABILITY RIGHTS NETWORK, *supra* note 1, at 16, 18–20.

56. See Council for Children with Behavioral Disorders, *supra* note 19, at 225.

57. See Dunlap et al., *supra* note 19, at 2.

58. See NAT'L DISABILITY RIGHTS NETWORK, *supra* note 1, at 15, 19.

59. See *id.* at 18–19.

60. See GAO, *supra* note 3, at 5, 7 (identifying “hundreds” of instances in which families alleged harm out of thousands of uses of seclusion and restraint).

II. CURRENT STATE OF THE LAW

Education regulation is generally derived from a combination three sources: state laws, federal laws, and the courts. In the case of seclusion and restraint, state laws currently dominate. This Part will first discuss the labyrinth of state regulations surrounding seclusion and restraint. Next, this Part will explain why courts offer little guidance in the area of seclusion and restraint. Finally, this Part will compare the United States House of Representatives' and Senate's versions of the 2011 Keeping All Students Safe Act, the most recent—and unsuccessful—effort to pass federal legislation regulating seclusion and restraint in schools.

A. *State-by-State Legislation: A Piecemeal Approach*

Currently, there is no federal regulation of seclusion and restraint. In its absence, many states have enacted their own legislation to clamp down on unbridled seclusion and restraint in schools. Although the various state laws and nonbinding guidelines address the same problems, they provide drastically different solutions in different jurisdictions.⁶¹ For context, this Note will provide only a brief sketch of the types of provisions states have enacted; because more thorough documentations of state laws have already been produced,⁶² this Note will not repeat those efforts.

Forty-two states currently have laws regulating seclusion and restraint, ten states have voluntary, nonbinding guidelines, and five states have no state-level provisions regarding seclusion and restraint.⁶³ States not only differ with respect to the existence of seclusion and restraint regulations but also with respect to the extent of those regulations: some have implemented a flat ban on any seclusion or restraint,⁶⁴ while others have banned only certain forms,⁶⁵ or have limited their use under certain circumstances.⁶⁶

61. See BUTLER, *supra* note 4, at 7–9.

62. See *id.* at 49–54; Daniel Stewart, *How Do the States Regulate Restraint and Seclusion in Public Schools? A Survey of the Strengths and Weaknesses in State Laws*, 34 *HAMLIN L. REV.* 531 (2011).

63. See BUTLER, *supra* note 4, at 7–11 (totaling more than fifty states due to the inclusion of Washington, D.C. in the state count and the use of both binding laws and nonbinding regulations in six states).

64. See *id.* at 17–18.

65. See *id.* at 25–31.

66. See *id.*

For example, four states ban seclusion entirely.⁶⁷ Ten states limit seclusion to emergency cases where the student being secluded poses a risk of physical harm and ban seclusion if the only risk of the student's behavior is property damage or classroom disruption.⁶⁸ Conversely, eighteen states explicitly authorize seclusion even when no physical emergency exists.⁶⁹ Among the states that allow seclusion under some circumstances, five states ban "locked seclusion"—secluding a student in a room that the student cannot exit—while six other states ban seclusion only when the door to the seclusion room utilizes a formal lock that cannot automatically release.⁷⁰

Even states that allow the same general forms of seclusion treat the details differently, with varying regulations regarding observed seclusion,⁷¹ property damage versus physical harm,⁷² inclusion of acceptable uses in a student's individualized education plan (IEP) and behavior implementation plan (BIP),⁷³ exhaustion of less restrictive alternatives,⁷⁴ mandatory release at the expiration of the emergency,⁷⁵ seclusion and restraint as punishment,⁷⁶ breathing

67. *See id.* at 17.

68. *See id.* at 18.

69. *See id.* at 19.

70. *See id.* at 17.

71. *See id.* at 28–29 (documenting provisions ranging from allowing unobserved seclusion where the procedure is written into the student's IEP, to permitting unobserved seclusion where the door to the seclusion room is unlocked, to allowing observation by video camera, to authorizing unregulated seclusion as long as a teacher intermittently checks the room).

72. *See id.* at 19–20 (noting that some states authorize seclusion when a student poses a serious threat to property, while others are silent or explicitly limit seclusion to cases involving threats to physical harm).

73. *See id.* (pointing out that some states only authorize seclusion or particular types of seclusion, such as unobserved seclusion, if the student's IEP or BIP provides for it).

74. *See id.* at 22–23 (identifying seventeen states that require school staff to try and fail to implement an alternative, less restrictive method before engaging in restraint or seclusion).

75. *See id.* at 23–24 (documenting sixteen states with laws requiring seclusion or restraint to cease when there is no longer an emergency, six states explicitly authorizing the continuation of restraint after an emergency has ended, and a near-majority of states with no law directly addressing the role of emergency).

