



**House Education Committee
Sixty-seventh Legislative Assembly of North Dakota
House Bill 1318
January 19, 2021
Honorable Mark S. Owens, Chair**

Good morning Chairman Owens and Members of the House Education Committee. I am Carlotta McCleary, Executive Director of Mental Health America North Dakota and Executive Director of the North Dakota Federation of Families for Children's Mental Health. Today I speak on behalf of the Mental Health Advocacy Network (MHAN). MHAN advocates for a consumer /family driven mental health system of care that provides an array of service choices that are timely, responsive and effective.

We work extensively with students and their families who struggle with educational issues. These struggles can look and feel like bad behavior which is all too often instead a manifestation of the student's disability and one resulting from an unnoticed or unmet need. A manifesting behavior can create a situation in which the student is restrained – meaning an adult uses his or her body to restrict or immobilize the student. The other situation which can occur is seclusion which means that an adult will put the child in a separate room by him or herself where the student is physically prevented from leaving. These are scary, dangerous, and traumatic situations for everyone - the school personnel performing the restraint or seclusion, onlooking classmates and fellow students, but most of all for the student who is subjected to restraint or seclusion.

Why is this an issue?

We know this happens in North Dakota because we see it in our work.

Schools are not required to report instances of restraint or seclusion to the North Dakota Department of Public Instruction, but schools are required to report the number of seclusions and restraints as part of the U.S. Department of Education's biennial Civil Rights Data Collection survey (CDRC). The 2017 survey revealed 1,409 seclusions, of which two-thirds involved students with disabilities. The 2017 survey showed 1,983 restraints, of which three-fourths involved students with disabilities. Those numbers are almost triple what they were in the 2015 survey. Considering that only 15% of all North Dakota students for that survey were students with disabilities, you can see how this is a huge problem in the work that we do.

What HB 1318 does to address the problem.

HB 1318 creates a new section to Chapter 15.1-19 of the North Dakota Century Code.

The Bill will require each school district to adopt a written policy, with minimum standards, regarding the use of restraint and seclusion methods by school district personnel. Each district's policy will at minimum, prohibit the use of seclusion, mechanical restraint, and chemical restraint in its school buildings, while allowing the use of physical restraint under limited circumstances. The heart of this bill is its provision requiring all districts to provide evidence-based training and support for their employees on methods proven to reduce the need for physical restraint in the first place.

The Bill is made up of two main sections—definitions and policy requirements. The first section defines key terms. The Bill's definitions are based on those in the mandatory CDRC survey, so these terms are very standardized and widely used. This legislation is, in part, based on a resolution adopted by the American Bar Association (ABA) in August 2020, urging federal, state, local, and tribal governments to adopt and enforce legislation,

as well as educational policy with the prohibitions contained in this bill. I have included the ABA's report accompanying its resolution, which talks about why this is a public policy issue, the impact of restraint and seclusion, and alternatives to restraint and seclusion.

The next part of the Bill sets forth the requirement that each school must adopt a written policy regarding use of restraint and seclusion methods by school personnel. There are three main areas each policy must contain. First, is a prohibition on the use of seclusion, mechanical restraint and chemical restraint on all students pre-K through grade 12.

Second, is the prohibition of physical restraint, except in situations where the student's behavior poses a threat of imminent danger of serious physical harm to the student or other individuals – keeping the safety of everyone in mind – and only if other less intrusive, nonphysical interventions have been attempted unsuccessfully or deemed inappropriate to protect the safety of the student or others involved. Recognition and definition of imminent danger is an element that will need to be addressed locally by districts through the training and support provided to their staff. The third provision prohibits dangerous ways for a physical restraint to be used, for example – positions which may impair the student's ability to breathe or communicate distress.

The Bill's final provision requires all school districts to deliver annual professional development and training in evidence-based programs and strategies to avoid the use of restraints and seclusions such as positive behavior interventions and trauma-informed practices, which are already implemented in many North Dakota schools. The bill additionally specifies crisis-de-escalation, restorative practices, and behavior management. Chairman Owens and members of the Committee, this is the key. Support

for school staff in the form of annual training and professional development will put tools into their toolboxes, tools which have been proven to help identify struggling students and prevent problems before they even start. But, if challenging situations should occur in the classroom, the cafeteria, or the hallway; staff will know what to do to avoid or de-escalate the behavior, and how to do it in the safest way possible, with the option that if all those tools fail and there is a threat of imminent danger, the student can be safely restrained in the least traumatic way possible for everyone involved.

Why restraint and seclusion needs to be legislated

Almost half of North Dakota schools do not appear to have a policy specifically addressing restraint and seclusion in their buildings, despite being federally mandated to report any occurrences of restraint and seclusion. A December 2020 internet search for online school district policies revealed that out of 174 districts reviewed, only 108 of those have written and published policies specifically relating to restraint and seclusion. Of the remaining school districts, 22 did not have restraint and seclusion policies, 15 did not have policies specific to restraint and seclusion included in their online policy manuals, and 28 did not have any policies published online. This is despite the fact that the North Dakota School Board Association has a model restraint and seclusion policy available to its members and has had one since at least 2013. No educational entity in North Dakota has been able to effect a statewide uniform policy in our schools. So it is up to you, the Legislature, to get a written and minimally uniform restraint and seclusion policy in 100% of our schools. Every student should know that no matter where he or she attends school in our state, that he or she is protected from the unreasonable use of restraints or seclusion and all adults working in our schools statewide deserve to have the

tools to feel confident in helping each child not just be their best learner, but achieve their best behavior.

