

Applying International Human Rights Standards to the Restraint and Seclusion of Students with Disabilities

David Weissbrodt, Regents Professor of Law, University of Minnesota Law School;¹ Willy Madeira, J.D. Candidate 2012, University of Minnesota; William Dikel, M.D., Independent Consulting Psychiatrist, Minneapolis, Minnesota & Dan Stewart, J.D., Ph.D., Minnesota Disability Law Center, Minneapolis, Minnesota

No federal law in the United States prohibits school administrators from physically restraining or secluding students.² State laws diverge widely.³ Unlike in medical, psychiatric and law enforcement settings, where strict national standards govern the use of physical restraint and seclusion, many schools may have no, or inconsistent, guidelines to follow in deciding when the use of force against students is appropriate.⁴ This lack of industry-approved protocol and standardized training of school personnel makes restraints and seclusion susceptible to misapplication and abuse.⁵

¹ Regents Professor of Law and Fredrikson & Byron Professor of Law, University of Minnesota Law School. The Author wishes to thank Joshua Wetzel of the University of Minnesota Law School Class of 2013 for his assistance in the preparation of this article.

² US GOVERNMENT ACCOUNTABILITY OFFICE, SECLUSIONS AND RESTRAINTS: SELECTED CASES OF DEATH AND ABUSE AT PUBLIC AND PRIVATE SCHOOLS AND TREATMENT CENTERS, GAO-09-719T, at 3 (May 19, 2009) [hereinafter GAO]; NANCY LEE JONES & JODY FEDER, CONGRESSIONAL RESEARCH SERVICE, THE USE OF SECLUSION AND RESTRAINT IN PUBLIC SCHOOLS: THE LEGAL ISSUES 1 (2010).

³ GAO, *supra* note 2, at 3; see generally Daniel Stewart. *How do the States Regulate Restraint and Seclusion in Public Schools? A Survey of the Strengths and Weaknesses in State Laws*. Hamline L. Rev. Vol. 34(3), Summer 2011.

⁴ COUNCIL FOR CHILDREN WITH BEHAVIORAL DISORDERS, CCBD'S POSITION SUMMARY ON THE USE OF PHYSICAL RESTRAINT PROCEDURES IN SCHOOL SETTINGS 5 –6 (July 8, 2009).

⁵ COUNCIL FOR CHILDREN WITH BEHAVIORAL DISORDERS, *supra* note 4 at 6.

Over a ten year period in the 1990s, 142 restraint-related deaths were reported in the United States.⁶ While restraints are dangerous even when used on adults, children face an especially high risk of death or serious injury.⁷ The students who most often suffer the ill effects of restraints are children with disabilities, whose behaviors are often misunderstood and whose needs are often not accommodated.⁸

In the school environment, such ignorance causes students with disabilities to receive a disproportionate amount of seclusion and restraint.⁹ For example, in one study, students with disabilities (as defined under the IDEA and Section 504 statutes) represented 12% of students in the sample, but comprised nearly 70% of the students who are physically restrained by adults in their schools.¹⁰ When the Government Accountability Office investigated the use of seclusions and restraints in U.S. public and private schools in 2009, it discovered hundreds of allegations of death and abuse over the prior twenty years.¹¹ Almost all of the reports it received involved children with disabilities.¹² Many reports of death occurred following a “prone restraint,” in which a child is placed face down

⁶ COUNCIL FOR CHILDREN WITH BEHAVIORAL DISORDERS, *supra* note 4 at 5.

⁷ NATIONAL DISABILITY RIGHTS NETWORK, SCHOOL IS NOT SUPPOSED TO HURT: INVESTIGATIVE REPORT ON ABUSIVE RESTRAINT AND SECLUSION IN SCHOOLS 7 (2009).

⁸ GAO, *supra* note 2, at 5; For a discussion of attempts to ensure the access to meaningful education for children with mental health disorders in the United States *see* Sara J. Ruff & William Dikel, *Mental Health Related Services in IEPs*, INQUIRY & ANALYSIS (Nov. 2009); *see also* Paul Ratwik & William Dikel, *Bridges and Firewalls: Contractual Relationships For Mental Health Services Provided in School Settings*, INQUIRY & ANALYSIS (April 2009).

⁹ *See* Office of Civil Rights Civil Rights Data Collection (CRDC) March 2012, available at <http://ocrdata.ed.gov/>.

¹⁰ *Id.*

¹¹ GAO, *supra* note 2, at 5.

¹² GAO, *supra* note 2, at 5

on a floor while being held by two or more adults.¹³ Human Rights Watch and the ACLU, in their 2009 investigation into the use of restraints and corporal punishment in U.S. schools, found that students with disabilities were punished at disproportionately high rates in almost every state that uses corporal punishment.¹⁴ Although corporal punishment is theoretically distinct from the use of seclusion and restraint for student safety, the line between the practices is often blurred and researchers find that restraints and seclusion are being used for a variety of purposes beyond therapeutic safety.¹⁵

Restraint and seclusion did not originate in the school environment and their current definitions are promulgated not by the Department of Education, but by the Centers for Medicare and Medicaid in their regulations on psychiatric facilities.¹⁶ Seclusion is defined as: “The involuntary confinement of [an individual] alone in a room or area from which the [individual] is physically prevented from leaving.”¹⁷ The term restraint refers to “Any manual method, physical or mechanical device, material, or equipment . . . that he or she cannot easily remove that restricts freedom of movement or normal access to one's body.”¹⁸ In U.S. schools, physical restraints are used most frequently, but school officials also have been reported to use crude mechanical restraints such as

¹³ GAO, *supra* note; for a discussion of what happens from a physiological perspective during prone restraint and the review of selected prone restraint related deaths, see PAI report.