76. *See id.* at 24 (identifying some states that prohibit seclusion as a punishment and others that do not address whether seclusion may be a punishment strategy).

restrictions,⁷⁷ minimum seclusion room conditions,⁷⁸ staff training,⁷⁹ and notification to parents.⁸⁰

In response to the (ultimately unsuccessful) congressional action in this area two years ago, several states passed new legislation or updated previous legislation, creating greater variation across states.⁸¹ Jessica Butler, the Congressional Affairs Coordinator for the Autism National Committee, deftly summarized the situation when she observed that “[t]he protection a child receives is still randomly decided by where he [or] she lives”⁸²

*B. Reluctant Courts: The Lack of a Coherent Judicial Message on
Seclusion and Restraint in Schools*

No study has purported to undertake an exhaustive or comprehensive review of court decisions relating to seclusion and restraint.⁸³ Only a few studies have analyzed the case law at all.⁸⁴ The general concurrence seems to be that a thorough review of the case law in this area would be extremely difficult given the varying nature of state laws; even if such a review were possible, the inconsistent treatment of this area by courts would not provide much clarity or guidance.⁸⁵ The fact that seclusion and restraint disputes involving special education students are sometimes resolved during an administrative adjudication rather than in federal or state court proceedings has further complicated efforts to identify judicial trends.⁸⁶

Those studies that do analyze courts’ treatment of seclusion and restraint have found that federal courts tended to side with school

77. *See id.* at 25–26 (documenting twenty-six states with breathing restriction provisions or guidelines, including flat bans on restraints that obstruct breathing, targeted bans on prone restraints, and broad welfare protections).

78. *See id.* at 30–31 (indicating that states set different minimum room conditions relating to lighting, ventilation, presence of dangerous objects, size, bathroom access, and food and water access).

79. *See id.* at 39–40 (finding that only twenty-four states have training requirements written into seclusion and restraint laws, and that those twenty-four laws mandate different types of training: first aid, safe seclusion and restraint use, conflict de-escalation, and alternative positive behavior supports).

80. *See id.* at 32–35 (observing that many states require schools to notify parents if a child is secluded or restrained but vary on timing, from requiring same-day notice to the mailing of a written notice within three days).

81. *See id.* at 41–44.

82. *Id.* at 43.

83. *See* Zirkel & Lyons, *supra* note 20, at 330–31.

84. *See id.* at 330–32, 341–46, 349–50, 353–54.

85. *See id.* at 330–31, 342–50.

86. *See id.* at 330–31.

districts more often than parents,⁸⁷ but, in a substantial minority of cases, the parents prevailed.⁸⁸ Part of the motivation for the courts' decisions in these cases appears to have been a hesitance to second-guess teachers' conclusions about what is necessary to maintain classroom safety.⁸⁹

Due to the jurisprudential thicket surrounding this issue, this Note will not attempt to review courts' handling of the matter in any depth. Rather, this Note suggests that seclusion and restraint reform needs to be first and foremost a legislative endeavor.

C. The Keeping All Students Safe Act: Failed Congressional Attempts to Remedy the Problem of Improper Seclusion and Restraint

In light of the disjointed nature of judicial and state legislative protections for students and the mounting allegations of abuse surrounding seclusion and restraint, Congressman George Miller proposed a bill in the United States House of Representatives in 2009 that would have limited seclusion and restraint in schools.⁹⁰ Although Congressman Miller's bill passed the House, Senator Christopher Dodd's companion legislation in the Senate died in committee.⁹¹ As a result, Congress did not enact either bill.⁹² In April 2011, Congressman Miller reintroduced his bill, the Keeping All Students Safe Act.⁹³ Several months later, Senator Tom Harkin proposed a modified bill of the same name.⁹⁴ Both bills were referred to a committee shortly after introduction, but no further action was taken.⁹⁵ Each chamber's version of the 2011 Keeping All Students Safe Act contained similar, and in some cases identical,

87. *See id.* at 348.

88. *See id.* at 341–43.

89. *See generally* Marquez, *supra* note 25, at 629–31.

90. *See* BUTLER, *supra* note 4, at 41; *see also* Amanda Karhuse, *Federal Legislation Introduced on Seclusion and Restraint*, NAT'L ASS'N OF SECONDARY SCH. PRINCIPAL'S POL'Y BLOG (Dec. 11, 2009), <http://nasspblogs.org/principalspolicy/2009/12/federal-legislation-introduced-on-seclusion-and-restraint/>.

91. Keeping All Students Safe Act, S. 3895, 111th Cong. (2009) (as referred to S. Comm. on Health, Educ., Labor, & Pensions).

92. *See* LeBel et al., *supra* note 6, at 77.

93. *See id.*

94. *See* BUTLER, *supra* note 4, at 41.

95. *See Bill Summary & Status, 112th Congress, H.R. 1381: All Congressional Actions*, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR01381:@@X> (last visited Aug. 5, 2013); *Bill Summary & Status, 112th Congress, S. 2020: All Congressional Actions*, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN02020:@@X> (last visited Aug. 5, 2013).

provisions; consequently, they provide valuable insight into the types of provisions considered significant by Congress.