In conclusion, I am asking for your support for HB 1318. This Bill is about the safety of everyone in a school building but will especially impact the safety and welfare of students with disabilities, who are more likely to be restrained or secluded than their peers without disabilities.

Mr. Chairman, thank you for your time. I would be happy to answer any questions the committee may have.

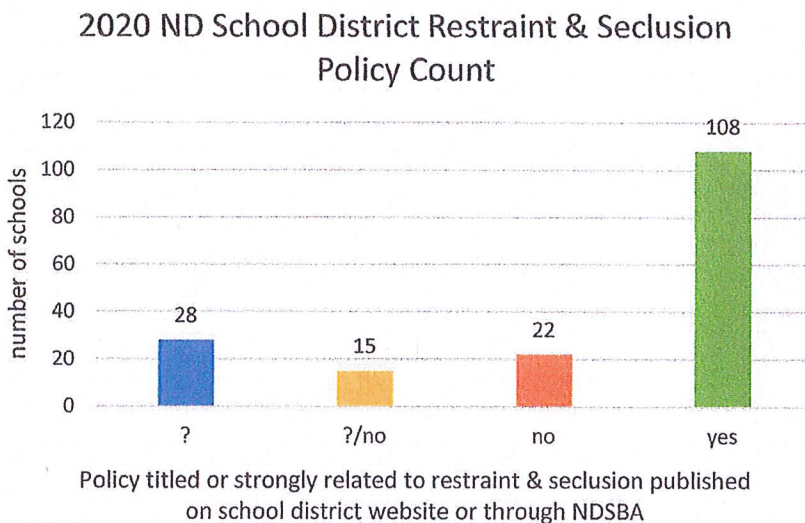
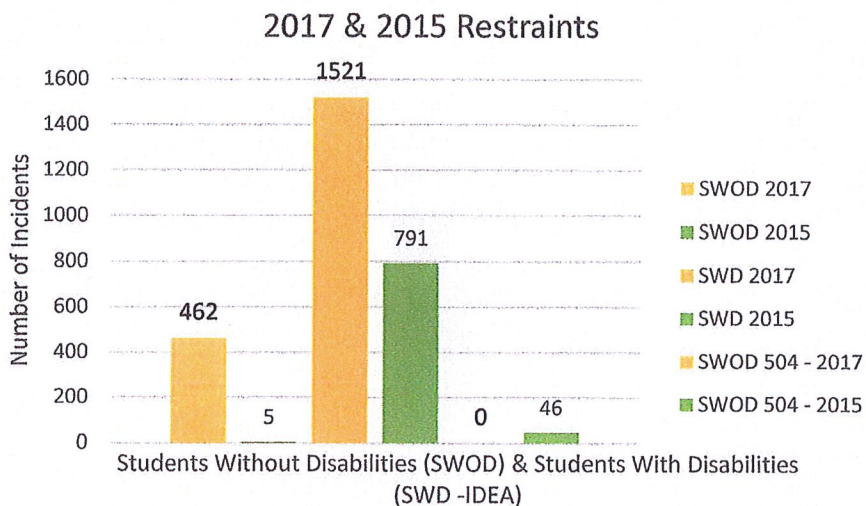
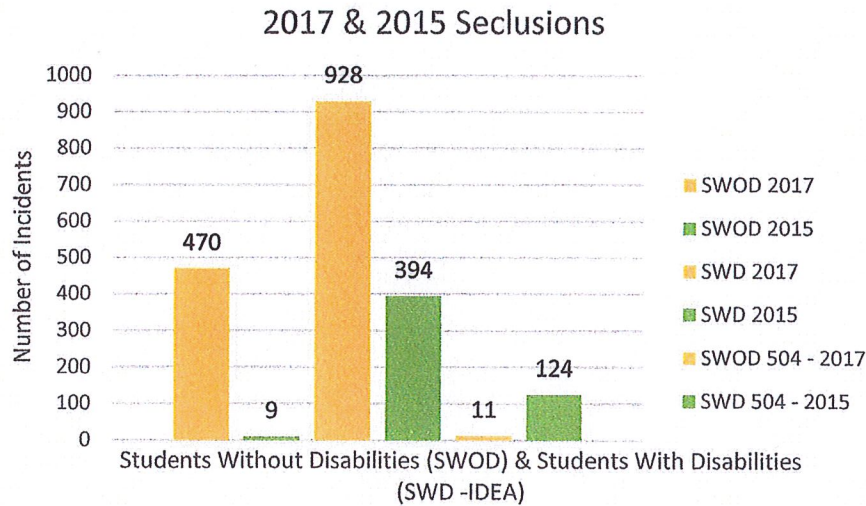


Chart information

2017 & 2015 Restraint and Seclusion data was taken from the Office of Civil Rights website for the survey years 2017 & 2015 and compiled by district before being combined to show the aggregate totals.