¹⁴ HUMAN RIGHTS WATCH & AMERICAN CIVIL LIBERTIES UNION, *IMPAIRING EDUCATION: CORPORAL PUNISHMENT OF STUDENTS WITH DISABILITIES IN US PUBLIC SCHOOLS* 29 (2009).

¹⁵ COUNCIL FOR CHILDREN WITH BEHAVIORAL DISORDERS, *supra* note 4 at 7.

¹⁶ NATIONAL DISABILITY RIGHTS NETWORK (2009), *supra* note 7, at 5.

¹⁷ 42 C.F.R. § 482.13(f).

¹⁸ 42 C.F.R. § 482.13(e).

gagging students with duck tape or binding them to their chairs.¹⁹

In addition to the physical injuries that restraints can inflict on students, there are strong indications that they cause psychological injury as well, especially for children who have experienced prior abuse by adults.²⁰ The “trauma-informed care” literature recognizes that many children and adults with mental health disabilities have been subjected to some form of trauma resulting from abuse or neglect and that coercive interventions often serve to re-trigger or exacerbate underlying mental health illness symptoms. Based in part on this premise, the Substance Abuse and Mental Health Services Administration (SAMSHA), an agency of the United States Department of Health and Human Services, has developed strategies, resources, and a training center to reduce and prevent the use of restraint and seclusion.²¹ Despite such recognition of the affirmative steps necessary to better protect against abusive practices, federal law remains silent on the matter.

The international community has shown its concern for the dearth of regulation on restraints and seclusion not just in the United States, but globally. In 1991, the UN General Assembly addressed human rights abuses against persons with mental illness by adopting the Principles for the Protection of

¹⁹ GAO *supra* note 2, at 10–13.

²⁰ COUNCIL FOR CHILDREN WITH BEHAVIORAL DISORDERS, *supra* note 4 at 5.

²¹ For a review of SAMHSA’s efforts in this area, see its website and related links, including its National Center for Trauma-Informed Care at: <http://www.samhsa.gov/nctic/about.asp>; Hodas, G. (2006). *Responding to Childhood Trauma; The Promise and Practice of Trauma Informed Care*. Pennsylvania Office of Mental Health and Substance Abuse Services. http://www.nationalcenterdvtraumamh.org./resources_trauma-services.php; Curie, C.: (2005): SAMHSA’s commitment to eliminating the use of seclusion and restraint. *Psychiatric Services*, 56, (9), 1139-1140.

Persons with Mental Illness and the Improvement of Mental Health Care.²²

Principle 11.11 provides, in part:

Physical restraint or involuntary seclusion of a patient shall not be employed except in accordance with the officially approved procedures of the mental health facility and only when it is the only means available to prevent immediate or imminent harm to the patient or others. It shall not be prolonged beyond the period which is strictly necessary for this purpose.²³

While addressing the situation of institutionalized patients in particular, Principle 11.11 echoes the requirements of necessity and proportionality that apply to restraints on schoolchildren as well and which are set forth in a number of international human rights instruments. These instruments address the issue of restraints and seclusion in general terms, rather than creating specific protocols. Each treaty, with its principal focus on a particular human rights issue, makes a contribution to the creation of international norms regarding seclusion and restraint in schools. Restraints of disruptive students both with disabilities and those without disabilities violate these international norms whenever they use excessive force.²⁴ The force used is excessive if it goes beyond the least intrusive measures possible to ensure safety or if it amounts to abuse.²⁵ In the

²² Principles for the Protection of Persons With Mental Illness and the Improvement of Mental Health Care, G.A. Res. 46/119, U.N. Doc. A/RES/46/119 (1991).

²³ *Id.*, principle 11.11.

²⁴ Convention on the Rights of the Child, arts. 19; 28. G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2 1990 [hereinafter Convention on the Rights of the Child].

²⁵ *Id.*; [European] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, arts. 2; 3; and 8.

case of children with disabilities, even restraints that do not use excessive force may violate their basic human rights if restraints are used in response to behaviors that directly result from the child's mental health disorder which the State has failed to identify and reasonably accommodate.²⁶

Why Schools Disproportionately Restrain and Seclude Students with Disabilities

The disproportionate use of restraint and seclusion on students with disabilities may be due in part to a failure to properly identify the source of those disabilities. Among students who are classified under the Emotional Disability (9ED) Category (known in some states as EBD or SED) in receiving special education services, the majority possess mental health disabilities, that are likely to manifest as behavioral issues.²⁷ For instance, Dery, et. al., found, in a sample of 324 Canadian elementary school students receiving special education services for behavioral difficulties, that three-quarters of the students met the criteria for attention deficit hyperactivity disorder (ADHD), one-half for Oppositional Defiant Disorder, and one-third for Conduct Disorder.²⁸ About 14% of the students presented with a General Anxiety Disorder or met the criteria for a

²⁶ International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006), *entered into force* May 3, 2008, art. 5; 24(1)-(2).

²⁷ Dery, Michele; Toupin, Jean; Pauze, Robert; Verlaan, Pierrette. *Frequency of Mental Health Disorders in a Sample of Elementary School Students Receiving Special Educational Services For Behavioural Difficulties*, The Canadian Journal of Psychiatry Vol.49(11), Nov 2004, pp. 769-775.