1. Seclusion: Definition and Authorization

The House and Senate bills contained different definitions of seclusion and different approaches to whether seclusion ought to be allowed. The Senate bill defined “seclusion” as “the isolation of a student in a room, enclosure, or space that is (A) locked; or (B) unlocked and the student is prevented from leaving.”⁹⁶ That bill did not require that a student be involuntarily placed in the locked room in order to find that a practice constituted seclusion.

The House bill, in contrast, adopted the Public Health Service Act’s definition of seclusion as⁹⁷:

[A] behavior control technique involving locked isolation. Such term does not include a time out. The term “time out” means a behavior management technique that is part of an approved treatment program and may involve the separation of the [student] from the group, in a non-locked setting, for the purpose of calming.⁹⁸

While the House bill included locked rooms in its definition of seclusion, unlike the Senate bill it was silent on the use of unlocked isolation rooms from which a student is otherwise prevented from leaving.⁹⁹

The Senate version of the Keeping All Students Safe Act banned seclusion under any circumstances.¹⁰⁰ The House version allowed seclusion in instances where “the student’s behavior poses an imminent danger of physical injury to the student, school personnel, or others”¹⁰¹ but required that a staff member continuously visually monitor the secluded student.¹⁰² In light of the fact that only four states have enacted flat bans on seclusion,¹⁰³ the House bill’s limitations on seclusion were much more in line with the majority of state laws, allowing seclusion but restricting its acceptable forms.

96. Keeping All Students Safe Act, S. 2020, 112th Cong. § 2(11) (2011).

97. See Keeping All Students Safe Act, H.R. 1381, 112th Cong. § 4(14) (2011).

98. 42 U.S.C. §§ 290jj(d)(4)–(5) (2006).

99. See Hoffman, *supra* note 38, at 68–69.

100. See S. 2020 § 4(1)(A).

101. H.R. 1381 § 5(a)(2)(A).

102. See H.R. 1381 § 5(a)(2)(C).

103. See BUTLER, *supra* note 4, at 17.

2. Restraint: Definition and Authorization

The House of Representatives and the Senate included similar provisions regarding both the definition of and authorization for restraint in their bills. The House bill used the Public Health Service Act's definition of "physical restraint,"¹⁰⁴ which characterizes restraint as "[a] personal restriction that immobilizes or reduces the ability of an individual to move his or her arms, legs, or head freely. Such a term does not include a physical escort," where a physical escort is defined as "[t]he temporary touching or holding of the hand, wrist, arm, shoulder, or back for the purposes of inducing a [student] who is acting out to walk to a safe location."¹⁰⁵ The Senate version of the bill used a virtually identical definition of restraint.¹⁰⁶

Both the House and the Senate bills limited the use of physical restraint to instances of imminent or immediate physical injury,¹⁰⁷ and both bills required the restraint of a student to end when the emergency ended.¹⁰⁸

The Senate bill contained two additional protections concerning restraint that were absent from the House bill. First, the Senate bill prohibited any form of restraint that "interfere[s] with the student's ability to communicate in the student's primary language or mode of communication."¹⁰⁹ This provision would be most relevant for students whose primary mode of communication is nonverbal. For example, under the Senate bill, if a student communicates predominantly through sign language, the restraint could not restrict the student's ability to use his or her hands (and in some cases, arms) to communicate with the adult engaging in the restraint.

Second, the Senate bill required a "debriefing" session following any use of restraint.¹¹⁰ At a debriefing session, the restrained student, the student's parents, relevant school personnel, and school administrators would meet to discuss the incident to determine why restraint was necessary and how a similar occurrence could be prevented in the future.¹¹¹

104. See H.R. 1381 § 4(8). The House of Representatives' version of the Keeping All Students Safe Act separately defines other types of restraint, such as chemical and mechanical, but the bill contemplates only physical restraint in a school setting. See H.R. 1381 §§ 4(1), 4(5), 5(a)(1).

105. 42 U.S.C. § 290jj(d)(2)–(3) (2006).

106. See Keeping All Students Safe Act, S. 2020, 112th Cong. § (2)(8) (2011).

107. See *id.* § 4(2)(A)(i) (2012); H.R. 1381 § 5(a)(2)(A).

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

109. S. 2020 § 4(2)(A)(ii).

110. See S. 2020 § 4(3)(B).

111. See S. 2020 §§ 4(3)(A)(iv)(II)–(B)(ii).

3. Training Requirements

Both the House and Senate versions of the Keeping All Students Safe Act required school personnel using restraint to be trained in a “State-approved crisis intervention training program.”¹¹² However, both the Senate and the House bills included an exception for “rare and clearly unavoidable emergency circumstances” in which a trained staff member was not available.¹¹³

