Restraint and Seclusion in Schools and the IDEA Struggle

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I. INTRODUCTION

Restraint and seclusion are behavioral control measures that are used in both public and private schools across the United States.[1] Restraint and seclusion are often used on children with disabilities, and these techniques are dangerous and traumatizing. Mechanical restraints, even when applied correctly, have been associated with grave outcomes, including asphyxiation, broken bones, oxygen deprivation to the brain and internal organs, and death.[2]

Restraint and seclusion have been used disproportionately on students with disabilities.[3] Empirical data shows that restraint and seclusion are routinely used as methods of discipline instead of emergency techniques.[4] The United States Government Accountability Office ("GAO") reported that there were 61,440 students in public schools subjected to physical restraints, and 33,578 students subjected to seclusion in school year 2013–2014.[5] Boys and students with disabilities are consistently restrained or secluded at

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[1] *See* U.S. DEP'T OF EDUC. OFF. FOR C.R. DATA COLLECTION DATA SNAPSHOT: SCH. DISCIPLINE 11 (Issue Brief No. 1, 2014), https://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf; *See generally* U.S. GOV'T ACCOUNTABILITY OFF., SECLUSIONS & RESTRAINTS: SELECTED CASES OF DEATH & ABUSE AT PUBLIC & PRIVATE SCH.'S & TREATMENT CTR. (May 19, 2009), https://www.gao.gov/assets/130/122526.pdf.

[2] LESLIE MORRISON ET AL., RESTRAINT & SECLUSION IN CAL.: A FAILING GRADE, DISABILITY RIGHTS CALIFORNIA 3 (2008), https://www.disabilityrightsca.org/system/files?file=file-attachments/702301.pdf.; *See generally* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 1.

[3] *See* U.S. DEP'T OF EDUC. OFF. FOR C.R. *supra* note 1.

[4] *See* Morrison, *supra* note 2, at 4.

[5] U.S. GOV'T ACCOUNTABILITY OFF., K-12 EDUC. FED. DATA & RES. ON RESTRAINT & SECLUSION 4 (Feb. 27, 2019), https://www.gao.gov/assets/700/697114.pdf.

higher rates than girls and students without disabilities.[6]

In an earlier investigation, the GAO also reported hundreds of allegations of death and abuse in public and private schools across the United States between the years 1990 and 2009. The GAO identified that almost all of the allegations involved students with disabilities.[7] Despite the U.S. Department of Education's ongoing effort to collect and review data on the inappropriate use of behavioral interventions,[8] the practice of dangerous restraint continues. In 2018, a thirteen-year-old Sacramento student with autism died after he was restrained face-down by school staff for one hour and forty-five minutes.[9] In 2019, a class action lawsuit was filed against a California public school for the improper use of dangerous restraint and seclusion techniques on a group of students with disabilities, causing significant physical and psychological harms.[10] Both cases are illustrative of the fact that restraint and seclusion are routinely used to punish students who exhibit disability-related behaviors perceived to be disruptive or aggressive.

Although the Individuals with Disabilities Education Act (IDEA)[11], section 504 of the Rehabilitation Act (section 504)[12], and the Americans with Disabilities Act (ADA)[13] all directly and indirectly strengthen the civil rights of students with disabilities in the education setting, case law suggests that these federal laws provide inadequate protection against the harm of restraint and seclusion and offer limited remedial measures. Litigation efforts by disability rights advocacy groups across the country focused primarily on the allegations of IDEA and section 504/ADA violations to address the improper use of restrain and seclusion. This paper discusses the fundamental limitations of IDEA and section 504 claims/ADA in protecting children from the harmful misuse of restraint and seclusion. This paper also analyzes the recent federal court interpretations of these statutes and their implications in restraint and seclusion litigation.

In Part I, this paper discusses what restraint and seclusion procedures

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[6] *Id.* at 4–5.

[7] *See generally* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 1.