²⁸ *Id.*

Major Depressive Episode in the past year.²⁹ Hall, et.al, found a similar pattern in the United States.³⁰

The disproportionate percentage of special education students with mental health disabilities is not limited to the ED category. The Autism Spectrum Disorders category focuses on service to students who have this psychiatric disability. Schroes, et.al. found that students with ADHD now constitute the majority of students in not only the ED category, but also that of Other Health Impairment.³¹ Moreover, the high proportion of children with psychiatric disorders in the ED special education population exceeds that of many other comparator populations.³² At 70.2%, it is higher than that of children and adolescents seen in the Alcohol/Drug treatment (60.3%), Child Welfare (41.8%), Juvenile Justice (52.1%) and even the Mental Health systems (60.8%).³³ Moreover, the underlying mental health disabilities among special education students are complex—often not limited to a single disorder. Hall, et.al. revealed that 76.8% of 617 students were identified as having one or more psychiatric disorder(s) and 21.2% of students were identified as having been diagnosed with multiple psychiatric disorders.³⁴ Approximately 65% of the elementary students in EBD

²⁹ *Id.*

³⁰ Hall, Kristina M.;Bowman, Krista A.; Ley, Katie, *Comorbid Diagnosis and Concomitant Medical Treatment for Children with Emotional and Behavioral Disabilities*, International Journal of Special Education, v21 n3 p96-107 2006.

³¹ Schnoes, Connie; Reid, Robert; Wagner, Mary; Marder, Camille, *ADHD Among Students Receiving Special Education Services: A National Survey*. Exceptional Children. Vol.72(4), Sum 2006, pp. 483-496.

³² Garland AF, Hough RL, McCabe KM, Yeh M, Wood PA, Aarons GA. *Prevalence of Psychiatric Disorders in Youths Across Five Sectors of Care*, Am. Acad Child Adolesc. Psychiatry 40:4 April 2001.

³³ *Id.*

³⁴ Hall, Kristina M.;Bowman, Krista A.; Ley, Katie, *Comorbid Diagnosis and Concomitant*

programs were identified as receiving psychiatric medication for the treatment of one or more psychiatric disorders.³⁵ Fifteen percent of students were identified as receiving combinations of medications, and 6.2% were identified as receiving three or more medications concurrently.³⁶

Instead of receiving the individualized treatment necessary to respond to such complex mental health disabilities, many ED students who possess such disabilities face a high risk of seclusion or restraint due to their behavior problems.³⁷ For many of these students, these behaviors initially led to their Special Education placement.³⁸ Although the majority of the students in the Emotionally Disturbed category have psychiatric disabilities, the federal criteria for that category focuses on behavior and not diagnosis.³⁹ As a result, the underlying psychiatric disability may not be directly addressed and its symptoms may not be appropriately accommodated.⁴⁰ Interventions are primarily based on behavioral concepts. Assuming that the student's behaviors are functional and based on factors such as work avoidance, attention-seeking or gaining tangibles, these interventions are unlikely to succeed if the behaviors are, in fact, direct clinical manifestations of the student's psychiatric disorder.⁴¹ Despite such indications that restraints and seclusion are being frequently misapplied to

Medical Treatment for Children with Emotional and Behavioral Disabilities, International Journal of Special Education, v21 n3 p96-107 2006.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Stewart, D. and Dikel, W. Emotional/Behavioral Disorders and Special Education: Recommendations for System Redesign of a Failed Category” Hamline Law Review, Volume 34, Issue 3, Summer 2011.

³⁸ *Id.*

³⁹ *Id.?*

⁴⁰ *Id.*

⁴¹ *Id.*

students with psychiatric disabilities, much about their use remains unknown as there is no federal restraint and seclusion use reporting law and only in March 2012 did the Office for Civil Rights begin collecting data on restraint and seclusion use from a national sample of American schools⁴²

School personnel are likely maintain that they need to provide a safe environment regardless of the underlying clinical causes of behaviors (e.g. psychiatric illness, brain tumors, etc.), and that schools are educational and not clinical institutions. Furthermore, schools may find that the student has received multiple diagnoses from multiple providers over the years, with no agreement on the nature of the student's disabilities. This can lead school personnel to question the usefulness of diagnosis in educational planning. School staff generally have limited training on mental health issues, including how psychiatric disorders manifest in an educational setting. As the majority of students who have mental health disorders never receive mental health services, and since school staff cannot rely upon all psychiatrically disabled students being correctly diagnosed and treated, behavioral interventions are often relied upon to maintain order and safety.

The difficulty of schools to adequately identify psychiatric disabilities is compounded by the severe limitations in access to child psychiatric and other mental health services encountered by parents when they seek treatment services for their children. The majority of providers of mental health services are primary care physicians, many of whom have limited training in the diagnosis and

⁴² GAO, *supra* note 2, at 4; Office of Civil Rights Civil Rights Data Collection (CRDC) March 2012, available at <http://ocrdata.ed.gov/>.

treatment of psychiatric disorders.⁴³ Many students' families lack insurance coverage, or have policies that have high co-pays and deductibles on their insurance policies. School districts are mandated by IDEA Special Education Law to be the payer of last resort for services that are necessary for the provision of a free appropriate public education, including many mental health services. This mandate results in the reluctance of many school programs to directly recommend mental health diagnostic or treatment services.

Schools, unlike treatment programs, do not have the option to deny services, and are obligated to educate all students including those who have been discharged from correctional or mental health programs where they displayed severe aggressive tendencies. HMOs and counties are becoming increasingly reluctant to provide intensive mental health services to children and adolescents. This reluctance has resulted in schools being required to fund programs for very severely disturbed students who previously were served in settings such as residential treatment programs. Hence, the psychiatrically disabled student who is being secluded or restrained may be the victim of a chain of numerous deprivations including lack of health care coverage, lack of access to quality diagnostic and treatment services, misdiagnosis, lack of protection against medical neglect, and lack of insurance or county-authorized payment for intensive services. As discussed below, under a number of instruments, such deprivations may violate international human rights norms.

