



October 22, 2015

The Honorable Catherine Lhamon  
Assistant Secretary  
Office of Civil Rights  
U. S. Department of Education

The Honorable Michael Yudin  
Assistant Secretary  
Office of Special Education and Rehabilitative Services  
U. S. Department of Education

AMERICAN CIVIL  
LIBERTIES UNION  
WASHINGTON  
LEGISLATIVE OFFICE  
915 15th STREET, NW, 6<sup>TH</sup> FL  
WASHINGTON, DC 20005  
T/202.544.1681  
F/202.546.0738  
[WWW.ACLU.ORG](http://WWW.ACLU.ORG)

KARIN JOHANSON  
DIRECTOR

NATIONAL OFFICE  
125 BROAD STREET, 18<sup>TH</sup> FL.  
NEW YORK, NY 10004-2400  
T/212.549.2500

OFFICERS AND DIRECTORS  
SUSAN N. HERMAN  
PRESIDENT

ANTHONY D. ROMERO  
EXECUTIVE DIRECTOR

ROBERT REMAR  
TREASURER

Dear Assistant Secretaries Lhamon and Yudin:

We write to strongly encourage the U.S. Department of Education to issue a guidance document on the topic of restraint and seclusion of schoolchildren with disabilities. Such guidance would build upon and expand principles set out in the existing Resource Document published by the Department in May 2012.<sup>1</sup>

We endorse and concur with the letter on this topic sent to you by APRAIS – The Alliance to Prevent Restraint and Aversive Interventions and Seclusions – on July 20, 2015, which is attached hereto.

---

<sup>1</sup> U.S. Dep’t of Educ., Restraint and Seclusion: Resource Document (May 2012), available at <https://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf>. The Department’s Civil Rights Data Collection (CRDC) defines “physical restraint” as: “A personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely. 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 inducing a student who is acting out to walk to a safe location.” An example of a physical restraint would be when an adult immobilizes a student by pinning her against the wall.

It defines “mechanical restraint” as: The use of any device or equipment to restrict a student’s freedom of movement. This term does not include devices implemented by trained school personnel, or utilized by a student that have been prescribed by an appropriate medical or related services professional and are used for the specific and approved purposes for which such devices were designed[.]” *Id.* at 10. An example of mechanical restraint would be handcuffs.

It defines “seclusion” as: “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, which is a behavior management technique that is part of an approved program, involves the monitored separation of the student in a non-locked setting, and is implemented for the purpose of calming” *Id.* An example of seclusion would be shutting a student in a closet or other small space.

We write separately to review several additional principles that we would like to see included in Department guidance on the restraint and seclusion of children at school.

**I. Clarify That Improper Use of Restraint & Seclusion Violates Section 504**

The Department should confirm that the use of restraint and seclusion of children with disabilities at school, outside of the emergency exception,<sup>2</sup> violates Section 504 of the Rehabilitation Act. The Department's regulations state that:

A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

34 C.F.R. § 104.4(b)(4). Students with disabilities, including disabilities involving behavior challenges, are particularly susceptible to and injured by the unnecessary use of physical restraints and seclusions.<sup>3</sup> Based on the data provided by the Department, students with disabilities are more than 20 times as likely as students without disabilities to be subjected to physical restraint at school.<sup>4</sup> The effects include substantial and disproportionate physical and emotional injuries, and disruptive exclusions from the educational process. The use of unnecessary restraint and seclusion by federally funded schools – either directly or through contractual arrangements with private special education schools – has the effect of disability discrimination, and of impairing the educational

---

<sup>2</sup> See U.S. Dep't of Educ., *Restraint and Seclusion: Resource Document* (May 2012) at 2 (“Physical restraint or seclusion should not be used except in situations where the child’s behavior poses imminent danger of serious physical harm to self or others and restraint and seclusion should be avoided to the greatest extent possible without endangering the safety of students and staff.”).

<sup>3</sup> See U.S. Government Accountability Office, *Seclusions and Restraint: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers* (May 2009) at 5, 7-10 (noting that almost all of the hundreds of allegations identified involved children with disabilities, and discussing 10 fatalities, 9 of which were children with disabilities).