4. Reporting Requirements

Both the House and Senate bills required state educational agencies to collect detailed data on restraint:¹¹⁴ how many times restraint was used in the preceding academic year, how many restraint incidents resulted in injury to a student or staff member, how many restraint incidents resulted in a student’s death, whether the staff member implementing the restraint was properly trained, how old the restrained student was, and whether the restrained student had a disability.¹¹⁵ Under both bills, the reports had to be submitted to the Secretary of Education and made available to the general public.¹¹⁶

Although both bills mandated these statewide reporting requirements for state educational agencies, both also contained a type of reporting requirement for individual schools: both bills required schools to notify the parents of any student who had been secluded or restrained within twenty-four hours of the incident.¹¹⁷

5. Grant Authority

Critics of strict seclusion and restraint regulation have objected that additional precautions and training requirements could be prohibitively expensive for schools.¹¹⁸ Perhaps in response to that

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

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

114. See H.R. 1381 § 6(b). In the case of the House of Representatives’ bill, the data collection requirements related to both restraint and seclusion.

115. See S. 2020 § 6; H.R. 1381 § 6(b).

116. See S. 2020 § 6(a); H.R. 1381 § 6(b)(1).

117. See S. 2020 § 4(3)(A)(iv); H.R. 1381 § 5(a)(5)(A).

118. See, e.g., Molly Bloom & Ida Lieszkovszky, *Ohio School Leaders Say State Should Not Regulate Use of Seclusion, Restraint*, STATEIMPACT (Oct. 29, 2012, 10:30 PM), <http://stateimpact.npr.org/ohio/2012/10/29/ohio-school-leaders-say-state-should-not-regulate-use-of-seclusion-restraint/>.

concern, both the House and Senate bills included provisions for three-year federal grants to assist schools with increasing safety for students and staff during behavioral outbursts.¹¹⁹ The federal grants were available for three purposes: to meet minimum restraint (and, under the House bill, seclusion) requirements, to collect and analyze data in connection with seclusion and restraint, and to implement positive behavior supports in an effort to reduce the need for seclusion and restraint by improving the school climate.¹²⁰

III. A COMPROMISE TO PROTECT BOTH STUDENTS AND SCHOOLS

Together, the 2011 House and Senate bills provide a good framework for seclusion and restraint legislation. In particular, the version of the Keeping All Students Safe Act proposed by the House is a solid model for federal seclusion and restraint legislation. However, neither bill is complete.

This section proposes five alterations to the 2011 House version of the Keeping All Students Safe Act that, if made, would improve student safety while offering school districts additional tools to maintain secure and orderly classrooms: first, eliminating the loophole that allows untrained staff members to restrain a student if no trained staff are present; second, adopting the Senate bill's provision that restraint may not be used if it interferes with a student's primary mode of communication; third, modifying the definition of seclusion and limiting the conditions under which seclusion can be implemented; fourth, expanding the grant authority to allow grants for developing de-escalation strategies to offer viable alternatives to seclusion and restraint in nonemergency situations; and fifth, including a five-year sunset clause to force legislators to timely reevaluate whether these provisions are successful or whether they require additional modification. This Part discusses each modification in turn.

119. See S. 2020 § 7; H.R. 1381 § 7.

120. See S. 2020 § 7(a); H.R. 1381 § 7(a).

A. Bolstering Restraint Regulations

1. Eliminating the Loophole that Allows Untrained Staff Members to Engage in Restraint

The restraint provisions of the 2011 House bill required restraints to be imposed by “school personnel trained and certified by a State-approved crisis intervention training program.”¹²¹ However, the bill also contained a loophole that enabled untrained personnel to utilize restraint.¹²² If a future Congress were to use the 2011 House bill as a model, the loophole authorizing restraint by untrained staff should be eliminated.

The 2011 House bill allowed “other school personnel” to physically restrain a student “in the case of a rare and clearly unavoidable emergency circumstance when [certified and trained] school personnel . . . are not immediately available due to the unforeseeable nature of the emergency circumstance.”¹²³ This loophole, while crafted to apply to a very narrow set of circumstances, provides no guidance as to what constitutes a “rare and clearly unavoidable emergency.” The provision thus has the potential to be abused by schools that cut corners while training staff in crisis intervention and then invoke the loophole provision when an emergency arises that might otherwise have been prevented.

This untrained personnel exception may have been intended to provide flexibility for schools that could not afford to have a crisis-intervention-trained staff member in each classroom. Some schools have complained that crisis-intervention-training requirements place too high a financial burden on school districts.¹²⁴ However, a loophole that allows untrained personnel to use restraint in circumstances that those same personnel deem an “unavoidable emergency” places students at risk. Particularly in light of the legislation’s statement that restraint should be performed by trained

