A TRAGIC VOID: GEORGIA'S FAILURE TO REGULATE RESTRAINT & SECLUSION IN SCHOOLS

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I. INTRODUCTION

In Gainesville, Georgia, a student named Jonathan King hung himself while at school.[1] Suicide is tragic. Suicide committed at school is harrowing. Suicide, as in the King matter, where a 13 year-old, mentally-ill student hangs himself with rope given to him by his teachers occupies a place in our consciousness that can only be labeled as unspeakable.[2] And yet, in Georgia,

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1. King v. Pioneer Reg'l Educ. Serv. Agency, 688 S.E.2d 7 (Ga. App. 2009). Jonathan King's story is compelling but, unfortunately, not unusual. Jonathan, a thirteen-year-old African-American male student, was receiving special education services at the most restrictive non-residential school placement in Georgia, the Alpine Psychoeducational Program for students with severe emotional behavioral disorders. *Id.* at 10. In the months before his suicide, Jonathan had been forced into an 8x8 "seclusion room" or cell for nineteen of the twenty-nine days of school. The cell had one small window mostly blocked with a piece of cardboard and obstructed by a metal grating. The room locked from the outside and had no water or bathroom. According to school records, Jonathan spent an average of 88.6 minutes in the room for each seven hour school day. Records further show that during his confinement, Jonathan threatened to kill himself, engaged in self-injurious behaviors, complained of claustrophobia, and indicated that he would "break his arms off and beat himself with them."

On November 15, 2004, Jonathan came to school without a belt. School staff gave him rope to tie his pants up. *Id.* at 12. Later in the day, following a school fight, Jonathan was forced into the seclusion room. *Id.* A school staff person, Mr. Trotter, on his second day on the job, placed and retained Jonathan in the seclusion room. *Id.* School administration had not trained Mr. Trotter in the use of the seclusion room nor did they make him aware of Jonathan's prior threats of suicide and self harm while in seclusion. Despite being calm while in seclusion, Jonathan was not allowed out of seclusion prior to the first fifteen minute interval. Mr. Trotter assumed, based on the information available, that monitoring of students in seclusion was in fifteen minute intervals. However, prior to the expiration of the interval, Jonathan became very quiet. *Id.* When Mr. Trotter opened the door, he found that Jonathan had hung himself with the "belt" provided to him by school staff. *Id.*

2. *Id*.

such actions of educators are not illegal *per se*, nor do they automatically trigger the constitutional protections that are afforded the involuntarily committed or even the criminally incarcerated.[3]

Around the same time as Jonathan's death, in Valdosta, Georgia, Isaac, a ten-year old student with severe bi-polar disorder, stood in juvenile court accused of battery against a teacher.[4] The charges related to an in-school incident where Isaac's teacher, in an attempt to restrain Isaac during a manic episode, forcefully grabbed him from behind and wrestled him to the ground.[5] During the episode, the nine-year old Isaac struggled to break free from the restraint; in a manic rage, he struck the teacher with his fist.[6] The teacher was not permanently harmed and did not require any medical attention.[7] Isaac was immediately referred to law enforcement for the alleged battery and subsequently found guilty and ordered to a juvenile detention facility.[8]

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3. *See generally* Youngberg v. Romero, 457 U.S. 307 (1982); *see infra* Part IV.C.

4. I.G. v. Valdosta City Sch., No. 0707668-92 (Ga. Office of State Admin. Hearings Oct. 2006) (admin. hearing before Hackney, J.).

5. *Id*.

6. *Id*.

7. *Id*.

8. *Compare id*., *with supra* note 1. Like Jonathan King, Isaac's story is not unique. Isaac is a ten-year old student enrolled in a Georgia psychoeducational center. *I.G.*, No. 0707668-92. Isaac had been diagnosed with bi-polar disorder and would cycle rapidly between episodes of depression and mania. *Id.* According to his neuropsychologist, Isaac became "completely incapacitated by his neurological or neuropsychiatric disability" and during manic episodes was "catatonic in the most classic sense." *Id.*

While attending the psycho-educational center, Isaac was the victim of repeated abusive restraint techniques by employees of the school. *Id.* The teachers physically restrained Isaac during cycles of mania. *Id.* Isaac suffered swollen eyes, a noticeable limp, and pain in his hip and arm from the attack. *Id.* Isaac was arrested for battery against the teachers that had inappropriately tried to restrain him. As a result of the abuse, Isaac continued to exhibit violent and aggressive behaviors in school. Less than a month after returning to school, Isaac again was sent to jail following an incident where an educator attempted to physically restrain him. During this incident, Isaac hit and pushed the teachers restraining him. One teacher "wrapped her arms around Isaac, and he "swung [her] to the floor." That

Both Jonathan and Isaac are guaranteed basic constitutional protections of due process of the law.[9] Both students are meant to receive an "adequate public education" from the county in which they reside.[10] Both students, as students with disabilities, are guaranteed a free, appropriate public education in the least restrictive environment.[11] Despite all these legal protections on the books, neither Jonathan's nor Isaac's families have been able to sustain any claims against the schools or school systems that failed them.[12] One boy dead and the other in jail – neither with any access to justice via the legal system. For Jonathan, Isaac and their families, the Georgia law offers no effective recourse. For students with disabilities, like Jonathan and Isaac, and those still attending the psycho-educational centers where they suffered, the Georgia law offers no protection either. For the national system that ensures that students with disabilities receive a free, appropriate public education, Georgia law offers an example of a state failing to protect its most vulnerable through institutional indifference, resulting in a pattern of abuse and maltreatment that continues to shock and appall.

This article will explore the alarming rise in school abuse of aversive behavioral control techniques such as physical restraint

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teacher filed criminal charges against Isaac for battery. As a result, Isaac was incarcerated for thirty days.

9. U.S. CONST. amend. XIV, § 1.

10. GA. CONST. art. VIII, § V, para. II.

11. Individuals with Disabilities Act, 20 U.S.C. §1400 (2010) [hereinafter IDEA]. IDEA is the federal law that requires public schools to provide students with disabilities equal educational opportunities. *Id.* The law protects any child "having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services." 34 C.F.R. § 300.8 (2010).

12. While the law does provide that such claims could be asserted, as this article will demonstrate, the ability for a student to prevail against a school system is dubious at best. Claims raised pursuant to state law must withstand several levels of immunity, as well as meet a legal standard that is approaching unattainable. Claims raised pursuant to the U.S. Constitution or federal disability law are subject to administrative limitations and also require students to meet a lofty legal standard. Many of these issues will be addressed in Section IV., *infra*.

and seclusion.[13] The article will survey the national landscape of law and regulation on restraint and seclusion for any effective policy directives and explain the current state of Georgia law with regards to students subjected to such abusive techniques. Finally, the article will present three potential avenues for change to the status quo through (1) new federal law; (2) state administrative rules; or (3) a shift in the legal analysis applied by Georgia's state and federal courts when presented with education civil rights cases involving abuse of restraint and seclusion by educators. These roads to change will hopefully ensure that Jonathan's death and Isaac's incarceration are the last pages in this sad chapter of Georgia educational history.

II. THE USE OF RESTRAINT & SECLUSION IN SCHOOLS

A. Physical Restraint

Physical restraint is a type of aversive behavioral control tool involving the forced restriction or immobilization of the child's body or parts of the body depending on the behavior being addressed by the technique. Generally, there are three types of restraint: manual,[14] mechanical,[15] and chemical.[16] The majority

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13. In education, the use of restraint and seclusion has developed over the past twenty years into a common form of behavioral management and classroom control. While use of restraint and seclusion is not limited to schools or classes for only disabled students, the data and commentary regarding the abuse of restraint and seclusion in schools has primarily focused on this community.

14. Manual restraint, often referred to as ambulatory restraint, physical intervention, or therapeutic holding, "is defined as any method of one or more persons restricting another person's freedom of movement, physical activity, or normal access to his/her body." THE COUNCIL FOR CHILDREN WITH BEHAVIORAL DISORDERS, COUNCIL FOR EXCEPTIONAL CHILDREN, THE USE OF PHYSICAL RESTRAINT PROCEDURES IN SCHOOL SETTINGS 3 (2009), *available at* http://www.casecec.org/pdf/seclusion/Accepted,%20CCBD%20on%20Use%20of%20Restraint,%207-8-09.pdf [hereinafter C.C.B.D. RESTRAINT]. The most common form of restraint consists of a person physically impeding or preventing the physical movement of another person.

15. *Id*. at 2-3 ("Mechanical restraint entails the use of any device or object (e.g., tape, ropes, weights, weighted blankets) to limit an individual's body movement to prevent or manage out-of control behavior . . . . Mechanical

of school restraint cases involve the use of either physical or mechanical restraint. Currently, no set parameters exist to determine when such practices may be employed.[17] And while there are schools that establish some criteria for using restraint and seclusion, mostly, educators use their own discretion in deciding when to restrain and isolate students. In Georgia, no formal training is required for teachers called upon to use such techniques,[18] nor is there a system of communication between the school and the family to inform a student's family when their son or daughter has been physically handled by a teacher or locked away by an administrator.[19] And while individual schools may have a de facto reporting system, without training and without oversight, the potential for educator abuse of these techniques grows.

The disability community has publically advocated for federal and state educational systems to adopt regulations to eliminate the abuse of restraint and seclusion techniques in school. Generally, these regulations propose that school restraint and seclusion techniques may be employed to control acute or episodic aggressive behavior only when: (a) the student's actions pose a clear, present, and imminent physical danger to himself or to others; (b) less restrictive measures have not effectively reduced the risk of injury; (c) the restraint lasts only as long as necessary to resolve the actual risk of danger or harm; and (d) the degree of force applied does not exceed what

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restraints such as tape, straps, tie downs, and a wide variety of other devices have also been used by educators to control student behavior.").