<sup>4</sup> See U.S. Dep't of Educ., Office of Civil Rights, *Civil Rights Data Collection, Data Snapshot: School Discipline Data* (Mar. 21, 2014) at 9 (stating that students with disabilities are 12 percent of students enrolled in public schools, that more than 70,000 students were physically restrained during the 2011-12 school year, and that 75 percent of those students had disabilities (or about 52,500), out of 49.7 million students enrolled); email discussions with Steve Kaye, Ph.D., Research Director, Disability Statistics Center, University Of California, San Francisco (July 30, 2015).

objectives of public schools with respect to schoolchildren with disabilities. The practice violates Section 504,<sup>5</sup> and the Department should state so plainly.<sup>6</sup>

## II. Clarify That Improper Use of Restraint & Seclusion Violates IDEA

Related, the Department should state that the use of restraint and seclusion on students with disabilities, outside of the emergency exception, violates the Individuals with Disability Education Act (IDEA). The techniques have no pedagogical basis, and their use denies the subjected child access to a free appropriate public education in the least restrictive environment in violation of the IDEA.<sup>7</sup> Further, the failures of the States to monitor and remedy the use of unnecessary restraint and seclusion on children with disabilities by local schools itself violate the IDEA. *See* 20 U.S.C. §§ 1412(a), 1416(a); 34 C.F.R. §§ 300.114(a), 300.149.

Once the Department clarifies that the improper use of restraint and seclusion violates the IDEA, we recommend that the Office of Special Education Programs (OSEP) monitor State practices by adding a restraint and seclusion indicator to its Results Driven Accountability (RDA) Matrices. A restraint and seclusion indicator aligns with the core principles of the RDA and would allow OSEP to identify States in particular need of intervention. OSEP could also improve accountability and transparency by including restraint and seclusion data in the State Data Profiles published annually with its State compliance determinations.

---

<sup>5</sup> *See, e.g., Alexander v. Lawrence County Bd. of Developmental Disabilities*, No. 1:10-cv-697, 2012 WL 831769, at \*\*11-12 (S.D. Ohio, March 12, 2012) (finding that plaintiff's allegation that defendant's use of frequent and inappropriate physical restraints on child with autism and other disabilities stated claim under Section 504); *D.K. ex rel. G.M. v. Solano County Office of Educ.*, 667 F.Supp.2d 1184, 1190-93 (E.D. Cal. 2009) (finding that allegations of abusive conduct including physical restraints stated claims under Section 504 and the ADA); *A.B. ex rel. B.S. v. Adams-Arapahoe 28J School Dist.*, 831 F.Supp.2d 1226, 1254- (D. Colo. 2011) (finding that plaintiff established triable issues of fact on claims brought under ADA and Rehabilitation Act based on evidence that she was strapped in a restraint chair).

<sup>6</sup> Other federal agencies have taken analogous steps in advancing our understandings of federal anti-discrimination laws. For example, the EEOC has made clear that employment discrimination based on an individual's gender identity or based on an individual's sexual orientation is a violation of Title VII of the Civil Rights Act of 1964. U.S. Equal Employment Opportunity Commission, *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, [http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm).

<sup>7</sup> *See, e.g., B.H. v. W. Clermont Bd. of Educ.*, 788 F. Supp. 2d 682, 699 (6th Cir. 2011) (holding that a student who had been subjected to physical restraints, as well as other adverse treatment, had been denied a free appropriate public education, and noting that "Defendant failed to meet B's behavioral needs where it neglected to implement appropriate positive behavioral interventions, set increasingly low behavioral expectations, and employed physical restraint, even where shown to be ineffective."); *Sumter County School Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478, 485-87 (4th Cir. 2011) (affirming district court finding that school district violated autistic student's right to a free appropriate public education where teachers were not trained in and did not implement behavioral supports and parents removed child after reports of physical and verbal abuse by teacher).

### **III. Articulate the Scope of the Emergency Exception**

The Department should take additional steps to articulate the scope of the emergency exception. Currently, the Department's resource document reiterates that restraint and seclusion should not be used unless there is an "imminent danger of serious physical harm" to the child or to others, but it does not give any further explanation for what circumstances meet or do not meet this standard. It would be helpful for the Department to include several examples to illustrate how the standard should be applied.