121. H.R. 1381 § 5(a)(2)(D)(i).

122. See H.R. 1381 § 5(a)(2)(D)(ii).

123. *Id.*

124. See, e.g., Jennifer Smith Richards, *Seclusion-Room Policy: State Plan a Burden, Schools Say*, THE COLUMBUS DISPATCH (Nov. 4, 2012, 7:44 AM), <http://www.dispatch.com/content/stories/local/2012/11/04/state-plan-a-burden-schoolssay.html>; see also Sasha Pudelski, AM. ASS’N OF SCH. ADM’RS, KEEPING SCHOOLS SAFE: ENSURING FEDERAL POLICY SUPPORTS SCHOOL SAFETY 15–16 (2012), http://www.aasa.org/uploadedFiles/Policy_and_Advocacy/AASAJuly-2012-Keeping-Schools-Safe.pdf (describing estimates of the cost to school districts of complying with the United States Department of Education’s restraint and crisis intervention training recommendations).

personnel, along with the provision of grant money to fund training programs,¹²⁵ a lack of available trained personnel is an unacceptable excuse for allowing an untrained staff member to restrain a student. Consequently, any legislation drafted by a future Congress should close this loophole.

2. Banning Restraint that Interferes with a Student's Primary Mode of Communication

Any new legislation modeled on the 2011 House bill should also adopt the 2011 Senate bill's provision that restraint may only be used when "the physical restraint does not interfere with the student's ability to communicate in the student's primary language or mode of communication."¹²⁶ In its investigation into allegations of death and physical injury due to restraint, the GAO found that restraints "that impede respiration[] can be deadly."¹²⁷ If a restraint interferes with a student's ability to breathe, the restraint almost certainly interferes with the student's ability to verbally communicate as well. Forms of restraint involving a high probability of respiration interference—like face-down or prone restraints¹²⁸—are appropriately and categorically banned under such a provision.

Even when restraints do not interfere with a student's ability to breathe, the use of restraint has the potential to cause that student considerable discomfort. One of the best ways to ensure that the restraint does not physically injure the student is to guarantee that the student is able to articulate his or her discomfort. Particularly in the case of students for whom verbalization is difficult or impossible, the staff member implementing the restraint must take care that the student is able to communicate by an alternative mode. Federal legislation modeled primarily on the 2011 House bill could better protect students during the use of restraint by adopting the Senate's provision on this issue.¹²⁹

125. See H.R. 1381 § 7(a).

126. Keeping All Students Safe Act, S. 2020, 112th Cong. § 4(2)(A)(ii) (2011).

127. GAO, *supra* note 3, at 7.

128. See *id.* at 8–9 (identifying face down or prone restraints as a common theme in many restraint-related deaths).

129. This Note presumes the existence of safe and effective restraints that do not interfere with communication methods such as sign language.

B. Modifying the Definition of Seclusion and Establishing Limitations on the Use of Seclusion

While the addition of a “serious property destruction” provision and protections for nonverbal communicators make schools and students safer in a restraint context, seclusion remains problematic under the 2011 House bill. The bill’s definition of seclusion did not provide sufficient guidance for schools about when to use the technique, and the bill’s provisions did not address many of the factors commonly present when students are injured during seclusion. By clarifying the definition and establishing limitations on its use, a future Congress could make seclusion considerably safer for students.

1. Modifying the Definition of Seclusion

The House of Representatives defined seclusion in its 2011 bill as “a behavior control technique involving locked isolation.”¹³⁰ This definition is insufficient for several reasons. One is that it is silent on the use of unlocked isolation rooms,¹³¹ which creates uncertainty for schools about whether unlocked rooms are appropriate or whether their use constitutes seclusion at all for the purposes of reporting requirements. Additionally, by defining seclusion as a “behavior control technique,” this definition sends a mixed message to school staff about whether seclusion ought to be used only as an emergency safety mechanism or also as a punishment mechanism—what might colloquially be considered a “time out”—for something like a rule violation. Further, by authorizing seclusion in locked rooms, the 2011 House bill put students’ safety at risk. Locked rooms present dangers to students in the event of an emergency, such as a fire,¹³² and students are trapped with no way to get out if a teacher becomes distracted and leaves the area.

A future Congress should provide more guidance to schools and better protect students by modifying this definition of seclusion. The definition used by the GAO in its 2009 seclusion and restraint investigation offers a good model. According to the GAO, “[s]eclusion is the involuntary confinement of an individual alone in a room or area from which the individual is physically prevented

130. 42 U.S.C. § 290jj(d)(4) (2006). See H.R. 1381 § 4(14) (adopting the definition of seclusion offered by the Public Health Services Act, 42 U.S.C. § 290jj(d)(4)).

131. See Hoffman, *supra* note 38, at 68–69.

132. See *id.* at 70–71.

from leaving.”¹³³ Because the GAO definition is more specific and applies to both locked and unlocked rooms, it leaves less room for abuse.

Some states have already adopted similar definitions; in March 2012, Wisconsin passed legislation that defined seclusion as “the involuntary confinement of a pupil, apart from other pupils, in a room or area from which the pupil is physically prevented from leaving.”¹³⁴ Wisconsin’s definition, like the GAO’s definition, covers both locked and unlocked isolation rooms, which removes the uncertainty for school districts about whether unlocked rooms fall under the definition of seclusion.