SWOD (Students without disabilities)

SWD (Students with disabilities)

SWD 504 (Students with disabilities – Section 504 only)

Total Seclusions 2017 – 1,409

Total Seclusions 2015 – 527

Total Restraints 2017 – 1,983

Total Restraints 2015 – 842

Based on a December 2020 search of school board policies available online at the school district website or NDSBA website (172 total)

*in order to be considered a **yes**, the policy had to be primarily related to or titled restraint and seclusion in the policy manual

**? and ?/no means that the policies either were not available online or the policy manual was available online and there appeared to be no policy relating to restraint and seclusion.

ADOPTED**AMERICAN BAR ASSOCIATION****COMMISSION ON DISABILITY RIGHTS
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE****REPORT TO THE HOUSE OF DELEGATES****RESOLUTION**

1 RESOLVED, That the American Bar Association urges federal, state, local, territorial, and
2 tribal governments to adopt and enforce legislation, as well as educational policy, that:

3
4 (a) prohibits school personnel from using seclusion, mechanical, and chemical
5 restraints on preschool, elementary, and secondary students;
6

7 (b) prohibits school personnel from using physical restraint on preschool, elementary,
8 and secondary students unless the student's behavior poses an imminent danger
9 of serious physical injury to self or others, and only after all less intrusive, non-
10 physical interventions have been tried and failed or deemed inappropriate to
11 protect the student or others;
12

13 (c) prohibits, in situations where physical restraint is used because there is an
14 imminent danger of serious physical injury, the use of restraints in a face-down
15 position or any other position that is likely to impair a student's ability to breathe or
16 communicate distress, places pressure on a student's head, neck, or torso, or
17 obstructs a staff member's view of a student's face; and
18

19 (d) requires professional development and ongoing training in positive behavior
20 interventions and trauma-informed care, including crisis de-escalation, restorative
21 practices, and behavior management practices, for all school personnel.

REPORT

I. The Relationship to Existing ABA Policy

The ABA has, over the years, adopted resolutions encouraging changes in law and policy to address school discipline, keep students in school, and make schools safe, supportive, and caring places for students to learn. For example, in 2018 the ABA adopted policy urging federal, state, local, territorial, and tribal governments to enact laws and adopt policies that prohibit the use of out-of-school suspension and expulsion of pre-kindergarten through second grade students, except in cases where: (1) the student poses an imminent threat of serious physical harm to self or others that cannot be reduced or eliminated through the use of age-appropriate school-based behavior interventions and supports, and (2) the duration of the exclusion is limited to the shortest period practicable.¹

In 2016, the ABA “urged all federal, state, territorial and local legislative bodies and governmental agencies to adopt policies, legislation, and initiatives designed to eliminate the school to prison pipeline,” recognizing the disproportionate impact of over-discipline on students of color, students with disabilities, and LGBTQ students, resulting in disparate push-out rates and juvenile justice system or prison interactions.² Also, in 2009 the ABA passed a resolution urging federal and state legislatures to pass laws and national, state, and local education, child welfare, and juvenile justice agencies to implement and enforce policies that “[h]elp advance the right to remain in school, promote a safe and supportive school environment for all children, and enable them to complete school.”³

This resolution is consistent with these policies. It advocates for regulation of restraint and seclusion, aversive behavior interventions that transform school from the nurturing, safe place it should be to a punitive, traumatizing, and potentially dangerous, even lethal, environment. Specifically, the resolution urges the adoption and enforcement of legislation and policy that prohibits school personnel from using seclusion, mechanical restraint, and chemical restraint on preschool, elementary, and secondary students. The resolution also prohibits school personnel from using physical restraint unless the student’s behavior poses an imminent danger of serious physical injury to self or others, and only after all less intrusive, non-physical interventions have been tried and failed or have been deemed inappropriate to protect the student or others. In situations where physical restraint is used because there is an imminent danger of serious physical injury, a student cannot be restrained in a face-down position or any other position that is likely to impair the student’s ability to breathe or communicate distress, places pressure on a student’s head, neck, or torso, or obstructs a staff member’s view of the student’s face.

¹ ABA Resolution 18A116B,

<https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/116b.pdf>.

² ABA Resolution 16A115, https://www.americanbar.org/groups/child_law/resources/attorneys/school-to-prison-pipeline.html.

³ ABA Resolution 09A111B at 8,

https://www.americanbar.org/content/dam/aba/directories/policy/2009_am_118b.authcheckdam.pdf.

Accordingly, restraint should be implemented by trained personnel and cease immediately when the student no longer poses an imminent danger. The resolution also requires professional development and ongoing training in positive behavior interventions and trauma-informed care, including crisis de-escalation, restorative practices, and behavior management practices for all school personnel.

For purposes of the resolution, seclusion is the involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving. It does not include a timeout, a behavior management technique that is part of an approved program, involves the monitored separation of the student in an unlocked setting, and is implemented for the purpose of calming. Physical restraint is a personal restriction that immobilizes or reduces a student's ability to move their torso, arms, legs, or head freely. It does not include a physical escort, a temporary touching or holding of the hand, wrist, arm, shoulder, or back to induce a student to walk to a safe location. Mechanical restraint is the use of any device or equipment to restrict a student's freedom of movement. Chemical restraint is the administration of psychoactive medication for the purpose of convenience, sedation, discipline, or punishment rather than for treatment. In this report, "restraint and seclusion" includes all these forms of intervention.