⁴³ Children's Mental Health: An Overview and Key Considerations for Health System Stakeholders National Institute for Health Care Management Issue Paper February 2005. <http://nihcm.org/pdf/CMHReport-FINAL.pdf>

The Civil and Political Covenant & the Convention against Torture

The International Covenant on Civil and Political Rights (Civil and Political Covenant), ratified by the U.S. on June 8, 1992, governs excessive restraints in schools through its prohibition on the use of cruel, inhuman, or degrading treatment or punishment under Article 7.⁴⁴ The Human Rights Committee (HRC), which is authorized with interpreting and monitoring implementation of the Civil and Political Covenant, emphasizes that the prohibition on the use of cruel, inhuman, or degrading treatment or punishment “must extend to corporal punishment, including excessive chastisement ordered . . . as an educative or disciplinary measure.”⁴⁵ It clarifies that the “prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.”⁴⁶ Such acts which inflict mental as well as physical suffering could include restraints.⁴⁷ The HRC’s comments note that Article 7 applies to the excessive use of seclusion as well, stating that “prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7.”⁴⁸

The language of the Civil and Political Covenant’s Article 7 is mirrored in the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention against Torture), which was ratified by the U.S. on October 21, 1994. Article 16 of the Convention against Torture

⁴⁴ International Covenant on Civil and Political Rights, adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States June 8, 1992, art. 7 [hereinafter Civil and Political Covenant].

⁴⁵ UN Human Rights Committee, General Comment No. 20, para. 5, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994).

⁴⁶ UN Human Rights Committee, General Comment No. 20, para. 5.

⁴⁷ COUNCIL FOR CHILDREN WITH BEHAVIORAL DISORDERS, *supra* note 4 at 5

⁴⁸ UN Human Rights Committee, General Comment No. 20, para. 6.

similarly establishes a ban on “cruel, inhuman or degrading treatment.”⁴⁹ The Committee against Torture, responsible for interpreting this Convention, has indicated that the “continuing application” of corporal punishment “could constitute in itself a violation of the Convention.”⁵⁰ This statement suggests that restraints and seclusion, if regularly misused as corporal punishment rather than as emergency interventions, could violate the Convention against Torture.⁵¹

The United Nations’ Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, Manfred Novak, reaffirmed that these provisions of the Civil and Political Covenant and the Convention against Torture are applicable to the school context:⁵²

Since corporal punishment in all its forms . . . whether imposed by State authorities or by private actors, including schools and parents, has been qualified by all relevant intergovernmental human rights monitoring bodies as cruel, inhuman or degrading punishment, it follows that, under present international law, corporal punishment can no longer be justified, not even under the most exceptional situations.

The Special Rapporteur also specifically condemned the excessive use of restraints and seclusion on children and adults with disabilities. He noted that

⁴⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted December 10, 1984, G.A. res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984), entered into force June 26, 1987, ratified by the United States October 21, 1994, art. 16 [hereinafter CAT].

⁵⁰ Report of the Committee against Torture, UN GAOR, UN Doc. A/50/44 (1995), para. 169.

⁵¹ HUMAN RIGHTS WATCH, *supra* note 14, at 60–61.

⁵² Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN GAOR, UN Doc. A/HRC/10/44, 14 Jan. 2009, para. 37.

“there can be no therapeutic justification for the prolonged use of restraints, which may amount to torture or ill-treatment.”⁵³ He further found that “persons with disabilities are often held in seclusion or solitary confinement as a form of control or medical treatment, although this cannot be justified for therapeutic reasons, or as a form of punishment,” and “may constitute torture or illtreatment.”⁵⁴

Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child (CRC), which went into force in September 1990, set forth the human rights of children, including access to education, and the rights of children with disabilities.⁵⁵ The CRC has been ratified by 194 countries – nearly every nation in the world – with the exception of the U.S. and Somalia. The CRC contains a number of provisions that restrict the use of restraints and seclusion for students with disabilities. Like the Civil and Political Covenant and the Convention Against Torture, the CRC includes a duty on states to protect children from “torture or other cruel, inhuman or degrading treatment or punishment.”⁵⁶ The CRC, however, also offers specific protections to schoolchildren and children with disabilities.

Article 2 of the CRC creates an obligation on State parties to prevent discrimination of any kind against children within their jurisdiction and makes explicit mention of disability as a prohibited ground for discrimination.⁵⁷ This express inclusion of disability reflects the fact that “children with disabilities

⁵³ *Id.* at para. 55.

⁵⁴ *Id.* at para. 56.

⁵⁵ Convention on the Rights of the Child, *supra* note 24, arts. 19; 28.

⁵⁶ *Id.*, Art. 37(a).

⁵⁷ *Id.*, Art. 2.

belong to one of the most vulnerable groups of children.”⁵⁸ While Article 2 demands that states prevent harmful discrimination against children with disabilities, Article 23 requires that States must sometimes recognize the different abilities of children with disabilities and take action to ensure the maximum inclusion of those children into society.⁵⁹ This requirement that children who are situated differently deserve to be treated differently demands that States provide appropriate care and assistance to disabled children “free of charge, whenever possible” in order to “ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services . . . in a manner conducive to the child's achieving the fullest possible social integration and individual development.”⁶⁰ Article 24 echoes the obligation of states to provide to all children “the highest attainable standard of health,” including providing children with disabilities the care they need.⁶¹ These provisions create a duty on States to provide reasonable accommodation to students with disabilities.⁶² This duty is breached – and the State is guilty of discrimination – when students with disabilities, who are not given appropriate care and assistance, are restrained or secluded by school personnel as a result of behaviors directly arising from their disabilities.⁶³

⁵⁸ Committee on the Rights of the Child, General Comment No. 9: The rights of children with disabilities, para. 8, UN Doc. CRC/C/GC/9, (2006).

⁵⁹ Convention on the Rights of the Child, *supra* note 24, art. 23, para. 1; Committee on the Rights of the Child, General Comment No. 9, para. 11.