The definitions used by Wisconsin and the GAO also refrain from using loaded phrases such as “behavior control technique.” Instead, they define seclusion as any involuntary confinement in a space from which the student is prevented from leaving, regardless of the motivation behind the confinement. By using a definition similar to Wisconsin or the GAO, a future Congress could establish safer seclusion practices by providing schools with much-needed guidance about what constitutes seclusion.

2. Establishing Limitations on the Use of Seclusion

A reworked definition is useful, but additional provisions are needed to appropriately limit the abuse of seclusion in schools. In particular, a future Congress could significantly improve safety by setting minimum requirements for the seclusion space and establishing a limit on the duration and frequency of seclusion episodes. A future Congress should also take care to incorporate the 2011 House bill’s requirement that school personnel maintain continuous face-to-face or direct visual monitoring of a secluded student.¹³⁵

Most of the injuries documented by the GAO and the National Disability Rights Network involved at least one of four factors: unsafe room conditions, long-term isolation without restroom or food breaks, frequent use of seclusion with the same student, and lack of monitoring.¹³⁶ Each of these factors is addressed by one of the four seclusion provisions above.

133. GAO, *supra* note 3, at 1.

134. 2011 Wis. Act 125 § 2(1)(i) (2012).

135. H.R. 1381 § 5(a)(2)(C).

136. See GAO, *supra* note 3, at 8, 27–28; NAT’L DISABILITY RIGHTS NETWORK, *supra* note 1, at 14–20.

a. Room Safety Provisions

A seclusion room should be a risk-free environment for students, and establishing minimum requirements for seclusion rooms would greatly reduce the problem of unsafe room conditions. Minimum standards regarding ventilation, lighting, and square footage should be included in any federal seclusion legislation. Additionally, securing seclusion room doors with locks that do not automatically release in the event of an emergency should be prohibited.¹³⁷ Several states have already implemented minimum standards for seclusion rooms,¹³⁸ providing Congress with examples for setting its own minimum requirements.

b. Time Limits

A limit on the permissible duration of a seclusion episode addresses concerns about long-term isolation without breaks. If a student may only be kept in seclusion for a fairly short period of time, such as one hour, the problem of denying breaks becomes far less critical, and students are less likely to suffer the psychological effects of long-term isolation. Seclusion should be an emergency mechanism to keep other students and staff safe while allowing the secluded student to regain control. If the secluded student has not de-escalated below a level where he or she poses an imminent risk

137. See, e.g., MINN. STAT. § 125A.0942, Subd. 3(a)(5)(v) (2012) (requiring seclusion rooms to be either “unlocked, locked with keyless locks that have immediate release mechanisms, or locked with locks that have immediate release mechanisms connected with a fire and emergency system”). This requirement would still enable schools to use self-releasing locks, such as electromagnetic locks, that immediately release either when not physically held in a locked position or when an emergency system, such as a fire alarm, is triggered. See, e.g., FLA. ADMIN. CODE r. 69A-58.0084(2)(b) (2012) (“An electro-magnetic locking device is the only approved device to secure a secured seclusion time-out room. The lock shall remain engaged only when the human hand is in contact with it placing pressure on it.”); UTAH ADMIN. CODE r. 710-4-3.4.3 (2012) (“[S]eclusion room doors may not be fitted with a lock unless it is a self-releasing latch that releases automatically if not physically held in the locked position by an individual on the outside of the door.”).

138. See, e.g., MAINE DEP’T OF EDUC., NO. 05-071 CH. 33 § 5(5), RULE GOVERNING PHYSICAL RESTRAINT AND SECLUSION (2012), available at www.maine.gov/sos/cec/rules/05/071/071c033.doc (“If a specific room is designated as a seclusion room, it must be a minimum of 60 square feet with adequate light, heat, ventilation, be of normal room height, contain an unbreakable observation window in a wall or door and be free of hazardous material and objects with which a student could self-inflict bodily injury.”); 2011 Wis. Act 125 §§ 2(2)(c)–(d) (2012) (setting minimum standards for seclusion rooms, such as “adequate access to bathroom facilities, drinking water, necessary medication, and regularly scheduled meals[,]” as well as that the room be “free of objects or fixtures that may injure the pupil.”).

of physical injury within an hour, school may no longer be an appropriate place for the student. At that point, school officials should get in touch with the student's emergency contact—most likely his or her parent or guardian—and arrange for someone to remove the student from school for the remainder of the day.

c. Frequency Limits

By placing a cap on the number of times seclusion may be used on the same student during a given period of time, frequent seclusion of the same student can be prevented. Because seclusion is designed for use only in emergency circumstances, repeated use of seclusion with the same student suggests a problem with the student's environment. It may be that the student has been mainstreamed¹³⁹ before he or she is ready to process a high level of stimulation, that the classroom placement is appropriate but school staff have not identified a particular trigger for the student, or due to another cause entirely. Whatever the reason for the student's escalation, the ultimate goal should be to identify and eliminate the underlying source of provocation. Repeated use of seclusion becomes a crutch that allows schools to remove an out-of-control student from the classroom rather than solve the problem that prompted the student to lose control.