II. Emergence of Restraint and Seclusion As a Public Issue and Policy Efforts to Address Their Use

Although courts have addressed the use of restraint and seclusion in institutional settings since the early 1970s,⁴ their use came to the public's attention in 1998 through a series of investigative articles published by the *Hartford Courant*.⁵ Based on a commissioned, first-of-its-kind national study, the reporters examined restraint deaths in facilities and group homes for children and adults with mental health and intellectual disabilities. The *Courant* confirmed 142 restraint or seclusion deaths over the previous decade but noted that, because many cases went unreported, the actual number of deaths could have been as high as 1,500, according to a statistical study. The authors of the series advocated oversight of and uniform standards for use of these practices.

By the early 2000s, several states, including Texas, Nevada and Maryland, enacted legislation to govern the use of restraint and seclusion in the school setting. Over the course of the decade, other states enacted laws, regulations, or policies. However, there was wide variance in how, or whether, states chose to address the use of restraint and seclusion in schools.⁶

⁴ *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972) (prohibiting the use of seclusion and barring the use of physical restraint unless (1) when absolutely necessary to protect residents from injury to self or to prevent injury to others, (2) if alternative techniques have failed, and (3) such restraint imposes the least possible restriction consistent with its purpose).

⁵ <https://www.courant.com/news/connecticut/hc-xpm-1998-10-11-9810090779-story.html>.

⁶ GOVERNMENT ACCOUNTABILITY OFFICE, SECLUSIONS AND RESTRAINTS: SELECTED CASES OF DEATH AND ABUSE AT PUBLIC AND PRIVATE SCHOOLS AND TREATMENT CENTERS, GAO-09-719T (MAY 19, 2009), <https://www.gao.gov/products/GAO-09-719T>.

In January 2009, the National Disability Rights Network (NDRN), the membership organization for the protection and advocacy (P&A) system,⁷ published *School Is Not Supposed to Hurt: Investigative Report on Abusive Restraint and Seclusion in Schools*, which documented many instances of restraint and seclusion in school, some lasting for hours and resulting in death.⁸ In May 2009, the Council of Parent Attorneys and Advocates (COPAA), which had issued a declaration of principles opposing restraint, seclusion and aversive interventions in 2008,⁹ issued *Unsafe in the Schoolhouse: Abuse of Children with Disabilities*.¹⁰ The report summarized incidents of abusive use of restraint and seclusion nationwide and made policy recommendations, including a legislative ban on the use of prone, chemical, and mechanical restraints; restraints that interfere with breathing; restraint or seclusion that is medically and psychologically contraindicated for a child; any other restraint, except when a student poses a clear and imminent physical danger to self or others; and locked seclusion rooms or other rooms from which a child cannot leave unless there is an imminent threat of immediate bodily harm, in which case a child can be placed in a locked room while awaiting the arrival of law enforcement or crisis intervention team.¹¹

That same month, the U.S. Government Accountability Office (GAO) published a report on restraint and seclusion-related deaths and abuse at public and private schools and residential treatment centers, providing an in-depth examination of 10 case studies.¹² GAO found that there were no federal laws addressing the use of restraint or seclusion in the school setting and “widely divergent” laws at the state level.¹³

In 2011, Equip for Equality, the Illinois P&A System, with funding from Congress and in cooperation with the National Disability Rights Network and medical, nursing and forensic experts, conducted a study that examined and analyzed the deaths of 61 individuals with disabilities ranging in age from nine to 95 years in various settings across 12 states that occurred following the use of restraint.¹⁴ The study revealed alarming abuses of these dangerous interventions, including prone (face-down) physical restraint,

⁷ The protection and advocacy system, created by federal law, has the authority to investigate abuse and neglect of children and adults with disabilities and to seek redress for violations of their rights. See Developmental Disabilities Assistance and Bill of Rights (DD) Act of 2000, 42 U.S.C. § 15043; Protection and Advocacy for Individuals with Mental Illness (PAIMI) Act of 1986, as amended, 42 U.S.C. § 10801 *et seq.*; and Protection and Advocacy for Individual Rights (PAIR) Program of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794(e), (f) (incorporating the general authorities, including access authorities as set forth in the DD Act.) Every state and territory has a protection and advocacy organization.

⁸ <https://www.ndrn.org/wp-content/uploads/2019/03/SR-Report2009.pdf>.

⁹ COPAA DECLARATION OF PRINCIPLES OPPOSING THE USE OF RESTRAINTS, SECLUSION, AND OTHER AVERSIVE INTERVENTIONS UPON CHILDREN WITH DISABILITIES (JUNE 2008), https://cdn.ymaws.com/copaa.site-ym.com/resource/resmgr/copaa_declaration_of_princip.pdf.

¹⁰ https://cdn.ymaws.com/www.copaa.org/resource/collection/662B1866-952D-41FA-B7F3-D3CF68639918/UnsafeCOPAAMay_27_2009.pdf.

¹¹ *Id.* at 11.

¹² GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 6.

¹³ *Id.* at i.

¹⁴ EQUIP FOR EQUALITY, NATIONAL REVIEW OF RESTRAINT RELATED DEATHS OF CHILDREN AND ADULTS WITH DISABILITIES: THE LETHAL CONSEQUENCES OF RESTRAINT (2011), <https://www.equipforequality.org/wp-content/uploads/2014/04/National-Review-of-Restraint-Related-Deaths-of-Adults-and-Children-with-Disabilities-The-Lethal-Consequences-of-Restraint.pdf>.

exacerbated by a critical lack of oversight and data collection. Consequently, Equip for Equality strongly recommended action to reduce and ultimately eliminate the use of restraint.