⁶⁰ Convention on the Rights of the Child, *supra* note 24, art. 23, para. 2.

⁶¹ Convention on the Rights of the Child, *supra* note 24, art. 24.

⁶² *See* Committee on the Rights of the Child, General Comment No. 9, para. 65.

⁶³ *See id.* (obligating States, in order to prevent discrimination in education for children with disabilities, to provide “personal assistance, in particular, teachers trained in methodology and techniques, including appropriate languages, and other forms of communication, for teaching

Reinforcing this standard is CRC Article 28, which directly addresses discipline issues in school.⁶⁴ This article provides, “States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.”⁶⁵ Article 28 also reaffirms a State’s duty to make a variety of forms of education accessible to all children.⁶⁶

Although the CRC does not specifically address restraint and seclusion, Article 19 can be used to encourage States to protect against the dangers these harmful practices present.⁶⁷ This article obligates States to take all measures necessary to “protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”⁶⁸ The Committee on the Rights of the Child, charged with monitoring compliance with the CRC, in 2006 issued General Comment No. 8, in which it found that article 19 “does not leave room for any level of legalized violence against children” and that “States must take all

children with a diverse range of abilities capable of using childcentred and individualised teaching strategies, and appropriate and accessible teaching materials, equipment and assistive devices . . . to the maximum extent of available resources.”)

⁶⁴ Laura C. Hoffman, *A Federal Solution that Falls Short: Why the Keeping All Students Safe Act Fails Children with Disabilities*, 37 J. LEGIS. 39, 78–79 (2011).

⁶⁵ Convention on the Rights of the Child, *supra* note 24, art. 28, para. 2.

⁶⁶ *Id.* at para. 1(a)–(d).

⁶⁷ Hoffman, *supra* note 64, at 78–79.

⁶⁸ Convention on the Rights of the Child, *supra* note 24, art. 19, para. 1.

appropriate legislative, administrative, social and educational measures to eliminate [any cruel and degrading forms of punishment].”⁶⁹

The Committee acknowledged “that there are exceptional circumstances in which teachers and others, e.g. those working with children in institutions and with children in conflict with the law, may be confronted by dangerous behaviour which justifies the use of reasonable restraint to control it.”⁷⁰ The Committee stated, however, that “[t]he principle of the minimum necessary use of force for the shortest necessary period of time must always apply.”⁷¹ In light of the Committee’s General Comment No. 8, Article 19’s duty to protect should be interpreted to apply to the use of restraints and seclusion in schools.⁷²

Convention on the Rights of Persons with Disabilities

In December 2006 the United Nations adopted the Convention on the Rights of Persons with Disabilities,⁷³ which has since been ratified by 103 nations. The United States has signed the Convention but not yet ratified it. Despite the U.S.’s reluctance to become a party, the Convention reflects a “paradigm shift’ in the way we think about and treat persons with disabilities.”⁷⁴ Its creation of a “universal standard” for the human rights of persons with

⁶⁹ UN Committee on the Rights of the Child, General Comment No. 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, inter alia) (Forty-second session, 2006), U.N. Doc. CRC/C/GC/8 (2006), para. 18.

⁷⁰ *Id.* at para. 15.

⁷¹ *Id.*

⁷² COUNCIL FOR CHILDREN WITH BEHAVIORAL DISORDERS, *supra* note 4 at 5.

⁷³ Convention on the Rights of Persons with Disabilities, *supra* note 26.

⁷⁴ MICHAEL L. PERLIN, INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD 144 (2012).

disabilities advances international norms that have potential to increase the protection of students with disabilities in the U.S..⁷⁵

The convention marks the first treaty specifically focused on the rights of persons with disabilities that creates enforceable obligations for party governments.⁷⁶ The purpose of the Convention is to guarantee persons with disabilities the same rights enjoyed by others, including the right to health and the right to education.⁷⁷ As such, the Convention does not recognize any new rights of persons with disabilities, but rather seeks to clarify the duties of states to protect rights recognized in previous instrument – such as the Civil and Political Covenant and the Covenant on Economic, Social, and Cultural Rights – as they apply to persons with disabilities.⁷⁸

The Convention does not define “disability,” acknowledging that the concept of disability is evolving.⁷⁹ The convention, however, does say that “disabled persons” includes “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”⁸⁰ This approach differs from the definitions used in previous instruments in that it explicitly endorses the social model of disability, identifying disabled persons in terms of the obstacles they face to full participation in society, rather

⁷⁵ PERLIN, *supra* note 74 at 144; HUMAN RIGHTS WATCH, *supra* note 14, at 58 –59.

⁷⁶ PERLIN, *supra* note 76 at 145.

⁷⁷ PERLIN, *supra* note 74 at 144 –46.

⁷⁸ Convention on the Rights of Persons with Disabilities, *supra* note 26, pmb., para. d.

⁷⁹ Convention on the Rights of Persons with Disabilities, *supra* note 26, pmb., para. e.

⁸⁰ Convention on the Rights of Persons with Disabilities, *supra* note 26, art. 1.

than in medical terms.⁸¹ The Convention also “reconceptualizes” mental health rights as disability rights, thereby including in its coverage children with mental disabilities who may be more prone to suffer restraints and seclusions in school.⁸²

The Convention contains a number of provisions which are implicated when a child with a disability is restrained or secluded in school instead of being given appropriate accommodations for his or her disability. Article 5 requires States to take all appropriate steps to ensure that reasonable accommodations are provided to persons with disabilities.⁸³ Article 7 obligates States to take “all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.”⁸⁴ Echoing a number of provisions from the Civil and Political Covenant, the Convention Against Torture, and the Convention on the Rights of the Child, Articles 14, 15 and 17 of the Convention on the Rights of Persons with Disabilities protect the liberty and security of the person, freedom from cruel, inhuman or degrading treatment and the integrity of the person, respectively.⁸⁵

Article 24 of the Convention addresses education, including a number of provisions that call upon States to take appropriate action to accommodate students’ disabilities, rather than resort to harmful practices like restraint and seclusion. The Convention instructs that States should ensure that children’s

⁸¹ PERLIN, *supra* note 76 at 144; Convention on the Rights of Persons with Disabilities, *supra* note 73, art. 1; pmb., para. e.