d. Continuous Monitoring

By requiring continuous face-to-face or direct visual monitoring, Congress could prevent self-inflicted injuries that occur most often during unmonitored seclusion. The only seclusion-related death described in the GAO report occurred when a student hanged himself while unobserved in the seclusion room.¹⁴⁰ The National Disability Rights Network identified other students who had sustained self-inflicted injuries while left alone in a seclusion room.¹⁴¹ These injuries could have been avoided had school personnel continuously monitored the secluded students. In acknowledgment of

139. "This term has generally been used to refer to the selective placement of special education students in one or more 'regular' education classes." Joy Rogers, *The Inclusion Revolution*, PHI DELTA KAPPA, RES. BULL. (Phi Delta Kappa, Bloomington, Ind.), May 1993, at 1, available at <http://www.eric.ed.gov/PDFS/ED367087.pdf>.

140. See GAO, *supra* note 3, at 5.

141. See NAT'L DISABILITY RIGHTS NETWORK, *supra* note 1, at 16, 19.

the importance of monitoring, the 2011 House bill required constant monitoring of secluded students. Any future attempt to pass federal legislation on the subject should be certain to adopt a similar provision to protect students from self-inflicted harm during seclusion.

3. Potential Criticisms of a Compromise Approach to Seclusion

Those at both extreme ends of the seclusion debate will likely object to a provision that allows for a limited form of seclusion. More extreme advocates of schools' and teachers' rights may be concerned that limitations on seclusion will tie teachers' hands in the event of an emergency. On the other extreme, those who seek a full ban on seclusion in schools will likely view the provision as legitimating the practice. While these objections deserve consideration, they do not reflect the reality facing teachers and students under this proposed reform.

a. Teachers' Hands Are Not Tied by Setting Minimum Standards for Seclusion

Teachers and school district officials may raise an autonomy-based objection to the limitations this Note proposes for seclusion. The essence of such an objection is that, when a student gets out of control, teachers need a substantial amount of discretion in order to maintain classroom safety. By placing limitations on the use of seclusion, the argument goes, discretion is too greatly reduced and teachers' hands may be tied when it comes to handling a dangerous student.

This argument is critically weakened by the fact that teachers may still use seclusion under this reform. Under this Note's proposed law, both seclusion and restraint remain on the table as options for teachers in emergency circumstances. In schools where seclusion is currently allowed, the only change this reform makes is prohibiting particularly high-risk types of seclusion¹⁴²—for example, students may not be secluded without supervision and may not be left in a seclusion room for hours at a time. This reform requires teachers to comply with commonsense practices and abandon any use of the

142. See *supra* Part I.C.2.

seclusion methods most frequently associated with student injuries.¹⁴³ It does not prevent teachers from engaging in safe seclusion practices when necessary.

Further, this Note proposes expanded grant authority to supplement the authorized use of seclusion.¹⁴⁴ The grant money, which would be available for developing and instituting positive behavior supports and alternative de-escalation strategies, provides schools with more opportunities to establish safe, effective mechanisms for addressing out-of-control behavior.

When combined with the expanded grant authority, the seclusion requirements under this proposed law would not tie teachers' hands. Instead, the law would equip schools with a greater array of legitimate options for containing and de-escalating problematic student behavior than is currently available in many schools.

*b. Allowing Seclusion Only When Minimum Standards Are Met
Does Not Legitimate Problematic or
Dangerous Uses of Seclusion*

Advocates of a flat ban on seclusion in schools will likely criticize this Note's seclusion proposal as unacceptably legitimating the practice. Although the proposal imposes safety requirements for the use of seclusion, those who consider seclusion to be inherently dangerous and degrading to students will view even a limited form of seclusion as problematic. This criticism has two main weaknesses: first, it does not account for the reality that teachers need some mechanism for dealing with students who have lost control, and second, it does not recognize that some forms of seclusion pose less danger to students than others.

When a student has lost control to the point where he or she poses a danger to him- or herself or others, teachers have limited options for maintaining classroom safety. While positive behavior supports or nonphysical interventions are an ideal way to de-escalate students, those options evaporate once the student poses an imminent danger of physical harm. At that point, the staff member must physically restrain the student, channel the student into a seclusion space, or stand by and allow the student to continue with his or her destructive course of action. Given that enabling a student to cause physical harm is not a viable option and that the risk

143. See *supra* Part I.C.2.

144. See *infra* Part III.C.

for severe injury is higher with extended restraint than seclusion,¹⁴⁵ seclusion seems to be the best of the three options. By using seclusion, along with as little restraint as possible to get the student to the seclusion room, schools can reduce the risk of classroom injuries in situations where a student poses a risk of imminent physical harm.