16. *Id*. at 3. Chemical restraint "uses medication to control behavior or restrict a patient's freedom of movement." *Id.* For example, in hospital programs, "patients who become agitated are provided with medication" that subdues them to a point where their movement is impacted. *Id.*

17. NAT'L DISABILITY RIGHTS NETWORK, SCHOOL IS NOT SUPPOSED TO HURT: INVESTIGATIVE REPORT ON ABUSIVE RESTRAINT AND SECLUSION SCHOOLS app. 1 (2009), *available at* http://www.napas.org/sr/SR-Report.pdf [hereinafter N.D.R.N. REPORT].

18. *Id*. at 11. While all educators must be certified, and those educators working with special needs children must have appropriate credentials, neither the Georgia Department of Education nor the Professional Standards Commission requires that educators receive any training on applying physical restraints on students. *Id.*

19. *Id*.

is necessary to protect the student or other persons from imminent bodily injury.[20]

Further, those in the disability community have called for the elimination of prone restraint, identified as the most dangerous of restraint techniques, and continue to advocate for limiting other aversive behavioral controls.[21] While no national consensus has developed regarding the limitations of such practices, disability advocates have set forth some basic principles on the emergency use of restraint and seclusion techniques.[22] Experts caution school staff to be "especially careful not to use their own bodies in a way that restricts ability to breathe, such as sitting or lying across a person's back or stomach."[23] As well, the use of restraints causes a person to

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20. *See generally* JESSICA BUTLER, THE COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC., UNSAFE IN THE SCHOOLHOUSE: ABUSE OF CHILDREN WITH DISABILITIES (2009), *available at* http://copaa.net/pdf/UnsafeCOPAAMay_27_2009.pdf; C.C.B.D. RESTRAINT, *supra* note 14; KEVIN ANN HUCKSHORN, NAT'L ASS'N OF STATE MENTAL HEALTH PROGRAM DIRS., SIX CORE STRATEGIES TO REDUCE THE USE OF SECLUSION AND RESTRAINT PLANNING TOOL (2005), *available at* http://www.wafca.org/Trauma%20Training/SR%20Plan%20Template%20latest%20102805.pdf; SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., SECLUSION AND RESTRAINT: NATIONAL ACTION PLAN ONLINE (2008), *available at* http://www.samhsa.gov/seclusion/SR_plan.aspx; K.A. Huckshorn, *Re-Designing State Mental Health Policy to Prevent the Use of Seclusion and Restraint*, 33 ADMIN. & POL'Y MENTAL HEALTH (2006).

21. Prone restraint is physically holding a student prone, usually with his face into the floor, for an extended period of time in order to control and physically manage an individual's behavior. PROTECTION & ADVOCACY, INC., THE LETHAL HAZARD OF PRONE RESTRAINT: POSITIONAL ASPHYXIATION (2002), *available at* http://www.disabilityrightsca.org/PUBS/701801.pdf [hereinafter PRONE RESTRAINT].

22. The question will arise: if not physical restraint, then what are educators to do with an aggressive or out of control student? This question remains the primary issue of where policy makers will draw the line between school safety and students' rights. This paper does not seek to establish where that line should be drawn in the pedagogical sense, but draws attention to the current legal issues surrounding Georgia's failure to establish any protections, legal, regulatory, or otherwise, for the abuse of restraint and seclusion.

23. CRISIS PREVENTION INST., INC., RISKS OF RESTRAINTS: UNDERSTANDING RESTRAINT RELATED POSITIONAL ASPHYXIA 4 (2005),

struggle while they are unable to breathe, increasing the person's need for air and aggravating the physiological effects of the restraint.[24]

To be clear, there are circumstances that may require intensive and immediate action by educators to ensure the health and safety of the students. However, school based restraints used as aversive techniques to control behavior or impose negative consequences should never be used on children.[25] When employed by a properly trained educator, a physical restraint may be the only option to manage behaviors that will cause serious physical injury to someone in the classroom. However, children should never be subjected to pain or noxious stimuli related to school-based restraints. Restraints should not be used if medically or psychologically contraindicated for a student.[26] Given the physical and emotional injuries inflicted by abusive restraint techniques, such limitations must exist to ensure student and educator safety.

There is no question that abusive restraints, as those just described, can be dangerous to both the child restrained and those using the restraints. They involve physical struggling that affects the ability to breathe.[27] Further, children, especially smaller children and those with fragile physical conditions resulting from a disability, are particularly likely to be subjected to restraints and to die while restrained.[28] Also, those

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available at http://www.crisisprevention.com/pdf/riskofrestraints.pdf. "Simply restraining an individual prone restricts the ability to breathe, thereby lessening the supply of oxygen to meet the body's demands." PRONE RESTRAINT, *supra* note 21, at 17.

24. Audrey Morrison & David Sadler, *Death of a Psychiatric Patient During Physical Restraint: Excited Delirium – A Case Report*, 41 MED. SCI. & LAW 46, 46-50 (2001).

25. BUTLER, *supra* note 20, at 10.

26. *Id*.

27. U.S. GEN. ACCOUNTING OFFICE, MENTAL HEALTH: IMPROPER RESTRAINT OR SECLUSION USE PLACES PEOPLE AT RISK 6-7 (1999), *available at* http://www.gao.gov/archive/1999/he99176.pdf [hereinafter 1999 G.A.O. REPORT]; *see generally* Wanda K. Mohr et al., *Adverse Effects Associated with Physical Restraint*, 48 CANADIAN J. PSYCHIATRY 5 (2003), *available at* http://www.charlydmiller.com/LIB03/2003adverseeffects.pdf.

28. *Id*.; *see also* Nancy Cotton, *The Developmental-Clinical Rationale for the Use of Seclusion in the Psychiatric Treatment of Children*, 59 AM. J. ORTHOPSYCHIATRY 442, 442–50 (1989); Kathleen R. Delaney & Louis

employing the restraints can be severely injured when attempting to apply a restraint hold on a child who may be physically aggressive or severely agitated. Abuse of school restraint techniques does not ensure a safe classroom, does not further any legitimate or research-based behavior management system, and has never been recognized as serving any pedagogical purpose.[29] They do not teach appropriate behaviors to students with behavioral challenges and can escalate a non-confrontational behavioral episode into a violent and aggressive "fight" response. Emergency situations may call for emergency actions, but aversive behavioral controls cannot replace empirically proven methods for behavioral management and modification, such as positive behavioral intervention systems.[30]

B. School Based Seclusion

Seclusion is no more effective than, and equally as harmful as, restraint.[31] In school terms, seclusion is:

Fogg, *Patient Characteristics and Setting Variables Related to Use of Restraint on Four Inpatient Psychiatric Units for Youth*, 56 PSYCHIATRIC SERVS. 186, 186-92 (2005); Kathleen A. Earle & Sandra L. Forquer, *Use of Seclusion with Children and Adolescents in Public Psychiatric Hospitals*, 65 AM. J. ORTHOPSYCHIATRY 238, 238–44 (1995); David Fassler & Nancy Cotton, *A National Survey on the Use of Seclusion in the Psychiatric Treatment of Children*, 43 HOSP. & COMM. PSYCHIATRY 370, 370–74 (1992); Michael A. Nunno et al., *Learning From Tragedy: A Survey of Child and Adolescent Restraint Fatalities*, 30 CHILD ABUSE & NEGLECT 1333, 1333–42 (2006); JOSEPH B. RYAN & REECE L. PETERSON, MICH. POSITIVE BEHAVIORAL SUPPORT NETWORK, PHYSICAL RESTRAINTS IN SCHOOLS (2002), *available at* http://www.bridges4kids.org/PBS/articles/RyanPeterson2004.htm.

29. Restraint and seclusion are not effective means to calm or teach children but tend to have the opposite effect, producing anxiety, fear, and a decreased ability to learn. *See generally* Wanda K. Mohr & Jeffrey A. Anderson, *Faulty Assumptions Associated with the Use of Restraints with Children*, 14 J. CHILD & ADOLESCENT PSYCHIATRIC NURSING 330 (2001). Reports that physical restraints are effective in any manner are based on anecdotal evidence and subjective case reports. *See generally* David M. Day, *Examining the Therapeutic Utility of Restraints and Seclusion with Children and Youth: The Role of Theory and Research in Practice,* 72 AM. J. ORTHOPSYCHIATRY 266 (2002).

30. *See infra* note 102.

31. *See generally* THE COUNCIL FOR CHILDREN WITH BEHAVIORAL DISORDERS, COUNCIL FOR EXCEPTIONAL CHILDREN, THE USE OF SECLUSION

> [T]he involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving. This includes situations where a door is locked as well as where the door is blocked by other objects or held by staff. Any time a student is involuntarily alone in a room and prevented from leaving a confined space should be considered seclusion. [32]

The intended purpose, or the labels assigned to these actions, are irrelevant.[33]

In schools, a failure to regulate seclusion has fostered improper and abusive use of seclusion settings.[34] School based seclusion has directly resulted in a "variety of injuries and deaths . . . while students are in seclusion environments including, suicide, electrocution, and self injury due to cutting, pounding, and head banging."[35] The lack of regulation combined with several factors unique to schools has contributed to increasing reports of harm in seclusion settings.[36]

IN SCHOOL SETTINGS (2009), *available at* http://www.ccbd.net/documents/CCBD%20Position%20on%20Use%20of%20Seclusion%207-8-09.pdf [hereinafter C.C.B.D. SECLUSION].

32. *Id*. at 1.

33. N.D.R.N. REPORT, *supra* note 17, at 5 n.4 (citing 42 C.F.R. § 482.13(e)(1)(ii) (2010)) (stating that "the Children's Health Act of 2000 defines 'seclusion' as 'any behavior control technique involving locked isolation,' 42 U.S.C. 290ii(d)(2) and 290jj(d)(4)," but noting that the Centers for Medicare and Medicaid Services (CMS) "has recognized that individuals can be forcibly confined in a room or area without the room being locked"). Thus, the definition used above is consistent with the federally accepted definition of seclusion.