### **IV. Endorse Audio/Video Recording of Restraint and Seclusion**

The practice of restraining and secluding schoolchildren is implicated in countless and often ongoing cases of severe, pervasive, and traumatic abuse. Eliminating restraint and seclusion outside of the emergency exception can only be achieved by accurate documentation. Schools that continue to restrain and seclude children, purportedly under the emergency exception, should have a policy of recording these interactions using an audio/video recording device. Such audio/video footage should be made available to parents, and subject to reasonable retention and deletion policies. The Department should endorse such audio/video documentation.

### **V. Reiterate Important Principles From Resource Document**

The Department should reiterate important principles from its Resource Document – that prone restraints or other restraints that restrict breathing should never be used, and that mechanical restraints such as handcuffs should never be used.

### **VI. Improve CRDC Reporting – Enforce Requirement**

The Department should take steps to strengthen the restraint and seclusion data being reported by school districts to the Civil Rights Data Collection. Currently, many school districts do not make even a good faith effort to comply with the reporting requirement. For example, three of the largest school districts in the nation – New York City Public Schools with more than one million students, Los Angeles Unified School District with nearly 600,000 students, and the City of Chicago School District with more than 400,000 students – have not reported any incidents of restraint and seclusion. The Mt. Diablo Unified School District in Concord, California, continues to report no incidents, despite a California Department of Education investigation finding more than 300 physical restraints in a classroom of 45 elementary school children.

The Department should take steps to enforce the reporting requirement, and should permit members of the public to file complaints with the Office of Civil Rights stating that a school district is out of compliance with the requirement to report on restraint and seclusion.

## VII. Include Restraint & Seclusion Data from Non-Public Special Education Schools

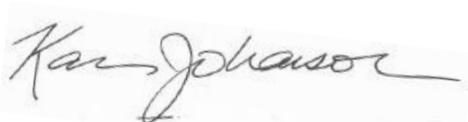
Finally, as the ACLU stated in its August 3, 2015 letter to Angela Arrington, commenting on the 2015-2016 Mandatory Civil Rights Data Collection, the Department should require that public school districts report on the restraint and seclusion experienced by students with disabilities who are placed by the districts into segregated nonpublic schools. This is data that public school districts already receive and maintain, or can access readily.

A recent review of restraint and seclusion experienced by California students found that most of the incidents reported in the 2011-12 school year – 66 percent, or 14,492 out of a total of 22,006 – occurred in nonpublic special education schools.<sup>8</sup> For example, in 2011-12, Oakland Unified School District reported 1,710 behavioral emergencies pertaining to individuals placed in nonpublic special education school settings, compared to 0 pertaining to individuals placed in district schools.<sup>9</sup> By failing to include data from the Non-Public Special Education schools, the CRDC simply misses the overwhelming majority of the incidents of restraint and seclusion in publicly funded schools.

We would like the opportunity to meet with you and your staff to discuss these matters.

To respond to this request, or for questions or comment about our recommendations, please contact Legislative Counsel Jennifer Bellamy at [jbellamy@aclu.org](mailto:jbellamy@aclu.org) or (202) 715-0828.

Sincerely,



Karin Johanson  
Director  
Washington Legislative Office



Claudia Center  
Senior Staff Attorney  
Disability Rights Project

---

<sup>8</sup> Cal. Educ. Code § 56521.1; Jane Meredith Adams & John C. Osborn, Little oversight of restraint practices in special education, Ed Source (Apr. 19, 2015), at [http://edsources.org/2015/little-oversight-of-restraint-practices-in-special-education/78040#.VT\\_ShJOUKDK](http://edsources.org/2015/little-oversight-of-restraint-practices-in-special-education/78040#.VT_ShJOUKDK).

<sup>9</sup> Oakland Unified Sch. Dist., Reply to ACLU Public Records Act Request Regarding Restraint and Seclusion Data Reporting (Feb. 9, 2015) (on file with ACLU Disability Rights Program).