In 2012, the United States Department of Education (ED) issued *Restraint and Seclusion: Resource Document*, outlining 15 principles to guide the development or revision of policies and procedures regarding the use of restraint and seclusion in schools.¹⁵ Among other principles, the ED declared that: every effort should be made to prevent the need for the use of restraint and seclusion with any student, whether disabled or not; physical restraint and seclusion should never be used in a way that restricts breathing or harms the child; schools should never use mechanical restraints or drugs or medication to control behavior or restrict movement; physical restraint and seclusion should not be used unless the child's behavior poses imminent danger of serious harm to self or others and other interventions are ineffective; and restraint and seclusion should be discontinued as soon as there is no longer imminent danger of physical harm.¹⁶

The ED further outlined principles addressing training of school staff, documentation of the use of restraint and seclusion, notification of parents, monitoring of students subjected to restraint or seclusion, review of behavior plans if restraint or seclusion is used repeatedly, and development of policies.¹⁷ This was the first statement about restraint and seclusion by the ED. It remains an important document because of its emphasis on not using restraint and seclusion as routine school safety measures, but rather only in situations where a child's behavior poses imminent danger of serious physical harm to self or others.

III. The Problem of Seclusion and Restraints and Their Deleterious Impact on Students and Their Families

National research shows that students have been subjected to restraint and seclusion in schools as a means of discipline, to force compliance, for convenience of staff, as retaliation, or as a substitute for appropriate educational and behavioral support.¹⁸ The use of restraint and seclusion in schools has resulted in serious physical injury, psychological trauma, and death to students. Restraint and seclusion can be contraindicated based on a student's disability, healthcare needs, or medical or psychosocial history. Despite the widely recognized risks, the use of restraint and seclusion in schools continues.

¹⁵ UNITED STATES DEPARTMENT OF EDUCATION, RESTRAINT AND SECLUSION: RESOURCE DOCUMENT 12-23 (MAY 2012), <https://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Keeping Students Safe Act, HR 7124 and S 3626 (115th Cong., 2017-18), SEC. 2. FINDINGS (1), <https://www.congress.gov/bill/115th-congress/house-bill/7124/text?q=%7B%22search%22%3A%5B%22keeping+all+students%22%5D%7D&r=1>; <https://www.congress.gov/bill/115th-congress/senate-bill/3626/text>.

According to data from the Civil Rights Data Collection (CRDC), in the 2015–2016 school year 124,500 students across the country were restrained or secluded.¹⁹ Students with disabilities and African American students were restrained and placed in seclusion at disproportionate rates compared to other students.²⁰ Although students with disabilities make up 12 percent of total enrollment across the country, they make up 71 percent of students who were restrained and 66 percent of the students who were secluded.²¹ African American students make up 15 percent of total enrollment, and yet represent 27 percent of those students restrained and 23 percent secluded.²²

However, the numbers of students restrained or secluded may be higher because the CRCD data do not reflect all incidents of restraint and seclusion. According to GAO's analysis of federal restraint and seclusion data for the 2015-16 school year (the most recent available), ED's quality control processes for data it collects from public school districts on incidents of restraint and seclusion are largely ineffective or do not exist. Specifically, 70 percent of all districts reported zero incidents, but the CRCD rule requiring districts to verify zeros only applied to 30 of the nation's 17,000 districts. Absent more effective rules to improve data quality, determining the frequency and prevalence of restraint and seclusion will remain difficult.

Current laws and guidelines are not sufficient to protect students and keep them safe in schools. Congress has yet to pass federal legislation that comprehensively regulates the use of seclusion and restraint in schools. A decade ago, members of Congress introduced legislation to address this issue, which failed to become law. Over the past several years, members of Congress have introduced the Keeping All Students Safe Act aimed at prohibiting seclusion and tightly governing restraint and the circumstances under which it could be used.²³

Notwithstanding their incompleteness, the CRDC data reveal significant use of restraint and seclusion. For example, for the 2015-16 school year Clark County School district in Nevada, a district with 326,238 students at the time, reported 1,107 incidents of restraint. Gwinnet County, Georgia, with a student population of 175,958, reported 427 incidents of restraint. Baltimore County, Maryland, with 110,786 students, reported 388 incidents of restraint and 157 incidents of seclusion.

The regulation of restraint and seclusion in schools has been left to the states. Although the increase in state laws on seclusion and restraint since 2009 shows progress, the protections provided vary, ranging from comprehensive to inadequate to non-existent, despite the widely recognized risks of restraint and seclusion. Important safeguards

¹⁹ U.S. DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS, 2015-16 CIVIL RIGHTS DATA COLLECTION, SCHOOL CLIMATE AND SAFETY 11 (APR. 2018, REVISED MAY 2019), <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>,

²⁰ *Id.*

²¹ *Id.* at 12.

²² *Id.* at 11.

²³ See, e.g., HR 4247 and S 2860 (111th Cong., 2009-10); HR 1381 and S 2020 (112th Cong., 2011-12); HR 927 and S 2036 (114th Cong., 2015-16); HR 7124 and S 3626 (115th Cong., 2017-18).

present in some states are absent in others. Some states have only suggested guidelines, while others have nothing at all.