34. C.C.B.D. SECLUSION, *supra* note 31, at 6. Interestingly, the C.C.B.D. identified standards for seclusion procedures in medical, mental health, and penal applications. *Id*. at 4. In Georgia, the Department of Human Resources has promulgated regulations prohibiting use of restraint and seclusion "as a means of coercion, discipline, convenience, or retaliation." GA. COMP. R. & REGS. § 290-4-4-.08(1)(c)(7) (2009).

35. *Id*.; *see also* 1999 G.A.O. REPORT, *supra* note 27, at 1 n.1 ("Seclusion is involuntary confinement in a room that the person is physically prevented from leaving.").

36. C.C.B.D. SECLUSION, *supra* note 31, at 6; *see also* Maureen Downey, *Learning Curve: The Forgotten Rooms*, ATLANTA J.-CONST., Jan. 4, 2010, *available at* http://www.ajc.com/opinion/learning-curve-the-forgotten-266370.html. School factors range from unqualified and untrained teachers interacting with students that have behavioral challenges to the pressures of

School seclusion rooms, often incorrectly identified as "timeout" rooms, can be improperly established and maintained.[37] In some reported instances, these rooms lack proper ventilation, light, and heat.[38] Students confined to these rooms have been denied access to food, water, and toilets.[39]

Those employing seclusion in schools argue that such techniques are necessary to ensure the safety and well-being of students and teachers alike. They also maintain that seclusion is an effective behavioral management tool that removes the affecting stimuli from the equation and allows a student a "quite space" to regain behavioral self-control. However, these arguments ignore the current reality, that is, seclusion settings are being used for more than emergencies. They are used as punishment. They are used as respite for tired teachers, and for students like Jonathan King, they were the aversive stimuli that drove the student to take his own life. Unfortunately, this is not merely a state or regional phenomena. Data reflecting the abuse of seclusion rooms across the country has been collected and reviewed at a state and national level. This data will be relied upon as educational systems and students' rights advocates work to address this issue.

C. The 2009 Governmental Accountability Office Study

In May 2009, the House Committee on Education and Labor requested a study from the Governmental Accountability Office ("G.A.O.") seeking verification of the reports of abuse and death from the use of restraint and seclusion in school, as well as the circumstances surrounding such cases.[40] The G.A.O.

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standardized testing accountability on public school teachers who seek to push the low performing or most disruptive students out of their classrooms in hopes of keeping their failing test scores off the books.

37. Originally, "timeout" meant "a behavior reduction procedure or form of punishment in which students who display a predefined inappropriate behavior are suspended for a short period of time from access to all opportunities to receive positive social reinforcement." N.D.R.N. REPORT, *supra* note 17, at 6 (citing Joseph B. Ryan et al., *State Policies Concerning the Use of Seclusion Timeout in Schools*, 30 EDUC. & TREATMENT OF CHILDREN 215 (2007)).

38. C.C.B.D. SECLUSION, *supra* note 31, at 4.

39. *Id*.

40. U.S. GEN. ACCOUNTING OFFICE, SECLUSIONS AND RESTRAINTS:

report stopped short of calling the incidence of abuse and death widespread, but did provide a tragic litany of cases related to the abuse of seclusion and restraint techniques in school.[41]

The G.A.O. reported that in Texas and California, states that contain more than twenty percent of the nation's school children, over thirty thousand instances of "emergency interventions" consisting of restraint and/or seclusion occurred during one school year.[42] The Report specifically documented ten cases that illustrated the nature and extent of the abuse.[43] These cases included the repeated use of prone restraint to control student behavior, including one instance of a teacher weighing 230 pounds sitting on top of a student "because the student would not stay seated."[44] The teacher called her actions a "therapeutic floor hold."[45] In another case, the G.A.O. reported that a seven year old female student, weighing only forty-three pounds, was secluded in a walled area in the back of a class for not completing her school work and then physically restrained for "wiggling a loose tooth."[46] A third case reported by the G.A.O. involved the failure of the school staff to provide medical attention to a student suffering from a seizure and losing control of his extremities and bladder. The student died after school staff employed a harmful prone restraint on the student for an hour.[47] Despite these horrific descriptions, the G.A.O. rightly identified that no federal law or regulations exist that prohibit, proscribe, or in any way limit the use of seclusion and/or restraint techniques in schools.[48]

After presenting significant data on the widespread abuse of restraint and seclusion, the G.A.O. presented four pervading

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SELECTED CASES OF DEATH AND ABUSE AT PUBLIC AND PRIVATE SCHOOLS AND TREATMENT CENTERS 1 (2009), *available at* http://www.gao.gov/new.items/d09719t.pdf [hereinafter 2009 G.A.O. REPORT]. The House of Representatives requested this report following a series of hearings on the subject. *Id.*

41. *Id.*
42. *Id*. at 7.
43. *Id*. at 10-13.
44. *Id*. at 16.
45. *Id*.
46. *Id*. at 26.
47. *Id*. at 20-21.
48. *Id*. at 3.

themes: (1) children with disabilities were sometimes restrained and secluded, even when they did not appear to be physically aggressive and their parents did not give consent; (2) facedown or other restraints that block air to the lungs can be deadly; (3) teachers and staff in these cases were often not trained in the use of restraints and techniques; and (4) teachers and staff from these cases continue to be employed as educators.[49]

Without any laws, regulations, rules, policies, or professional standards establishing a protective baseline for restraint and seclusion, schools have left the control and implementation of this dangerous practice to front-line educators who lack the training, support, or supervision needed to properly employ this potentially lethal behavioral intervention.

D. Federal and State Laws and Regulations

No federal laws currently exist that restrict the use of restraint and seclusion in public and private schools.[50] While federal law requires that states provide all students with disabilities in public schools a free, appropriate public education in the least restrictive environment, nothing in the law directly prohibits or proscribes the school's use of aversive techniques to control or modify behavior.[51] Without direction from the federal government, the states have been free to regulate this subject without an established baseline.[52] States have varied in the scope of the protections afforded and the level of accountability required to ensure such abusive acts do not occur.[53] Some have

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49. *Id*. at 7.

50. *Id*. at 1.

51. IDEA, *supra* note 11, is the law that requires states to accommodate disabled children in public schools. IDEA proscribes the process to identify, evaluate, and appropriately serve children with disabilities. IDEA requires that all children have an individualized education plan, or IEP, that is reasonably calculated to confer an educational benefit. *See* Hendrick Hudson Ctr. Sch. Dist. v. Rowley, 458 U.S. 176, 203-04 (1982). IDEA confers a right to such students to be educated in the "least restrictive environment." 20 U.S.C. §1412 (a)(5) (2010); 34 C.F.R. §§ 300.114-.116 (2010); *see also* Greer v. Rome City Sch. Dist., 950 F.2d 688 (11th Cir. 1991).

52. 2009 G.A.O. REPORT, *supra* note 40, at 3.

53. *Id*. at 4 ("Nineteen states have no laws or regulations related to the use of seclusions or restraints in schools . . . . [S]even states place some

no laws on the books, like the current situation in Georgia, while others ban the use of restraint and seclusion for non-emergent purposes.[54]

In contrast, the federal government has amended Title V of the Public Health Service Act to include limitations on the use of restraints and seclusions in some hospitals and health care facilities that receive any type of federal funds.[55] The genesis of these amendments was in part the response of Connecticut Senator Chris Dodd to a series of investigative news reports on the alarming number of patient deaths related to the overuse of restraint or seclusion and a federally commissioned study by the G.A.O. that revealed a nationwide need to regulate restraint and seclusion of the mentally ill and disabled.[56] Yet, the education community has seen similar reporting of abuse of restraint and seclusion rise. Also, the G.A.O. has conducted a study to confirm the anecdotal information provided to the government about the misuse of restraint and seclusion in school. Importantly however, the regulations implementing the Children's Health Act's prohibition on abusive restraint and seclusion have never been reproduced, adopted, or in any way considered by the United States Department of Education or the federal government for use in schools.[57]

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restrictions of the use of restraints, but do not regulate seclusions. Seventeen states require that selected staff receive training before being permitted to restrain children. Thirteen states require schools to obtain consent prior to using foreseeable or non-emergency physical restraints while nineteen [states] require parents to be notified after restraints have been used. Two states require annual reporting on the use of restraints. Eight states specifically prohibit the use of prone restraints or restraints that impede a child's ability to breathe.") (internal citations omitted).

54. *Id*. at app. 1.

55. 42 U.S.C. § 290ii(d)(2) & (4) (2010); 42 C.F.R. § 482.13(e) (2010). The federal regulation reads, "All patients have the right to be free from restraint or seclusion, of any form, imposed as a means of coercion, discipline, convenience, or retaliation by staff. Restraint or seclusion may only be imposed to ensure the immediate physical safety of the patient, a staff member, or others and must be discontinued at the earliest possible time." 42 C.F.R. § 483.13(e) (2010).

56. 146 Cong. Rec. H8255-56 (2000) (comments of Rep. Chris Shays, Conn., during debate on the passage of the Children's Health Act).

57. Interestingly, some argue that the limitations on restraint and seclusion provided in the Children's Health Care Act apply to school providers. The argument focuses on the reality that a majority of school districts are,

III. STUDENT §1983 CLAIMS AND WHAT "SHOCKS THE CONSCIENCE"

Without statutory or regulatory limitations, student victims of abusive restraints or seclusions in school possess only those constitutional rights they have "not shed at the schoolhouse gate."[58] For the most part, student victims have relied upon constitutional claims and federal statutory claims alleging constitutional violations by educators.[59] And while the students recount facts of physical and emotional abuse, willful neglect, and gross and reckless conduct by educators, courts have framed their claims as a challenge to schools' ability to make pedagogical choices and ensure the safe and orderly operation of their campus.[60]

Courts continue to mischaracterize these cases as corporal punishment cases even when there is no legitimate pedagogical reason for the abusive actions.[61] In most cases, the only thing

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themselves, Medicaid providers and subject to the Medicaid laws. Congress has codified this overlap and created regulatory requirements for schools to obtain parental consent before seeking reimbursement from Medicaid for services the school provides. 34 C.F.R. § 300.154(d) (2010). For example, a disabled student that requires significant occupational therapy may receive this service from a school occupational therapist. The school, with the parent's consent, may then seek reimbursement of the cost of the therapy session from the student's Medicaid insurance. In this way, the school has become a provider under the Children's Health Act and therefore subject to the restrictions on restraint and seclusion.

58. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969).

59. *See infra* Part III.

60. *See generally* A.B. v. Seminole County Sch. Bd., 6:05-CV-802-ORL-31KRS 2005 U.S. Dist. LEXIS 36722 (M.D. Fla. Aug. 31, 2005).

61. Black's Law Dictionary defines "corporal punishment," as "physical punishment as distinguished from pecuniary punishment or a fine; any kind of punishment inflicted on the body." BLACK'S LAW DICTIONARY 235-36 (6th ed. 1991). In 1977, the U.S. Supreme Court initiated a line of cases that examined physical violence against students through the prism of school discipline. In holding that corporal punishment, or the paddling of students on the buttocks with a wooden paddle, did not violate the Eighth Amendment to the Constitution, the Court noted that such punishment was rooted in our American history. Ingraham v. Wright, 430 U.S. 651, 681 (1977). The Court sanctioned the use of corporal punishment as a pedagogical tool and dismissed the dissents' concern that such a holding may result in a teacher cutting "off a child's ear for being late to class." *Id*. at 670

educational about the scenario is the fact that the abuse occurred in school. This characterization is incorrect. Abuse does not become a legitimate form of behavior because the bad actor happens to be a teacher in school. The focus of the analysis should not be the location of the abuse; rather, it's the abuse itself that requires the court's attention. However, unable to break from routines that have become almost absurd, courts search for pedagogical interests in the harmful and abusive behavior of some educators to justify reliance on available legal precedents.[62]

Section 42 U.S.C. §1983 provides the most common basis for student claims of abuse against educators.[63] Student plaintiffs

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n.39. What may have seemed outrageous and surreal in 1977 is not so far off in the new millennium. *See, e.g.*, O.H. v. Volusia County Sch. Bd., No. 6:07-CV-1545-ORL-22DAB, 2008 U.S. Dist. Lexis 59187, at *2 (M.D. Fla. July 23, 2008) ("Special education teacher 'Hu regularly *restrained* [Plaintiff] *in another student's wheelchair inside a darkened bathroom as punishment* for up to ten minutes at a time.' Plaintiff also alleges that Defendant 'Hu placed *belts and/or straps around Plaintiff's chest and legs in order to restrain him in the wheelchair*' and that she 'would push the wheelchair and Plaintiff into the bathroom, close the door, and block the door with a table' . . . . Hu 'would push [Plaintiff's] desk against the wall to prohibit Plaintiff from moving[,]' and that Plaintiff had to witness Defendant Hu abusing other students and confining a student to a closet."); Kirkland *ex rel.* Jones v. Greene County Bd. of Educ., 347 F.3d 903, 904 (11th Cir. 2003) ("Demario Jones, a thirteen-year-old student called into Morrow's office for disciplinary reasons, claims that Morrow *struck him with a metal cane in the head, ribs and back, leaving a large knot on his head* and causing him to suffer continuing migraine headaches.") (emphasis added); Neal v. Fulton County Bd. of Educ., 229 F.3d 1069, 1071 (11th Cir. 2000) (describing the behavior of Coach Ector, who "in the presence of Robinson, *took the weight lock and struck Plaintiff in the left eye*. As a result of the blow, Plaintiff's eye 'was knocked completely out of its socket,' leaving it 'destroyed and dismembered.' According to Plaintiff, even after this blow, as Plaintiff's eye 'was hanging out of his head, and as he was in severe pain,' neither Coach Ector nor Principal Robinson stopped the fight.") (emphasis added). *See also* a parade of shocking educator conduct described in Kristina Rico, *Excessive Exercise as Corporal Punishment in* Moore v. Willis Independent School District, 9 VILL. SPORTS & ENT. L.J. 351, 361 (2000).

62. *See Neal*, 229 F.3d at 1072.

63. 42 U.S.C. § 1983 (2010) provides that any "[p]erson who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to

most often allege that the abusive actions of the educators violate the Fourteenth Amendment to the Constitution.[64] Depending on the underlying facts, students may also have actionable claims under the Fourth Amendment for unlawful seizure.[65] Finally, if the student is disabled, they may raise claims under the Americans with Disabilities Act,[66] Section 504 of the Vocational Rehabilitation Act,[67] and the Individuals with Disabilities Education Act.[68] While more legal theories may be

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the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

64. Student-plaintiffs most often raise both procedural and substantive due process claims arguing that the actions of the educator and school system were a deprivation of her right to be free from physical harm without notice or an opportunity to respond. Further, student-plaintiffs allege that the educator's actions implicate their liberty interests to the extent that such conduct is "arbitrary, or conscience shocking, in a constitutional sense." *Neal*, 229 F.3d at 1074 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 848 (1998)); Edwards v. County Bd. of Educ., No. CV 104-168, 2007 U.S. Dist. LEXIS 59789, at *43 (S.D. Ga. Aug. 15, 2007) ("[T]here is no right to be free from unreasonable, arbitrary, and capricious disciplinary action in the plain text of the Fourteenth Amendment. Rather, the Fourteenth Amendment provides that no State 'shall deprive any person of life, liberty, or property, without due process of law'" U.S. Const. amend. XIV, § 1.) In the context of a school setting, Plaintiffs' allegations regarding the alleged abuse implicate a student's fundamental liberty interest in her "bodily integrity," as protected by the Due Process Clause of the Fourteenth Amendment. *See* Hackett v. Fulton County Sch. Dist., 238 F. Supp. 2d 1330, 1353 (N.D. Ga. 2002) (explaining that several federal courts recognize "a 'liberty interest' by a student in his 'bodily integrity,' such that when a state actor, such as a public school teacher, violates that 'bodily integrity,' a claim under the Fourteenth Amendment arises") (cited sources omitted); *see also* Doe v. Taylor Indep. Sch. Dist.,15 F.3d 443, 451 (5th Cir. 1994); Edwards v. County Bd. of Educ., No. CV 104-168, 2007 U.S. Dist. LEXIS 59789, at *43 (S.D. Ga. Aug. 15, 2007).

65. The Fourth Amendment guarantees, "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures . . . ." U.S. CONST. amend. IV. In Georgia, the seminal school search case is Thomas v. Roberts, 261 F.3d 1160 (11th Cir. 2001). *See also* Gray v. Bostic, 458 F. 3d. 1295 (11th Cir. 2006).

66. 42 U.S.C. § 12101 (2010).

67. 29 U.S.C. § 701 (2010).

68. *See supra* note 51. For students with disabilities, the complex administrative structure established by IDEA must first be exhausted prior to filing an original action in court. 20 U.S.C. § 1415(*l*) (2010); *see* M.T.V. v.

postulated, the most prominent legal theories in Georgia are the *Neal* and *DeShaney* theories that address restraint and seclusion respectively.

A. Neal *and Educator Abuse as "Punishment"*

For almost ten years, the seminal case on educator liability for student abuse in the United States Court of Appeals for the Eleventh Circuit has been *Neal v. Fulton County Board of Education*.[69] In *Neal*, the court reviewed the "corporal punishment" imposed by an educator on a student following a student-on-student fight.[70] The facts of *Neal* are gruesome. High school freshman, Durante Neal, was a member of the varsity football team.[71] During practice, Neal was slapped by another player and reported that to his coach.[72] The coach instructed Neal "to learn how to handle your own business."[73] Neal, planning to do just that, placed a "weight lock" in his gym bag and, after practice, hit the student that slapped him with the lock.[74] The court recounted the abuse as follows:

> While the two were fighting, Coach Ector and Principal Herschel Robinson were in the immediate area. Neither of them stopped the fight. Ector came over and began dumping the contents of Plaintiff's bag on the ground, shouting repeatedly "what did you hit him with; if you hit him with it, I am going to hit you with it." Ector then, in the presence of Robinson, took the weight lock and struck Plaintiff in the left eye. As a result of the blow, Plaintiff's eye "was knocked completely out of its socket," leaving it "destroyed and dismembered." According to Plaintiff, even after this blow,

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DeKalb County Sch. Dist., 446 F.3d 1153 (11th Cir. 2006) (holding that "IDEA's broad complaint provision affords the 'opportunity to present complaints with respect to *any* matter relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child.' 20 U.S.C. § 1415(b)(6)"); *see also* Babicz v. Sch. Bd., 135 F.3d 1420, 1422 n.10 (11th Cir. 1998) (stating that students must use IDEA's administrative system "even if he invokes a different statute").

69. Neal v. Fulton County Bd. of Educ., 229 F.3d 1069 (11th Cir. 2000).

70. *Id.* at 1071.

71. *Id*.

72. *Id*.

73. *Id*.

74. *Id*.

> as Plaintiff's eye "was hanging out of his head, and as he was in severe pain," neither Coach Ector nor Principal Robinson stopped the fight.[75]

Presented with these facts, the first question the court considered was whether the coach's actions somehow constituted "corporal punishment."[76] Based on a series of fact patterns involving "less traditional, more informally-administered, and more severe 'punishments,'" the court found the coach's conduct in *Neal* amounted to corporal punishment.[77] While the court would eventually conclude that *Neal* could assert a claim against the educator for his "arbitrary and conscience shocking" behavior, the standard set forth has established an almost insurmountable bar for student plaintiffs to hurdle.[78] The court, aligning itself with five other circuit courts held,[79] "excessive corporal punishment, at least where not administered in conformity with a valid school policy authorizing corporal punishment as in *Ingraham* [*v. Wright*],[80] may be actionable under the Due Process Clause when it is tantamount to arbitrary, egregious, and conscience-shocking

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75. Neal v. Fulton County Bd. of Educ., 229 F.3d 1069, 1072 (11th Cir. 2000).