⁸² PERLIN, *supra* note 76 at 144.

⁸³ Convention on the Rights of Persons with Disabilities, *supra* note 26, art. 5.

⁸⁴ *Id.*, art. 7.

⁸⁵ *Id.*, art. 14, 15, 17.

impairments are identified early and that interventions and services are provided to minimize further disabilities.⁸⁶ In order to ensure fulfillment of disabled persons' right to education, Article 24 calls upon nations to avoid excluding disabled persons from compulsory education systems based on their disabilities and to provide "the support required, within the general education system, to facilitate their effective education."⁸⁷ Governments should also ensure that "effective individualized support measures are provided in environments that maximize academic and social development."⁸⁸ These standards explicitly require states not only to provide mental health services to children with disabilities, but also to do so in conjunction with education. Exactly which services nations must provide, however, is subject to the caveat that each state is only required to "take measures to the maximum of its available resources."⁸⁹

International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social, and Cultural Rights, which entered into force in 1976, has been ratified by 160 countries and signed but not ratified by six others, including the United States.⁹⁰ The Covenant addresses the rights of children with disabilities through its protection of "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health"⁹¹ and "the right of everyone to education".⁹² In 1995, the

⁸⁶ *Id.*, art. 25.

⁸⁷ *Id.*, art 24 § 2(d).

⁸⁸ *Id.*, art 24 § 2(e)

⁸⁹ *Id.*, art 4.

⁹⁰ International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

⁹¹ Covenant on Economic, Social and Cultural Rights, *supra* note 90, at art. 12.

Committee on Economic, Social and Cultural Rights issued a General Comment on persons with disabilities.⁹³ General Comment 5 noted that, although the Covenant never explicitly mentions persons with disabilities, they are still entitled to the rights found in the treaty, including the right to health and the right to education, and that governments are obligated to take necessary measures, to the greatest extent possible, to ensure disabled persons full enjoyment of those rights.⁹⁴ Based on the Committee's interpretation of the treaty, governments are required not only to ensure that disabled persons within their jurisdiction are treated the same as everyone else, but also to provide special services, when possible, to allow disabled persons to exercise their rights to the greatest extent possible.⁹⁵

Despite the Committee's General Comment, the lack of specific reference to disabled persons in the Covenant on Economic, Social, and Cultural Rights, may impede the protection of persons with disabilities.⁹⁶ Governments occasionally choose not to include information on the treatment of persons with mental health disorders or other disabilities in their periodic reports to the Committee on Economic, Social and Cultural rights or other international bodies,

⁹² *Id.*, art. 13.

⁹³ Committee on Economic, Social and Cultural Rights, General Comment No. 5, Persons with disabilities (Eleventh session, 1994), U.N. Doc E/1995/22 at 19 (1995), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 24 (2003).

⁹⁴ General Comment No. 5, *supra* note 93, at para. 5.

⁹⁵ *Id.* at para. 9.

⁹⁶ *Id.* at para. 6.

choosing instead to treat conditions of disabled persons as a domestic matter and making monitoring of human rights violations difficult.⁹⁷

Although such weaknesses arise from its failure to specifically refer to children with disabilities, the Covenant's requirement that states meet the "highest attainable standard of physical and mental health" directly implicates their rights.⁹⁸ The UN Committee on Economic, Social and Cultural Rights clarified the meaning of the right to health in 2000 in its General Comment 14, including anti-discrimination measures relevant to people with disabilities.⁹⁹ The General Comment defines the right not as the right to be healthy but to have access to health care and other necessities for a healthy lifestyle and to be free from discrimination in access to health care and other health related resources.¹⁰⁰ The Comment states that Articles 2.2 and 3 of the Covenant explicitly proscribe discrimination in the provision of healthcare means and entitlements toward people with physical or mental disabilities.¹⁰¹

In addition to the right to health, the Covenant provides protection to children with disabilities through its guarantee of "the right of everyone to

⁹⁷ See Conclusions and recommendations of the Committee on Economic, Social and Cultural Rights, Slovakia, para. 32, U.N. Doc. E/C.12/1/Add.81 (2002); Debra Benko, *The Application of Universal Human Rights Law to People with Mental Disabilities*, 9 No. 1 Hum. Rts. Brief 9 (2001).

⁹⁸ Covenant on Economic, Social and Cultural Rights, *supra* note 90, art. 12.

⁹⁹ Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 85 (2003).

¹⁰⁰ General Comment 14, *supra* note 99, at ¶ 8.

¹⁰¹ *Id.* at ¶ 18.

education”¹⁰² The right to education obligates governments to provide compulsory, free, primary education, to ensure access to secondary and higher education as well as technical and vocational education to the greatest extent possible, and to prevent discrimination within the educational system.¹⁰³ The level of education required by the Covenant depends on the nation’s resources.¹⁰⁴

This universal right to education without discrimination creates a duty to protect against neglect, exclusion or separation based on disability that would prevent children from exercising their economic, social and cultural rights on an equal basis with persons without disabilities.¹⁰⁵ Hence, the Covenant obligates States to provide reasonable accommodations in schools to children with disabilities, including accommodations that are appropriately responsive to behaviors associated with their disabilities for which school staff might otherwise be unprepared.¹⁰⁶ In the United States, these accommodations would likely be described among strategies to be used to support the student in a student’s Individualized Education Program, a requirement for students with disabilities under the Individuals with Disabilities Education Act (IDEA).¹⁰⁷ A failure to provide such accommodations would likely be in contravention of the norms established by the Covenant on Economic, Social and Cultural Rights.