In July 2019, The Autism National Committee published an updated version of *How Safe is the Schoolhouse? An Analysis of State Seclusion and Restraint Laws and Policies*.²⁴ First published in 2012, this report represents the most current survey of state laws regarding restraint and seclusion. According to the report, 42 states and the District of Columbia have enacted some form of legislative or regulatory restriction on the use of restraint and seclusion, but these laws range from weak to meaningful.²⁵

Thirty states have laws providing meaningful protections against restraint and seclusion for all children, while 39 for children with disabilities.²⁶ Only 22 states by law require that an emergency situation of threatening physical danger exist before restraint can be used for all children; 26 states impose the threatening physical danger requirement for children with disabilities.²⁷ Restraints that impede breathing and threaten life are prohibited in 31 states for all children and in 35 states for children with disabilities.²⁸ Twenty-one states ban mechanical restraint for all children; 25 for students with disabilities.²⁹ Twenty-one states prohibit dangerous chemical and drug restraints for children with and without disabilities.³⁰ Twenty-five states either ban seclusion or require staff to continuously watch all students in seclusion; 35 states, for students with disabilities.

Further, there are wide variations in how school districts report restraint and seclusion, making it impossible to get a full picture of its use, and suggesting that these practices are more common than the data show.³¹ In January 2019 ED announced the Office for Civil Rights (OCR) and the Office of Special Education and Rehabilitative Services (OSERS) will work in partnership to protect students with disabilities by providing technical assistance and support to schools, districts, and state education agencies regarding restraint and seclusion and to strengthen oversight. Among other things, OCR will work with school districts to improve the quality of the data submitted in accord with

²⁴ Jessica Butler, *How Safe is the Schoolhouse? An Analysis of State Seclusion and Restraint Laws and Policies*, <http://autcom.org/pdf/HowSafeSchoolhouse.pdf>.

²⁵ *Id.* at 127-34 (AZ, AL, AK, AR, CA, CO, CT, DE, DC, FL, HI, IL, IN, IO, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, NE, NV, NH, NJ, NM, NY, NC, OH, OR, PA, RI, SD, TN, TX, UT, VT, WA, WVA).

²⁶ *Id.* at x.

²⁷ *Id.*

²⁸ *Id.* at xi.

²⁹ *Id.*

³⁰ *Id.*

³¹ See, e.g., Asmar, Melanie, "Behind closed doors: When it comes to seclusion and restraint, Colorado schools 'are investigating themselves,'" *Chalkbeat*, Feb. 20, 2020, <https://co.chalkbeat.org/2020/2/20/21178602/behind-closed-doors-when-it-comes-to-seclusion-and-restraint-colorado-schools-are-investigating-them>; Williams, Ed, "Restraint, Seclusion, Deception: Parents, regulators left in the dark over school behavior management techniques," *NM Political Report*, Nov. 10, 2019, <https://nmpoliticalreport.com/2019/10/11/restraint-seclusion-deception-parents-regulators-left-in-the-dark-over-school-behavior-management-techniques/>.

the requirements of the CRDC and to provide technical assistance to schools on data quality.³²

What these numbers do not explain is the impact that each restraint and seclusion incident has on the child or youth and their family, or who these children and youth are. Death in restraint or seclusion occurs, although it is a rare occurrence, but trauma and injuries are not.³³ Families must deal with the repercussions of the use of restraint and seclusion with their children; parents and guardians have reported regression, toileting accidents, children not wanting to sleep in their own beds, and school phobia, in addition to the physical injuries children and youth sustain, ranging from bruises and scratches to broken fingers and bones.³⁴

As previously noted, students with disabilities are restrained and placed in seclusion at disproportionate rates compared to students without disabilities. These students have a variety of disabilities ranging from autism to intellectual disability to emotional and behavioral disabilities or, often, a combination of disabilities. For many of these students, particularly those who are nonverbal or who have limited verbal skills or difficulty expressing themselves, their behavior is a form of communication.³⁵ When challenging behavior is not recognized as communication but is simply viewed as something to be eradicated, restraint and seclusion become punitive and even more traumatizing. One boy with autism and behavioral issues was reportedly restrained or secluded more than 400 times from 2013 to 2016. As a result, he hated school, was more violent, and distrusted authority figures.³⁶

All students deserve to be safe in schools. Restraint and seclusion have a profoundly traumatizing impact not just on students and their families, but also on the students who witness the use of these aversive interventions and on school staff³⁷ themselves. Given the widely recognized risks involved with the use of restraint and seclusion, it is incumbent upon policymakers to enact legislation to restrict, and eventually eliminate, these practices and promote practices that allow educators and other school personnel to support students with positive interventions that are evidence-based, trauma-informed, and tailored to meet their individual needs.

³² <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

³³ Williams, *supra* note 31.

³⁴ Examples from cases handled by Disability Rights Maryland, the protection and advocacy organization for Maryland.

³⁵ See, e.g., "Challenging Behavior as Communication," American Speech-Language-Hearing Association, <https://www.asha.org/NJC/Challenging-Behavior-as-Communication/>.