76. *Id*. at 1072.

77. *Id*. The court highlights several incidents where the educator's abusive conduct has been deemed corporal punishment, such as London *ex rel.* Avery v. Dirs. of DeWitt Pub. Schs., 194 F.3d 873, 875 (8th Cir. 1999) (dragging student across room and banging student's head against metal pole); P.B. v. Koch, 96 F.3d 1298, 1300 (9th Cir. 1996) (hitting student in mouth, grabbing and squeezing student's neck, punching student in chest, and throwing student headfirst into lockers); Metzger v. Osbeck, 841 F.2d 518, 519-20 (3d Cir. 1988) (choking student and allowing student to fall, break nose and teeth); Carestio v. Sch. Bd., 79 F. Supp. 2d 1347, 1348 (S.D. Fla. 1999) (teachers ganging up on student and beating him); Gaither v. Barron, 924 F. Supp. 134, 135-36 (M.D. Ala. 1996) (head-butting of student).

78. *Neal*, 229 F.3d at 1074.

79. *Id.* at 1075 (citing London v. Dir. of DeWitt Pub. Schs., 194 F.3d 873, 876-77 (8th Cir. 1999); Saylor v. Bd. of Educ., 118 F.3d 507, 514 (6th Cir. 1997); Metzger v. Osbeck, 841 F.2d 518, 520 (3d Cir. 1988); Garcia v. Miera, 817 F.2d 650, 653 (10th Cir. 1987); Hall v. Tawney, 621 F.2d 607, 611-14 (4th Cir. 1980)).

80. Ingraham v. Wright, 525 F.2d 909 (5th Cir. 1976) (establishing that the United States Constitution's Eighth Amendment guarantee against cruel and unusual punishment is not applicable to school corporal punishment).

behavior."[81] The court set forth a two prong test for establishing educator liability stating that at a minimum, "the plaintiff must allege facts demonstrating that (1) a school official intentionally used an amount of force that was obviously excessive under the circumstances, and (2) the force used presented a reasonably foreseeable risk of serious bodily injury."[82]

Since the Eleventh Circuit's holding in *Neal*, the court has seen more claims of educator misconduct or abuse. In *Davis v. Carter*,[83] the Eleventh Circuit examined the substantive due process claims of a student-athlete's family after the student died as a result of his coaches' (1) failure to keep the student hydrated during the practice; (2) failure to observe his signs of overheating; and (3) deliberate choice not to assist the student or seek medical assistance after the student collapsed.[84] The court, examining the line of school cases, starting with *Neal*, concluded that while the educators were "deliberately indifferent to the safety risks posed by their conduct to [the student]," the coaches were entitled to qualified immunity as they had not acted willfully or maliciously with an intent to injure."[85]

In contrast, in 2003, the Eleventh Circuit affirmed a district court's denial of qualified immunity for a principal that had used a metal cane to strike a student in the head, ribs, and back.[86] The court applied the *Neal* test and found that a school

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81. Neal v. Fulton County Bd. of Educ., 229 F.3d 1069, 1075 (11th Cir. 2000). The court reviewed holdings from the Eighth, Sixth, Third, and Tenth circuits in reaching its conclusion. *Id.* In establishing the test for a constitutional violation, the court seems to rely mostly on the language in *Metzger* where a school administrator choked a student until he lost consciousness and fell to the pavement-breaking his nose and fracturing his teeth. *See id.*

82. *Id*.; *see also* Peterson v. Baker, 504 F.3d 1331 (11th Cir. 2007) (finding a Paulding County teacher accused of choking a student that was trying to leave the classroom not liable applying the *Neal* standard). Again, the court characterized "squeezing [a student's] neck to where [the student] was starting to not be able to breathe" as falling under the *Neal* standard of "corporal punishment administered in conformity with a valid school policy." *Id*. at 1336.

83. Davis v. Carter, 555 F.3d 979 (11th Cir. 2009).

84. *Id*. at 980-81.

85. *Id*. at 984.

86. Kirkland v. Greene County Bd. of Educ., 347 F.3d 903 (11th Cir. 2003).

principal, "[r]epeatedly striking a thirteen-year-old student with a metal cane, including once on the head as [the student] was doubled over protecting his chest, when he was not armed or physically threatening in any manner, obviously fulfills both criteria."[87]

However, while the bruises caused by a metal cane may satisfy the *Neal* standard, the bruises caused by the hand of a special education teacher may not. In *Edwards v. County Board of Education*,[88] the United States District Court for the Southern District of Georgia held that a special education teacher who had (1) inflicted bruises; (2) denied use of the bathroom; and (3) failed to respect the dietary needs of two five-year old disabled students did not violate the students' substantive due process rights.[89] The district court in *Edwards* examined the educator's actions on a "culpability spectrum" ranging from one pole of negligence to the other of malign intent.[90] The court, employing *Neal* as a factual measuring stick, held that the educator conduct did not "shock the conscience."[91]

Finally, a series of cases originating in Florida, currently on appeal in the Eleventh Circuit, show the troubling circumstances of applying the corporal punishment standard to school abuse cases.[92] From 2002 to 2005, Kathleen Mary Garrett was employed as an Exceptional Student Education ("E.S.E.") teacher in Seminole County, Florida.[93] During this time:

> Garrett subjected A.B. to the following acts: (1) slapping him on the head; (2) grabbing him by the neck and choking him; (3) yelling at and intimidating him when he was non-

87. *Id*. at 904.

88. Edwards v. County Bd. of Educ., No. CV 104-168, 2007 U.S. Dist. LEXIS 59789 (S.D. Ga. Aug. 15, 2007).

89. *Id.* at *47-57.

90. *Id*. at *52.

91. *Id*. at *56.

92. D.N. v. Sch. Bd., 6:07-CV-1494-ORL-28KRS 2009 U.S. Dist. LEXIS 62408 (M.D. Fla. July 21, 2009); M.S. v. Seminole County Sch. Bd., 636 F. Supp. 2d 1317 (M.D. Fla. July 10, 2009); T.W. v. Sch. Bd., 6:07-CV-155-ORL-28GJK, 2009 U.S. Dist. LEXIS 35764 (M.D. Fla. Apr. 28, 2009); A.B. v. Seminole County Sch. Bd., 6:05-CV-802-ORL-31KRS, 2005 U.S. Dist. LEXIS 36722 (M.D. Fla. Aug. 31, 2005).

93. *A.B.*, 2005 U.S. Dist. LEXIS 36722, at *7.

> compliant, although Garrett knew A.B. would potentially be harmed by such yelling; (4) placing A.B. in a closet and turning off the lights; (5) striking him on the buttocks after he had wet his pants, resulting in a red mark; and (6) ridiculing and cursing at A.B. when he hit himself on the head with his hand, saying "you stupid little ass . . . if you want to keep banging yourself on the head, then go ahead . . . because you deserve it."[94]

Garrett worked until these and other allegations were brought to light by the students' parents.[95] Garrett was "charged with multiple felony counts, including: (1) aggravated child abuse by willful torture or malicious punishment, related to placing A.B. in the closet; (2) child abuse, for hitting or battering a student (two counts); and (3) child abuse for bending a child's fingers backward."[96]

In A.B.'s case, the court relied on *Neal* and characterized some of the teacher's conduct as "punishment" and some as "abuse."[97] The court then applied the *Neal* standard to both the acts of abuse and the acts of punishment finding that the same "shocks the conscience" standard applied.[98] The court found that A.B. had asserted a valid constitutional claim, noting the repeated nature of the conduct, the particular vulnerability of the victim, and the nature of the emotional and mental injury to the student as the basis for finding liability.[99]

In contrast, in the subsequent series of companion lawsuits raising the students' substantive due process rights to be free from such abuse, the same district court judge applied the two prong test of *Neal* and found that no constitutional violations had been established.[100] In the cases of D.N. and T.W., the court justified Garrett's actions as arguably necessary because they were in response to the behavior of the mentally retarded

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94. *Id*.

95. *Id*. at *8-10.

96. *Id*. at *10.

97. *Id*. at *21-22.

98. A.B. v. Seminole County Sch. Bd., 6:05CV-802-ORL-31KRS, 2005 U.S. Dist. LEXIS 36722, at *23 (M.D. Fla. Aug. 31, 2005).

99. *Id*.

100. *See* D.N. v. Sch. Bd., 6:07-CV-1494-ORK-28KRS, 2009 U.S. Dist. LEXIS 62408 (M.D. Fla. July 21, 2009); T.W. v. Sch. Bd., 6:07-CV-155-ORL-28GJK, 2009 U.S. Dist. LEXIS 35764 (M.D. Fla. Apr. 28, 2009).

and autistic students.[101] The court's characterization of the students' words and actions reflect the lack of appreciation or understanding for behavioral manifestations of students with autism.[102] More importantly, the court's confounding application of *Neal* evidences the difficulty courts experience trying to ram the abusive actions of educators into the current *Neal* analysis for school punishment.[103]

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101. *D.N.*, 2009 U.S. Dist. LEXIS 62408, at *20-21; *T.W.*, 2009 U.S. Dist. LEXIS 35764, at *26-27.