The European Convention on Human Rights

¹⁰² Covenant on Economic, Social and Cultural Rights, *supra* note 90, art. 13.

¹⁰³ *Id.* at art. 13(a)–(d).

¹⁰⁴ *Id.* at art. 14.

¹⁰⁵ See General Comment No. 5, *supra* note 93, at para. 15.

¹⁰⁶ GAO, *supra* note 2, at 3.

¹⁰⁷ GAO, *supra* note 2, at 3; 20 U.S.C. § 1414(d).

Although the U.S. is not a party to it, the European Convention on Human Rights (ECHR) further reinforces the international norms prohibiting excessive physical restraints of schoolchildren. Article 2 could be construed to protect against any restraint that could cause death.¹⁰⁸ Article 3 echoes the numerous treaties which prohibit subjecting any person to inhuman or degrading treatment or punishment.¹⁰⁹ Discriminatory denial of the rights in the ECHR to any protected ground or other status is prohibited by Article 14.¹¹⁰ Article 5 establishes a right to liberty and security and outlaws the unlawful deprivation of freedom that would arise in an unnecessary restraint.¹¹¹ Important limits to the amount of force used in restraints are provided by ECHR article 8, which establishes a right to physical integrity and requires that any action that interferes with this right should be in accordance with established law and guidelines, that it should be for a legitimate purpose, and that it should be necessary for and proportionate to that purpose.¹¹² To be proportionate, a physical intervention must be the least intrusive measure possible and should be a last resort only,

¹⁰⁸ [European] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, art. 2 [hereinafter ECHR].

¹⁰⁹ *Id.* art. 3; *see* Civil and Political Covenant, *supra* note 44, art. 7; CAT, *supra* note 49, art. 16; Convention on the Rights of the Child, *supra* note 24, art. 37; Convention on the Rights of Persons With Disabilities, *supra* note 26, art. 15.

¹¹⁰ ECHR, *supra* note 108, art. 14.

¹¹¹ *Id.* art. 5.

¹¹² *Id.* art 8; Joint Committee on Human Rights, Third Report, Physical Restraint and Seclusion. (prepared December 14, 2004), <http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/15/1511.htm> (interpreting the ECHR for the government of the United Kingdom); *see also* URSULA KILKELLY, THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE: A GUIDE TO THE IMPLEMENTATION OF ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS at 31–32 (2003).

applied with the minimum force necessary and for the shortest time necessary to ensure safety.¹¹³

The ECHR's principles of proportionality and necessity are reflected in decisions of the European Court of Human Rights, which provides a valuable source of case law on international human rights.¹¹⁴ In *Winterwerp v. Netherlands*, the Court articulated the requirements that must be met before a State may involuntarily detain persons with disabilities¹¹⁵ The *Winterwerp* standard requires a diagnosis of a medically recognized mental disorder by objective medical experts, a determination that the disorder does is "of a kind or degree warranting compulsory confinement," and demands that detention is only permissible for as long as the disorder persists.¹¹⁶

The Court established further constraints on the State's treatment of persons with disabilities in *Keenan v. UK*, in which the Court condemned the use of excessive restraints on persons with mental disabilities.¹¹⁷ The Court stated that ". . . in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 [of the ECHR]."¹¹⁸ The *Keenan* case, which concerned the suicide in punitive seclusion of a mentally ill man, also clarified that seclusion can violate the right to

¹¹³ ECHR, *supra* note 108, art 8; Joint Committee on Human Rights, *supra* note 112.

¹¹⁴ Paul Hunt & Judith Mesquita, *Mental Disabilities and the Human Right to the Highest Attainable Standard of Health*, 28 Hum. Rts. Q. 332, 338–39 (2006).

¹¹⁵ Eur. Ct. H.R. 4 (1979).

¹¹⁶ *Id.*

¹¹⁷ *Keenan v. the United Kingdom*, 10 Eur. Ct. H.R. 319, ¶ 112 (2001).

¹¹⁸ *Id.*

be free from inhuman or degrading treatment or punishment under ECHR Article 3.¹¹⁹

Another leading case on restraints on persons with disabilities from the European Court is *Price v. the United Kingdom*.¹²⁰ In *Price*, a woman who did not have use of her four foreshortened limbs and who suffered kidney disease was bound to her wheelchair while in detention, became dangerously cold, and was unable to use the bathroom without assistance or to reach emergency call buttons.¹²¹ The European Court of Human Rights found that, despite the absence of any intention to humiliate the prisoner, these conditions constituted degrading treatment contrary to Article 3 of the ECHR.¹²² The judgment established that the failure to treat differently a person whose situation is significantly different can itself be degrading.¹²³ While an important judgment in support of reasonable accommodations, commentators have cautioned the European Court might not be as willing to declare that a failure to accommodate constitutes degrading treatment when it occurs outside of an institution.¹²⁴

¹¹⁹ *Id.* at ¶ 115.

¹²⁰ *Price v. United Kingdom*, 34 Eur. Ct. H.R. 53 (2002); Davíd Pór Björgvinsson, *The Protection of the Rights of Persons with Disabilities in the Case Law*, in *THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES* 141, 145 (Oddný Mjöll Arnardóttir & Gerard Quinn, eds., 2009).

¹²¹ *Price*, *supra* note 120, at ¶ 30.