³⁶ Abamu, Jenny, "How Some Schools Restrain or Seclude Students: A Look at a Controversial Practice," NPR, June 15, 2019, <https://www.npr.org/2019/06/15/729955321/how-some-schools-restrain-or-seclude-students-a-look-at-a-controversial-practice>.

³⁷ Asmar, *supra* note 31.

IV. Alternatives to Restraint and Seclusion

School staff turn to restraint and seclusion when they do not know what else to do. Accordingly, they need to have an array of strategies in hand to prevent a crisis, defuse a crisis, and make sense of what has happened after a crisis has occurred. If services are scaffolded to support students and assist them to manage effectively in the school environment and the other places where they spend their time, crises can often be averted, and the need for restraint or seclusion can be reduced or eliminated.³⁸

School staff must have the necessary tools to meet their students' academic, social-emotional, and behavioral needs. Robust teacher, administrator, and service provider preparation programs, professional development, and ongoing technical assistance and support are all critical to increasing the likelihood that school staff will be able to establish and maintain safe, nurturing, and supportive learning environments for the children and youth who enter their buildings each day. Use of proactive strategies and supports provides needed structure and supports to children and youth, ensuring school system accountability.

The regulations implementing the Individuals with Disabilities Education Act (IDEA)³⁹ require that for students with behavior that impedes their learning or the learning of others, the team designing their individualized education programs must consider positive behavior supports, interventions, and strategies.⁴⁰ The use of physical restraint as a planned intervention shall not be written into a student's education plan, individual safety plan, behavioral plan, or individualized education program.⁴¹ At its core, positive behavior supports are ways of addressing behavior that do not rely on punishment or aversive interventions such as suspension, restraint or seclusion. Much has been written about positive behavior supports in general and the three-tier system of Positive Behavior Interventions and Supports (PBIS) developed by George Sugai and Robert Horner, a school-wide systems change model that focuses on progressively more intensive interventions beginning with the whole school and then intervening with smaller groups of students who do not respond to the previous level of intervention.⁴² The effective implementation of positive behavior supports is linked to greater academic achievement, significantly fewer disciplinary problems, increased instruction time, and staff perception

³⁸ See, e.g., DEPARTMENT OF EDUCATION, *supra* note 15, at 13-14 (when integrated with effective academic instruction, comprehensive, prevention-oriented, positive behavioral systems such as PBIS reinforces appropriate behaviors while reducing instances of dangerous behaviors that may lead to the need to use restraint or seclusion).

³⁹ 20 U.S.C. §§ 1400 *et. seq.*

⁴⁰ 34 C.F.R. § 300.324(a)(2)(i).

⁴¹ Keeping All Students Safe Act, *supra* note 18, at SEC. MINIMUM STANDARDS; RULES OF CONSTRUCTION 5(a)(5).

⁴² See, e.g., Office of Special Education Programs (OSEP) PBIS Technical Assistance Center at <https://www.pbis.org> (includes links to research articles); "Positive Behavior Support (PBS)—A Discussion," Safe & Civil Schools, www.safeandcivilschools.com/research/papers/pbs.php; Robert H. Horner, "Positive Behavior Supports" in *Mental Retardation in the 21st Century* (2000, M.L. Wehmeyer & J.R. Patton eds.), citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.910.4491&rep=rep1&type=pdf.

of a safer teaching environment.⁴³ Training for school personnel that is focused on the dangers of restraint and seclusion as well as training in positive behavior supports, de-escalation techniques, and physical restraint and seclusion prevention, can reduce the incidence of injury, trauma, and death.⁴⁴

Trauma-informed care in the school setting recognizes that children are affected by trauma they experience, such as abuse or neglect, loss of a loved one, or other negative event, or series of events, and that those experiences can have an impact on brain development and how a child behaves in and outside of school.⁴⁵ Increasingly, resources are becoming available to assist school staff in applying the principles of trauma-informed care to the classroom by engaging in practices such as setting up predictable classroom routines, creating a safe, uncluttered classroom, providing movement breaks for students, and having students repeat verbal instructions.⁴⁶

A number of states have adopted trauma-informed practices. For example, Massachusetts encourages schools to adopt a “Flexible Framework” for Trauma-Sensitive Practices in Schools; this framework includes strategies designed to address school culture and infrastructure, staff training, links to mental health professionals, academic instruction for students who have experienced trauma, nonacademic strategies, and school policies, procedures and protocols.⁴⁷ Washington State has a handbook entitled *The Heart of Learning and Teaching: Compassion, Resiliency, and Academic Success*, issued through its Superintendent’s Office, containing principles that should guide interactions with students who have experienced trauma.⁴⁸

V. Conclusion

Restraint and seclusion are not educational strategies, nor are they therapeutic. They are aversive interventions used by desperate school staff when they do not know how else to manage students in their classrooms and schools. Prohibiting seclusion and restricting restraint to situations posing only imminent serious physical injury while at the same time providing staff with the professional development and ongoing support and technical assistance necessary to provide appropriate educational instruction, positive behavior supports and trauma-informed care will go a long way toward making school a nurturing, safe, and supportive learning environment for children, especially those who need a refuge from an otherwise stormy world.

⁴³ Keeping All Students Safe Act, *supra* note 18, at SEC. 2. FINDINGS (6).

⁴⁴ *Id.* at SEC. 2. FINDINGS (3).