Seclusion becomes an even better option when the potential for student injury is substantially reduced through safety requirements, such as those established by the reform proposed in this Note.¹⁴⁶ By targeting and eliminating the primary factors associated with student injury from seclusion,¹⁴⁷ this reform makes seclusion a safer option when necessary to maintain classroom safety. Further, if the safety requirements proposed by this law do not significantly reduce student injuries during seclusion, this Note's proposed data collection requirements¹⁴⁸ and sunset clause provision¹⁴⁹ would enable legislators to identify and address the problems that remain.

A zero-tolerance approach to seclusion is both unnecessary and impracticable in light of the reality that teachers need a mechanism for providing classroom safety once a student has lost control and that seclusion is the safest option, particularly with the protections built into this reform. By allowing teachers to use seclusion in emergency situations but mandating basic minimum safety requirements, this reform offers a middle ground between full-blown teacher discretion and a flat ban on all seclusion.

C. Expanding Grant Authority to Include Development and Implementation of Safe, Alternative De-escalation Strategies

Particularly if seclusion is limited in duration and frequency, school district officials trying to maintain safe schools should be armed with more tools for de-escalating students before those students' behavior becomes dangerous to themselves or others. Congress can help equip teachers for behavior control by offering grants for the development and implementation of safe de-escalation strategies.

145. See *supra* Part I.C.2.

146. See *supra* Part III.B.2.

147. The factors are based on reports by the GAO and the National Disability Rights Network. See *infra* Part III.C; see also GAO, *supra* note 3, at 8, 27–28; NAT'L DISABILITY RIGHTS NETWORK, *supra* note 1, at 14–20.

148. See *supra* Part II.C.4; see also Keeping All Students Safe Act, H.R. 1381, 112th Cong. §§ 6, 8 (2011).

149. See *infra* Part III.D.

Section seven of the 2011 House bill provided grant authority to assist schools in three endeavors: implementing the bill's provisions, improving data collection and reporting, and implementing positive behavior supports.¹⁵⁰ Any future legislation on this topic should expand that grant authority to include one additional category: development and implementation of alternative de-escalation strategies and safe behavior control mechanisms. That grant money would be available to schools either for conferences and workshops to train staff in safe de-escalation strategies or as funding for school districts to plan and institute their own new strategies.

The likely worry from teachers that federal legislation will hamstring efforts to pacify out-of-control students is not a trivial concern: while appropriately limiting the availability of seclusion and restraint, Congress must also take into account the reality that some students do occasionally lose control, disrupting classroom learning and endangering themselves and others. By offering federal financial assistance to school districts willing to seek innovative and safe ways to prevent the kinds of emergencies that necessitate restraint, Congress can ease the burden this legislation might otherwise place on school districts and staff.

*D. Supplementing the Mandatory Reporting Requirements
with a Five-Year Sunset Clause*

Section eight of the 2011 House bill provided for a national assessment of the data collected under the bill's mandatory reporting and data collection requirements.¹⁵¹ While those types of requirements are essential provisions for monitoring the effectiveness of a bill, future legislation could capitalize on the required data collection by including a sunset clause that would force timely re-evaluation of the legislation's provisions.

Inserting a five-year sunset clause into federal seclusion and restraint legislation would force action upon national assessment data in a timely fashion. If a future Congress were to review the data regarding seclusion and restraint under the legislation and determine that the provisions were not protecting students in the way intended, it would have the opportunity to swiftly make alterations to put new (and, ideally, better) protections in place.

150. See H.R. 1381 § 7(a).

151. See H.R. 1381 §§ 6, 8.

CONCLUSION

Both students and school staff remain at risk without federal legislation regulating seclusion and restraint. The current patchwork of state laws has failed to adequately address this nationally documented problem. In addition, attempts to pass federal legislation have twice stalled in committee, likely due in part to the fact that those efforts have pitted two powerful, opposing coalitions at odds: students' rights groups and those seeking to protect maximum classroom discretion for teachers. Any legislation regarding seclusion and restraint must take account of these entrenched groups by offering a middle-of-the-road approach in which both sides can take some comfort.

The best way to achieve such a compromise is by instituting the moderate reforms proposed by this Note, maximizing teachers' options while establishing basic, commonsense protections for students. Many teachers' rights advocates have feared that a ban on seclusion and restraint would hamstring teachers' efforts to maintain safe, orderly classrooms. This Note's proposed reforms should assuage those fears by continuing to allow certain forms of seclusion and restraint and increasing grant authority for developing and implementing alternative de-escalation strategies. This Note's proposed legislation also offers students' rights advocates the safeguards they seek by setting training requirements for school staff and limiting the available forms of both seclusion and restraint. If either coalition is unhappy with the way the legislation affects schools or students, the data collection requirements and sunset clause provide an opportunity to reevaluate this compromise. Perhaps, by showing a little restraint and avoiding either extreme position, Congress can pass this much-needed legislation on its third attempt.