102. "Autism is a developmental disorder that is recognized and diagnosed by impairment of the ability to form normal social relationships, by impairment of the ability to communicate with others, and by stereotyped behavior patterns." *A.B.*, 2005 U.S. Dist. LEXIS 36722, at *2 n.1 (quoting Medline Plus, U.S. Nat'l Lib. of Med., *available at* http://www.nlm.nih.gov/medlineplus/mplusdictionary.html). Students with autism may exhibit violent or aggressive behavior when stressed. BEHAVIORAL ISSUES IN AUTISM 179-83 (Eric Schopler & Gary B. Mesibov eds., Plenum Press 1994). Students with autism may exhibit socially inappropriate behaviors at times; however, such behaviors are not re-directed or modified by physical force or through punishment. *Id.* Positive Behavior Support has scientific and research-based support demonstrating it "to be a feasible and valued approach for improving the social climate of schools and supporting intervention programming for students with high risk problem behavior." OFFICE OF SPECIAL EDUC. PROGRAMS CTR. ON POSITIVE BEHAVIOR SUPPORT, UNIV. OF OR., SCHOOL-WIDE POSITIVE BEHAVIOR SUPPORT, IMPLEMENTERS' BLUEPRINT AND SELF-ASSESSMENT 5 (2004), *available at* http://www.osepideasthatwork.org/toolkit/pdf/SchoolwideBehaviorSupport.pdf. "PBS involves the application of positive behavioral interventions and systems to achieve socially important behavior change. PBS has four interrelated components, namely, systems change activities, environmental alterations activities, skill instruction activities, and behavioral consequence activities." H. Rutherford Turnbull et al., *IDEA Requirements for Use of PBS: Guidelines for Responsible Agencies*, 3 J. POSITIVE BEHAV. INTERVENTIONS 11, 11 (Winter 2001) (internal quotations and citations omitted), *available at* http://www.beachcenter.org/Research%5CFullArticles%5CPDF%5CPBS10_IDEArequirementsforPBS.pdf.

103. *See generally* Nolan v. Memphis City Sch., 589 F.3d 257 (6th Cir. 2009) (upholding a jury verdict that a school administrator that admitted to paddling a student for non-disciplinary reasons, and therefore no legitimate reasons at all, did not shock the conscience); H.H. v. Moffett, 335 Fed. Appx. 306 (4th Cir. 2009); Peterson v. Baker, 504 F.3d 1331 (11th Cir. 2007) (finding a teacher's act of choking a student attempting to leave classroom as not meeting the *Neal* standard); Jefferson v. Ysleta Indep. Sch.

B. DeShaney*, the Special Duty, and Jonathan*

A second theory raised by student victims, mostly in seclusion cases, follows the reasoning of the 1989 United States Supreme Court holding in *DeShaney v. Winnebago*.[104] In general, students relying on *DeShaney* argue that the state had an affirmative duty to protect the student and the alleged harms were caused by a breach of that duty.[105] In the school context, the *DeShaney* argument focuses on two components: (1) the school's actions have rendered the student more vulnerable to harm, thereby creating a constitutional duty to protect; and (2) the student's school attendance creates a special relationship between the state and the citizen much like an involuntary confinement or incarceration.[106]

Dist., 817 F.2d 303 (5th Cir. 1987) (affirming denial of qualified immunity where teacher tied an eight-year-old child to her chair with a jump rope for almost two full school days); *but see* Webb v. McCullough, 828 F. 2d 1151, 1159 (6th Cir. 1987) (holding that because the educator's blows were non-disciplinary and the need to strike the student so minimal that the educator's actions did "shock the conscience").

104. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989). In *DeShaney*, the Supreme Court held that no substantive due process claim existed against the State for a deprived child that suffered severe and permanent injuries from his father after the State's child protective services took affirmative actions to protect the child but failed. *Id*. at 192-93. Most relevant to this article, the Supreme Court confirmed that "when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs- *e.g.,* food, clothing, shelter, medical care, and reasonable safety-it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." *Id*. at 200. The Court recognized that "the protections of the Due Process Clause, both substantive and procedural, may be triggered when the State, by the affirmative acts of its agents, subjects an *involuntarily confined* individual to deprivations of liberty which are not among those generally authorized by his confinement." *Id*. at 200 n.8 (emphasis added). "Those circumstances are present when the state affirmatively acts to restrain an individual's freedom to act on his own behalf, either 'through incarceration, institutionalization, or other similar restraint of personal liberty.'" *Id.* at 200.

105. Wyke v. Polk County Sch. Bd.*,* 129 F.3d 560, 565 (11th Cir. 1997).

106. Wright v. Lovin, 32 F.3d 538, 540 (11th Cir. 1994); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 732 (8th Cir. 1993); Russell v. Fannin County Sch. Dist., 784 F. Supp. 1576, 1581-83 (N.D. Ga. 1992); Maldonado v. Josey, 975 F.2d 727, 732-33 (10th Cir. 1992); D.R. v. Middle Bucks Area

Relying on *DeShaney*, the mother of a public school student who tried twice to commit suicide on school grounds sued the school district and the school administrators in *Wyke v. Polk County School Board.*[107] The facts showed that when she called the school to discuss the first suicide attempt, the school administrator assured her that he would "take care of it."[108] The student attempted suicide at school again, and some time later the student actually killed himself.[109] The mother filed a § 1983 action against the school and argued, under *DeShaney*, that the school had a constitutional duty to protect her son from this harm.[110] The mother asserted that constitutional duty derives from the legal requirement that a student attend school, or compulsory school attendance.[111] Next, the mother argued that by "cutting off" Shawn's "private sources of aid," the school rendered Shawn "more vulnerable to harm," and thereby incurred an affirmative duty to protect him."[112] Despite evidence of inadequate training and failure by the school to tell the mother of the student's attempted suicides, the Eleventh Circuit found that the school had no constitutional duty to provide for the student's safety because the State had not restrained the student's liberty or made him more vulnerable to harm.[113]

While the Eleventh Circuit was not willing to extend *DeShaney* to these facts, the First Circuit has left the door open to such claims in *Hasenfus v. LaJeunesse*.[114] In *Hasenfus*, a female student reprimanded for replying to taunts from her classmates was sent, unsupervised, out of class by the teacher.[115]

Voc. Tech. Sch., 972 F.2d 1364, 1371-73 (3d Cir. 1992); J.O. v. Alton Cmty. Unit Sch. Dist. 11, 909 F.2d 267, 272 (7th Cir. 1990).

107. *Wyke*, 129 F.3d at 564-65.

108. *Id*. at 564.

109. *Id*.

110. *Id*.

111. Wyke v. Polk County Sch. Bd., 129 F.3d 560, 564 (11th Cir. 1997). In Georgia, the Compulsory School Attendance law states "mandatory attendance in a public school, private school, or home school program shall be required for children between their sixth and sixteenth birthdays." O.C.G.A. § 20-2-690.1 (2009).

112. *Wyke*, 129 F.3d at 569.

113. *Id*.

114. *See* Hasenfus v. LaJeunesse, 175 F.3d 68, 72 (1st Cir. 1999).

115. *Id.* at 70.

The student left class and immediately tried to hang herself; she did not die, but suffered permanent injury.[116] The student brought §1983 claims against the school and the educators for acts and omissions that constituted a deprivation of her right to life and physical safety.[117] Relying upon *DeShaney*, the court denied any relief.[118] However, the court noted in dicta:

> We are loath to conclude now and forever that inaction by a school toward a pupil could never give rise to a due process violation. From a commonsense vantage, Jamie is not just like a prisoner in custody who may be owed a broad (but far from absolute) 'duty to protect.' But neither is she just like the young child in *DeShaney* who was at home in his father's custody and merely subject to visits by busy social workers who neglected to intervene. For limited purposes and for a portion of the day, students are entrusted by their parents to the control and supervision of teachers in situations where-*at least as to very young children*-they are manifestly unable to look after themselves.[119]

And what of Jonathan King?[120] The family of Jonathan King has argued that the seclusion that resulted in his death created an affirmative constitutional duty to protect the student from harm.[121] The King family, building on the language from *Wyke*

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116. *Id.*

117. *Id.*

118. *Id*. at 72.

119. *Id*. (emphasis added); *see also* Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 655-56 (U.S. 1995) ("While we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional 'duty to protect,' we have acknowledged that for many purposes 'school authorities act in loco parentis,' with the power and indeed the duty to 'inculcate the habits and manners of civility.'") (internal citations omitted).

120. Jonathan King was the student referenced at the beginning of the article. *See supra* note 1.

121. Brief of Appellants at 9-12, King v. Pioneer Reg'l Educ. Serv. Agency, 688 S.E.2d 7 (Ga. App. 2009). Jonathan's parents, Donald and Tina King, filed a lawsuit in Hall County Superior Court raising Jonathan's substantive due process rights under the Fourteenth Amendment of the United States Constitution via 42 U.S.C. §1983 against both the regional educational agency (R.E.S.A.) that operated the school where Jonathan committed suicide and the Georgia Department of Education (G.D.O.E.). *Id.* Jonathan's claims against the G.D.O.E. focused on the state's failure to promulgate regulatory guidance on the use of seclusion rooms in public

and *Hasenfus*, has argued that it was not the compulsory school attendance alone that created the constitutional duty to protect Jonathan.[122] Rather the duty arises from the school's requirement that Jonathan remain in a seclusion room.[123] Making the comparison between involuntarily committed persons, prisoners, and students in seclusion, the King family asserted, and the school system agreed in deposition, that all three are types of confinement.[124] Jonathan's family asserted that the school's act of placing the student in a seclusion room constituted a restraint on his liberty.[125] This created a special relationship between the school and Jonathan that imposed a duty on the state to assume responsibility for Jonathan's safety and well-being.[126]

On November 5, 2009, the Georgia Court of Appeals closed off all legal avenues to relief for the family that Jonathan left behind by holding that neither the educational agency operating the school nor the Georgia Department of Education ("G.D.O.E.") are liable for the death of Jonathan King.[127] With regards to the family's claims against the Pioneer Regional Educational School Agency ("R.E.S.A."), the court of appeals upheld the trial court's grant of summary judgment.[128] In doing

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schools. *Id.* The matter was presented to the trial court on the R.E.S.A.'s motion for summary judgment and the G.D.O.E.'s motion to dismiss. King v. Pioneer Reg'l Educ. Serv. Agency, 688 S.E.2d 7 (Ga. App. 2009).