⁴⁵ See, e.g., Maura McNerney, J.D. & Amy McKlindon, M.S.W., “Unlocking the Door to Learning: Trauma-Informed Classrooms & Transformational Schools” (Education Law Center, 2014), <https://www.elc-pa.org/wp-content/uploads/2015/06/Trauma-Informed-in-Schools-Classrooms-FINAL-December2014-2.pdf>.

⁴⁶ “Creating a Trauma-Sensitive Classroom,” National Education Agency, <http://www.nea.org/tools/tips/creating-a-trauma-sensitive-classroom.html>.

⁴⁷ McNerney & McKlindon, *supra* note 45, at 8.

⁴⁸ *Id.* at 9.

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Respectfully submitted,

Denise Avant
Chair, Commission on Disability Rights
August 2020

GENERAL INFORMATION FORM

Submitting Entity: Commission on Disability Rights

Submitted By: Denise Avant, Chair

1. Summary of the Resolution(s). Urges the adoption and enforcement of legislation and policy that prohibits school personnel from using seclusion, mechanical restraint, and chemical restraint on preschool, elementary, and secondary students, and prohibits the use of physical restraint unless the student's behavior poses an imminent danger of serious physical injury to self or others, and only after all less intrusive, non-physical interventions have been tried and failed or have been deemed inappropriate to protect the student or others. In situations where physical restraint is used because there is an imminent danger of serious physical injury, a student cannot be restrained in a face-down position or any other position that is likely to impair the student's ability to breathe or communicate distress, places pressure on a student's head, neck, or torso, or obstructs a staff member's view of the student's face. The resolution also requires professional development and ongoing training in positive behavior interventions and trauma-informed care, including crisis de-escalation, restorative practices, and behavior management practices, for all school personnel.
2. Approval by Submitting Entity. August 10, 2019 at the Commission on Disability Right's Business Meeting. April 4, 2020 the Section of Civil Rights and Social Justice approved co-sponsorship of the resolution.
3. Has this or a similar resolution been submitted to the House or Board previously? No
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? In 2009 the ABA passed a resolution urging federal and state legislatures to pass laws and national, state, and local education, child welfare, and juvenile justice agencies to implement and enforce policies that "[h]elp advance the right to remain in school, promote a safe and supportive school environment for all children, and enable them to complete school." ABA Resolution 09A111B at 8, https://www.americanbar.org/content/dam/aba/directories/policy/2009_am_118b.authcheckedam.pdf. This resolution expands the scope of the 2009 policy, promoting a safe and supportive school environment for all children by prohibiting or restricting the use of restraint and seclusion on preschool, elementary, and secondary students.
5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A
6. Status of Legislation. (If applicable). Keeping All Students Safe Act. HR 7124 (115th Congress, 2017-18) was introduced by Representative Donald Beyer Jr. (D-VA-8) and

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was referred to the Subcommittee on Military Personnel on November 15, 2018. S 3626 (115th Congress, 2017-18) was introduced by Senator Murphy Christopher (D-CT) and referred to the Committee on Health, Education, Labor, and Pensions. Legislation has yet to be introduced in the 116th Congress.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. We would work with federal, state, local, territorial, and tribal governments to adopt or strengthen existing laws or policies on the use of restraint and seclusion in schools. We would also be able to support any pending legislation in Congress.
8. Cost to the Association. (Both direct and indirect costs) None
9. Disclosure of Interest. (If applicable) N/A
10. Referrals.

Litigation Section
State and Local Government Law Section
Center on Children and the Law
Commission on Youth at Risk
11. Contact Name and Information prior to the Meeting. Amy Allbright, 703.336.2501, amy.allbright@americanbar.org.
12. Contact Name and Information. (Who will present the Resolution with Report to the House?) Denise Avant, 773.991.8050, davant1958@gmail.com

EXECUTIVE SUMMARY

1. Summary of the Resolution

Urges the adoption and enforcement of legislation and policy that prohibits school personnel from using seclusion, mechanical restraint, and chemical restraint on preschool, elementary, and secondary students, and prohibits the use of physical restraint unless the student's behavior poses an imminent danger of serious physical injury to self or others, and only after all less intrusive, non-physical interventions have been tried and failed or have been deemed inappropriate to protect the student or others. In situations where physical restraint is used because there is an imminent danger of serious physical injury, a student cannot be restrained in a face-down position or any other position that is likely to impair the student's ability to breathe or communicate distress, places pressure on a student's head, neck, or torso, or obstructs a staff member's view of the student's face. The resolution also requires professional development and ongoing training in positive behavior interventions and trauma-informed care, including crisis de-escalation, restorative practices, and behavior management practices, for all school personnel.

2. Summary of the Issue that the Resolution Addresses

Seclusion and various forms of restraint (mechanical, chemical, and physical) are punitive measures used in schools from elementary through high school in lieu of therapeutic interventions with students. Notwithstanding the long-standing recognition that these forms of behavioral intervention cause significant harm to children, school officials continue to deploy them to an unacceptably high degree. The Resolution calls for an end of the use of seclusion, mechanical and chemical restraints and significant limitations on the use of physical restraints, and in their place urges the use of positive behavioral supports and trauma-informed care to help children to thrive.

3. Please Explain How the Proposed Policy Position Will Address the Issue

The proposed policy position directly addresses this issue by calling for governments to adopt legislation and policies banning or limiting the above harmful practices.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None