¹²² *Id.*

¹²³ Oliver De Schutter, *Reasonable Accommodations and Positive Obligations*, in *DISABILITY RIGHTS IN EUROPE: FROM THEORY TO PRACTICE* 35, 54 (Anna Lawson & Caroline Gooding, eds., 2005).

¹²⁴ *Id.* at 55.

There is, however, potential for expanding the rights of persons with disabilities beyond the institutional context.¹²⁵ The Court constrained the corrective measures that may be taken against students with disabilities in *A. v. United Kingdom* by finding that, under ECHR Article 3, severe corporal punishment of any child is inhumane, regardless of the setting and even if committed by the child's parents.¹²⁶ In *D.H. v. Czech Republic*, the Grand Chamber of the European Court of Human Rights clarified the responsibilities of school administrators when it found that the disproportionate segregation in the special education system of Roma students constituted active discrimination by the government, in violation of ECHR Art. 14.¹²⁷ The Court reasoned that the statistics used by the applicants to show the extent of racial segregation placed the burden on the Czech government to prove a non-discriminatory justification, which it failed to do.¹²⁸ This willingness of the Court to examine the impact of exclusionary treatment could open the door for systematic discrimination claims, including those based on disability.¹²⁹

Commentators have forecasted further potential of the Court to expand protection under ECHR Articles 3, 8 and 14 by scrutinizing resource allocation

¹²⁵ Colm O'Connell, *Extracting Protection for the Rights of Persons with Disabilities*, in *THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES* 141, 145 (Oddný Mjöll Arnardóttir & Gerard Quinn, eds., 2009).

¹²⁶ *A v. United Kingdom*, App. No. 10000/82, 6 Eur. H.R. Rep. 535 (1984); *but see* *Costello-Roberts v. United Kingdom*, 247 Eur. Ct. H.R. 50 (1993) (finding that the striking of a student three times with a soft-soled shoe by a teacher in a private school did not constitute inhumane treatment).

¹²⁷ O'Connell, *supra* note 125, at 185.

¹²⁸ *Id.*

¹²⁹ *Id.*

decisions in terms of their effect on persons with disabilities.¹³⁰ While the Court's judgments do not carry the binding status on the U.S. of an international treaty, they provide interpretive guidance that should be used to add specificity to understanding corresponding, treaty-based rights.¹³¹

Conclusion and Recommendations

The United States, as a party to both the Civil and Political Covenant and Convention against Torture, is obligated to guard against any restraint or seclusion of school children which violates their common prohibition on cruel, inhuman or degrading treatment or punishment.¹³² International norms establish further expectations for protection of children in schools, particularly those with disabilities. The Convention on the Rights of Persons with Disabilities imposes extensive obligations on the State to accommodate children with disabilities to prevent discrimination and provide them equal educational opportunities with other children.¹³³ Additionally, both the Convention on the Rights of the Child and the Covenant on Economic, Social and Cultural Rights establish duties to accommodate students with disabilities and provide them the highest attainable standard of health.¹³⁴ When, as in the U.S., physical restraints and seclusion are imposed disproportionately, repeatedly, or excessively on students with

¹³⁰ *Id.* at 186; De Schutter, *supra* note 123, at 45 –53.

¹³¹ Hunt & Mesquita, *supra* note 114, at 338–39.

¹³² Civil and Political Covenant, *supra* note 44, art. 7; Convention Against Torture, *supra* note 49, art 16.

¹³³ Convention on the Rights of Persons with Disabilities, *supra* note 26.

¹³⁴ Convention on the Rights of the Child, *supra* note 24, art. 23 (encouraging the extension of special assistance to disabled children to provide effective access to education); *Id.* art. 24; Committee on Economic, Social and Cultural Rights, General Comment No. 5, *supra* note 93, para.32 (entitling children with disabilities to special protection); *Id.*, para. 35 (requiring, under articles 13 and 14, that the necessary equipment and support be made available to bring persons with disabilities up to the same level of education as their non-disabled peers).

disabilities, the government is failing to meet the basic human rights of these students and thus violates international norms.¹³⁵

The United States can rely on these international human rights norms, as well as current research literature, to develop legislation on a national level.¹³⁶ To reflect such international standards and research, legislation should focus on accountability through required documentation and regular reviews of the use of restraint and seclusion on individual and systemic levels.¹³⁷ It should mandate appropriate training for school employees, stricter standards on when restraint or seclusion is permitted, procedures to ensure restraint or seclusion are being applied safely, and prevention and reduction strategies. This legislation must also prohibit unjustifiable procedures, require reasonable accommodations to ensure access to education, and prevent discrimination. By enacting such laws in defense of human rights, the United States can halt the disproportionate infliction of trauma and mistreatment on some of its most vulnerable citizens.

¹³⁵ HUMAN RIGHTS WATCH, *supra* note 14 at 62.

¹³⁶ Civil and Political Covenant, *supra* note 44; Convention Against Torture, *supra* note 49; Convention on the Rights of Persons with Disabilities, *supra* note 26; Convention on the Rights of the Child, *supra* note 24, Covenant on Economic, Social and Cultural Rights, *supra* note 90, ECHR, *supra* note 108. For a review of trauma informed care practices and research see e.g., Hodas, G. (2006). *Responding to Childhood Trauma; The Promise and Practice of Trauma Informed Care*. Pennsylvania Office of Mental Health and Substance Abuse Services. http://www.nationalcenterdvtraumamh.org/resources_trauma-services.php

¹³⁷ For a comprehensive review of state laws existing in 2009 and recommendations for a comprehensive approach to restraint and seclusion, see Stewart, Daniel. How do the States Regulate Restraint and Seclusion in Public Schools? *A Survey of the Strengths and Weaknesses in State Laws*. Hamline Law Review Vol. 34(3), Summer 2011.