122. Brief of Appellants, *supra* note 121, at 9.

123. *Id*.

124. *Id*. While no case has extended these protections to students in school, the U.S. Supreme Court has identified a constitutional duty to involuntarily committed persons and prisoners. *See* Youngberg v. Romero, 457 U.S. 307, 307 (1982) (holding that mentally retarded individual who was involuntarily committed had "constitutionally protected liberty interests under the Due Process Clause of the Fourteenth Amendment"); Estelle v. Gamble, 429 U.S. 97, 106 (1976) (describing "deliberate indifference to serious medical needs" of prisoners as violating the Eighth Amendment ban against cruel and unusual punishment). In such cases, failures to provide medical care or to stop inmate violence may be actionable because the confinement renders the persons more vulnerable.

125. Brief of Appellants, *supra* note 121, at 9.

126. *Id*.

127. King v. Pioneer Reg'l Educ. Serv. Agency, 688 S.E.2d 7, 10 (Ga. App. 2009).

128. *Id.*

so, the court of appeals foreclosed the family's theory that Pioneer had an affirmative duty to prevent Jonathan from harming himself.[129] The court rejected the family's argument that Jonathan's removal to a seclusion room with a locked door is "by definition, a restraint on individual freedom under *DeShaney*."[130] In its analysis, the court, while accepting the family's analogy of a student in a seclusion room to an incarcerated prisoner, relieved R.E.S.A. of liability by applying the "deliberate indifference" standard for prisoner suicide cases.[131] The court found that the only two school officials "actually responsible for [Jonathan's] confinement" were not deliberately indifferent to the risk of Jonathan committing suicide.[132]

This finding ignores educational reality. Jonathan interacted with almost every staff and faculty member in the school.[133] He

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129. *Id*. at 13. Jonathan's family's argument essentially tracks the reasoning set forth in *DeShaney*, asserting that the school's act of placing Jonathan in a seclusion room constituted a restraint on his liberty to the extent that a special relationship existed between the school and Jonathan. This relationship created a duty on the state to assume responsibility for Jonathan's safety and well-being. Brief of Appellants, *supra* note 121, at 9-12. Appellants first argued that placing Jonathan in the seclusion room was a clear restraint on his liberty. *Id.* at 10. Comparing Jonathan's seclusion to a prisoner's incarceration, the family relied on *DeShaney* and its progeny to persuade the court that a special relationship existed. *Id.* Of particular note was the family's legal gymnastics with regards to the Eleventh Circuit's decision in *Wyke*, which held that compulsory school attendance does not, standing alone, create such a duty. Wyke v. Polk County Sch. Bd., 129 F.3d 560 (11th Cir. 1997). The family noted that it was not the fact that Jonathan was in school the day he died that created the state's duty, it was the fact that the school placed him in an 8x8 cinder block room with no access to basic human services that created the duty. Brief of Appellants, *supra* note 121, at 9.

130. Brief of Appellants, *supra* note 121, at 11.

131. *King*, 688 S.E.2d at 15 (citing Gish v. Thomas, 516 F.3d 952, 954 (11th Cir. 2008) (holding that officer was not "deliberately indifferent" when leaving firearm in front seat while transporting a prisoner who was a high suicide risk, as officer believed security window was locked).

132. *Id*.

133. Brief of Appellants, *supra* note 121, at 4-5 (describing Jonathan's history of seclusion at Alpine, including prior suicidal threats made by the student, the alarming amount of time the student was confined in the seclusion room before his death, and the discussions between school officials about Jonathan's suicidal tendencies).

had been placed in the seclusion room nineteen times prior to his suicide.[134] The administration was aware of Jonathan and his emotional instability.[135] It also fails to consider that the employees were merely carrying out the directives given to them by superiors. Overall, the narrow application of the court's "deliberate indifference" analysis whittles down the pedagogical process to untrained and unsupported teachers making dangerous decisions without any administrative support. This is not how schools work in Georgia.

The court further held that neither the R.E.S.A nor the G.D.O.E. could be found liable for Jonathan's death. Relying on their holding that no duty of care was owed to Jonathan, the court declined to review the lack of policy or procedures at R.E.S.A. regarding use of seclusion rooms.[136] Finally, the court held that the G.D.O.E. was not liable for Jonathan's death, as the federal law requiring schools to provide all disabled students a free, appropriate public education did not support such a tort-like claim.[137] The court also agreed that the G.D.O.E. enjoyed sovereign immunity protection from the state tort claims related to the matter.[138]

The King decision has set the liability bar for school abuse cases at an unattainable level. If a school is not liable for the mentally ill student that hangs himself with the school's rope, then it is unclear where any liability could ever exist in Georgia. This legal reality, combined with the void of statutory or

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134. *Id*.

135. *Id*. at 4.

136. King v. Pioneer Reg'l Educ. Serv. Agency, 688 S.E.2d 7, 15 (Ga. App. 2009). In finding that neither the school nor the state owed any duty of care to Jonathan, the court relied on *Wyke v. Polk County School Board*, which states that "[b]y mandating school attendance, the state simply does not restrict a student's liberty in the same sense that it does when it incarcerates prisoners or when it commits mental patients involuntarily." Wyke v. Polk County Sch. Bd., 129 F.3d 560, 569 (11th Cir. 1997). The court declined Jonathan's invitation to explore the issue of a deprivation of liberty "continuum" articulated in *Wideman v. Shallowford Community Hospital*, which found that no bright line test can be applied and that, the closer the circumstances resemble prisoner incarceration, the more likely a special relationship is to exist. Wideman v. Shallowford Cmty. Hosp., 826 F.2d 1030, 1035 n.7 (11th Cir. 1987).

137. *King*, 688 S.E.2d at 15-16.

138. *Id*. at 16-17.

regulatory guidance on the issue, has created a dangerous and volatile educational environment. Without accountability from either the legislature or the judicial system, underpaid and poorly trained school teachers will continue to resort to deadly holds to control student behavior; school districts will avoid any liability for the dangerous acts of their educators, and there exists no pressure, political or otherwise, to change the status quo in Georgia.

While schools are responsible for the health and safety of Georgia's students, a cloud hovers over any state actors that forge ahead unregulated and essentially immune from liability. Each student that attends school becomes a potential victim with no redress. Even the most well-intentioned teachers have shown themselves capable of heinous acts.[139] Without regulation or accountability, Georgia's parents must accept a large leap of faith that their children will be safe from harm during the school day. Surely, this is not what the G.D.O.E. or the Georgia Court of Appeals intended as the consequence of the death of Jonathan King.

A continuing theme of jurisprudence in this area is the judiciary's reluctance, or its own perceived limitations, when imposing their judgment for that of educational professionals.[140]

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139. Recently, the Atlanta Journal Constitution published an interview with Mary Hollowell, a former educator that had spent a year investigating the use of seclusion rooms in Georgia. In her opinion, "even good teachers can go numb. Even good people can participate in something like [using seclusion rooms] if they are stressed or under duress . . . I believe we should abolish and disable these solitary-confinement rooms because if they are there, they will be used." Downey, *supra* note 36.

140. "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems . . . ." Epperson v. Arkansas, 393 U.S. 97, 104 (1968). "It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking in wisdom or compassion . . . . [Section] 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations." Wood v. Strickland, 420 U.S. 308, 326 (1975). *See also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266-67 (1988); Nix v. Franklin County Sch. Dist., 311 F.3d 1373, 1377 (11th Cir. 2002) (citing Collins v. City of Harker Heights, Tex., 503 U.S. 115, 128-29 (1992) and White v. Lemacks, 183 F.3d 1253, 1259 (11th Cir. 1999)); Wise v. Pea Ridge Sch. Dist., 855 F.2d 560, 566 (8th Cir. 1988).

Since first diving into public education issues, courts have been trying to navigate the rocky waters between federalism and constitutional equity.[141] On the one hand, they attempt to preserve at a great cost the rights of states and local counties to establish and operate their own systems of public education. While on the other hand, they are unable to sit idly by as these same state actors engage in conduct that continually chips away at the integrity of these very systems. The result in Georgia has been the erosion of those constitutional protections for students being subjected to unreasonable seclusion and abusive restraint.

Both legal theories applied to these issues have been limited and distinguished by Georgia courts to the point of nullity. Presently, Georgia's jurisprudence is not "shocked" by a student hanging himself in school with a rope provided by a teacher. Moreover, the cases appear to reflect an absurd notion that a student's disability (and the behaviors that result from such a limitation) can justify conduct that would create a cause of action against a murderer or rapist. Georgia state and federal courts continue to chip away at a student's right to be safe and free from physical harm while at school. And while the public consciousness seems to support protecting students from harm, neither our federal or state governments, nor our Georgia courts can find the political will or legal precedent to make this happen.

IV. THE BALANCE OF PROTECTING TEACHERS AND ENSURING SAFE CLASSROOMS

To restore trust and accountability to the classroom, a balance must be struck between classroom management and the individual rights of students subjected to harmful seclusion and restraint practices. This balance may come by statute, by rule or perhaps by operation of the educational civil rights laws. The remainder of this article will focus on how each of these areas may combine to ensure Georgia can protect its students while continuing to operate safe and productive learning environments.

141. *See* cases cited *supra* note 140.

A. Federal Law

Recently, Representative George Miller of California and Representative McMorris Rodgers of California presented House Resolution 4247, the Preventing Harmful Restraint and Seclusion in Schools Act, for consideration by the House of Representatives.[142] The Resolution, as proposed, would create the first federal limitations on the use of restraint and seclusion in school.

Generally, House Resolution 4247 tracks those principles proposed by the disability community as discussed above.[143] The Resolution calls for the elimination of (1) mechanical restraints; (2) chemical restraints; (3) physical restraint or physical escort that restricts breathing; and (4) aversive behavioral interventions that compromise health and safety.[144] Also, the Resolution requires that educators employing allowable restraints be fully trained in administering such holds.[145] House Resolution 4247 requires parent notification following the use of any physical force against the student and prohibits the use of restraint or seclusion as the primary method of behavioral management.[146] The Resolution incorporates the definitions of restraints and seclusion from the Title V of the Public Health Service Act, the law that establishes federal baselines for those states that participate in the public health service programs, Medicaid and Medicare.[147]

While the current version of House Resolution 4247 is not likely to pass, some portions of this language may eventually make their way to President Obama's desk as federal law. Should that happen, Georgia would have the benefit of a national baseline from which to operate while it seeks to create its own policy on restraint and seclusion. The federal legislation addresses the most pressing issues surrounding student safety, which is eliminating abusive techniques while

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142. H.R. 4247, 111th Cong. (2009), *available at* http://edlabor.house.gov/documents/111/pdf/legislation/HR4247Seclusion_Restraint.pdf.

143. *See supra* note 20 and accompanying text.

144. H.R. 4247.

145. *Id*.

146. *Id*.

147. *Id*.; *see supra* note 55 and accompanying text.

allowing for emergency procedures by trained educators when necessary. Georgia will be greatly aided in its policy making by the passage of this federal initiative.

B. Georgia Administrative Rules

Likewise, the G.D.O.E. has proposed regulatory language to limit the use of restraint and seclusion in Georgia.[148] The proposed rules would establish that the use of seclusion, prone restraint, mechanical restraint, or chemical restraint "is prohibited in Georgia public schools and educational programs."[149] Further, the proposed rules would prohibit the use of physical restraint, "except in those situations in which the student is an immediate danger to himself or others and the student is not responsive to appropriate less intensive behavioral interventions including verbal directives and other de-escalation techniques."[150]

These rules are Georgia's first attempt to regulate any type of school restraint and seclusion.[151] While the language has yet to become official, the initial versions of the proposed rules do not appear to reach as far as the federal counterpart.[152] The proposed rules prohibit restraint and seclusion; however, the rules' definitions contain significant carve-outs that leave several questions regarding whether the use of such techniques would be limited at all. For example, "time out" is permitted under these rules; yet the definition of "time out" is so vague that it may actually permit several forms of seclusion.[153]

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148. GA. DEP'T OF EDUC., 160-5-1-.35 (proposed) (2009), *available at* http://web.me.com/gcdd/GCDD/Meeting_Minutes/Entries/2009/10/14_Materials_for_Our_Meeting_in_Macon_files/Draft%20Rule-Seclusion%20and%20Restraint%20Version%2001-%2008-25-09.pdf [hereinafter G.A.D.C. PROPOSAL].

149. *Id.*

150. *Id*.

151. No such regulations have ever existed in Georgia. *See* Ga. Dep't of Educ., State Educ. R., tit. 160, *available at* http://www.doe.k12.ga.us/pea_board.aspx?PageReq=PEABoardRules.

152. Pursuant to the Georgia Administrative Procedures Act, O.C.G.A. § 50-13-1, any executive agency seeking to promulgate an administrative rule must first subject that rule to public scrutiny. O.C.G.A. § 50-13-3 (2009).

153. G.A.D.C. PROPOSAL, *supra* note 148, at (1)(g) (Georgia defines "time out" as, "a behavioral intervention in which the student is temporarily

Finally, the rules fall significantly short in two other major areas: requirement of educator training and parent notice. The rules do provide that a school district must train anyone that will employ necessary restraints;[154] however, the rules contain no specific directives to local school districts on the type, frequency, or duration of any such training. As the rule defers to the local school districts that are cash strapped and focused on other educational priorities, the risk of mismanagement or outright non-compliance exists.

Similarly, the rules' parent notice requirement only states that a local district must create policies that include, "[w]ritten parental notification when physical restraint is used to restrain their student within a reasonable time not to exceed one school day from the use of restraint."[155] The rules provide no guidance or specificity on what information must be conveyed in the notice. The notice would not be required to include the time, date, and antecedent circumstances leading to the use of restraint. The notice would not require a showing that the school had employed less restrictive measures prior to resorting to physical restraint. Further, the notice would not require any information for a parent about how many or which educators were called upon to restrain their child or the length of time the child was actually restrained. Such information serves not only to offer a minimum level of transparency to the school's behavior, but also serves as educational data that a student's collaborative planning team could review when making decisions about the troubled student's future.

For all its faults, Georgia must be commended on recognizing that the winds of change have started to blow. Hopefully, through a strong public debate and the influence of a similar resolution in the U.S. House of Representatives, the Georgia rule will evolve into a powerful regulatory force that will protect all Georgia students from abusive restraint and seclusion techniques.

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removed from the learning activity but in which the student is not confined.") This could include a removal from the classroom to another smaller area that had a non-locked door. If so, this would be seclusion by another name.

154. *Id*. at 3.

155. *Id*.

C. Educational Civil Rights Litigation

The final opportunity to balance the interests of safety and individual student rights could be a paradigm shift by the courts hearing these matters. As discussed above, the courts hold a special place for education cases and have struggled to make jurisprudential sense of unthinkable fact patterns and tenuous educational policies. The Georgia courts have strained the precedents of previous education cases and should now establish a new line of reasoning that resembles more closely the factual realities of education in this era.

In 1982, the United States Supreme Court, in *Youngberg v. Romero*,[156] established the rights of involuntarily committed persons with intellectual disabilities under substantive due process. It held that "the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause."[157] The Court held that a substantive due process claim exists "when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."[158]

Since 1982, *Youngberg* has been widely held to apply to all situations where people are confined to a variety of institutions and a wide variety of factual scenarios.[159] In 1996, the United States Court of Appeals for the Eighth Circuit, in *Heidemann v. Rother*, a case of first impression, held that *Youngberg* applies to determine whether a child's substantive due process rights were violated when the child was in special education.[160]

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156. Youngberg v. Romero, 457 U.S. 307 (1982).

157. *Id*. at 315.

158. *Id*. at 323.

159. *See generally* Kyle K. v. Chapman, 208 F.3d 940 (11th Cir. 2000) (applying the *Youngberg* standard to a failure to properly treat the self-abusive behavior of a child with autism); Dolihite v. Maughnon, 74 F.3d 1027 (11th Cir. 1996) (applying the *Youngberg* standard to a failure to prevent adolescent's suicide attempt at a mental health facility); Spivey v. Elliott, 29 F.3d 1522 (11th Cir. 1994) (applying the *Youngberg* standard to a to children confined in a school for children with hearing impairments); Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987) (applying the *Youngberg* standard to children in foster care system).

160. Heidemann v. Rother, 84 F.3d 1021, 1029 (8th Cir. 1996).

Relying in part on *Heidemann*, the United States District Court for the District of Connecticut agreed.[161] Most recently, the United States Court of Appeals for the Fourth Circuit, in *H.H. v. Moffett*,[162] carried this theory further into an education context. In this case, decided in July of 2009, the Fourth Circuit abandoned any attempt to find a pedagogical purpose behind two educators employing a mechanical restraint on a disabled student for the purpose of verbally abusing her.[163] Recognizing that "a reasonable teacher would know that maliciously restraining a child in her chair for hours at a time interferes with that child's constitutional liberty interests," the court declined to extend any qualified immunity to the defendant educators.[164] Interestingly, the Fourth Circuit cited both *Youngberg* and another school restraint case, *Jefferson v. Ysleta Independent School District*,[165] to clearly establish that professional educational standards do not include physically or mechanically restraining students without legitimate justification.[166]

Following the Fourth Circuit, the Eighth Circuit, and the Connecticut District Court, the Georgia courts should analyze substantive due process claims of students claiming educator abuse using the standard articulated in *Youngberg, Heidemann* and, most recently, *Moffett.* Abuse is not education. Abusive techniques, like restraint and seclusion, when employed with malice or without regard for student safety or welfare, meet the constitutional threshold of actionable conduct. Because such actions no longer reflect educational practice and carry such great risk to life and liberty, the courts should recognize the *Youngberg* standard as controlling.

In doing so, courts would strike the proper balance between school safety and student liberty. As abuse of restraint and unnecessary seclusion are neither safe, nor effective, they

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161. M.H. v. Bristol Bd. of Educ., 169 F. Supp. 21, 31 (D. Conn. 2001).

162. H.H. v. Moffett, 335 Fed. Appx. 306 (4th Cir. 2009).

163. *Id*. at 314.

164. *Id*.

165. Jefferson v. Ysleta Indep. Sch. Dist., 817 F.2d 303 (5th Cir. 1987) (holding that school teacher and principal were not entitled to qualified immunity from liability for tying a second-grade student to a chair for the majority of two consecutive days without any justification such as disciplinary action).

166. *Moffett*, 335 Fed. Appx. at 314 (citing *Jefferson*, 817 F.2d at 305).

should be considered outside the *Youngberg* penumbra of "professional judgment, practice, or standards" and given no protection.[167] As the standard allows for "professionally acceptable choices,"[168] the court could preserve an educator's ability to employ acceptable educational practices that promote positive behavioral changes and allow the safe management of a classroom environment while continuing to protect a student's educational and civil rights.

V. CONCLUSION

Without change, the death of Jonathan King and the incarceration of Isaac are in vain. Education in Georgia must evolve and recognize that destructive practices like abusive restraint and unnecessary seclusion undermine the legitimacy of the educational institutions and those attempting to teach our future. They destroy the trust between educator and family and cast the once pillar of democracy into the shadow of doubt and uncertainty. Georgia must act to ensure that its educational institutions retain their integrity by eliminating abusive practices like improper restraint and seclusion. Further, the courts in Georgia should abandon their prior formula for a jurisprudence that recognizes the educational realities of the millennium.

167. Youngberg v. Romero, 457 U.S. 307, 323 (1982).

168. Heidemann v. Rother, 84 F.3d 1021, 1029 (8th Cir. 1996).