[8] Press Release, U.S. Dept. of Educ., U.S. Dept. of Educ. Announces Initiative to Address the Inappropriate Use of Restraint & Seclusion to Protect Children with Disabilities, Ensure Compliance with Federal Law https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws (last visited Apr. 17, 2020).

[9] Press Release, Disability Rights California, Disability Rights California Responds to Student Death at Guiding Hands School (Apr. 16, 2020 at 11:48pm), https://www.disabilityrightsca.org/press-release/disability-rights-california-responds-to-student-death-at-guiding-hands-school.; *See also* Langley et al. v. Guiding Hands Sch. et al., No. 2:19-cv-02265 (E.D. Cal. Nov. 8, 2019).

[10] *See generally* Kerri K. v. State of Cal., No. CIVMSC19-00972 (Cal. Super. Ct., May 13, 2019).

[11] Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482 (2000 & Supp. IV 2004).

[12] Section 504 of the Rehabilitation Act, 29 U.S.C. §§ 794, *et seq.* (2000).

[13] Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2008).

are and why are they used in schools. This is necessary to understand how dangerous and inappropriate these interventions are when used among students with disabilities. This section also draws on facts from recent court cases to illustrate the detrimental effects of these interventions. Part II gives a description of existing federal disability statutes and seeks to analyze how the construction of these statutes interplay. This section explains how the current judicial interpretation of these provisions creates a significant hurdle which plaintiffs must overcome in order to allege a successful cause of action under the IDEA or section 504. This section also examines case law to illustrate the ineffectiveness of these federal laws in providing remedies to students who are harmed by the improper use of restraints and seclusion. Finally, Part III provides recommendations on possible legal reforms to protect students from improper use of restraint and seclusion.

II. USE OF RESTRAINTS, SECLUSION, AND CORPORAL PUNISHMENT IN THE SCHOOL CONTEXT

Historically, the use of physical restraint and seclusion was rooted in psychiatric medicine.[14] Although controversial, these techniques were used to help patients manage their physical or emotional outbursts.[15] The National Disability Advocacy Network's (NDRN) 2009 report defines "restraint" as "[a]ny manual method, physical or mechanical device, material, or equipment that immobilizes or reduces the ability of an individual to move his or her arms, legs, body, or head freely," and "seclusion" as "the involuntary confinement of an individual alone in a room or area from which the individual is physically prevented from leaving."[16] Today, restraint and seclusion are methods that may be routinely deployed by school personnel as a way of intervening with students' behavioral challenges.[17] Moreover, the use of restraint and seclusion could be repeated for an individual child and administered by the same individual.[18] However, there are well documented adverse physical and psychological effects related to the use of restraint and seclusion when used amongst children and adolescents.[19]

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[14] Janet Colaizzi, *Seclusion & Restraint: A Historical Perspective*., 43 J. PSYCHOSOCIAL NURSING & MENTAL HEALTH SERV. 31 (2005).

[15] *Id.* at 33.

[16] NAT'L DISABILITY RTS. NETWORK, SCH. IS NOT SUPPOSED TO HURT: INVESTIGATIVE REPORT ON ABUSIVE RESTRAINTS & SECLUSION IN SCH. (Jan.2009), https://www.ndrn.org/images/Documents/Resources/Publications/Reports/SR-Report2009.pdf.

[17] *See* Morrison, *supra* note 2.

[18] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 1, at 26. A 7-year-old girl enrolled in a special classroom at a public school in Californian was repeatedly restrained and secluded as a punishment for non-aggressive behaviors by the same teacher. The adverse interventions continued despite formal complaint to the school principal and the teacher.

[19] *See generally* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 1.

A. Case Illustration: Kerri K. et al. vs. State of California

In May 2019, a disability rights advocacy group and its co-counsels filed a class action on behalf of five elementary school children with disabilities against the California Department of Education (CDE), county school officials, and staff at Floyd I. Marchus School, in order to challenge the improper use of restraints and seclusion in non-emergency situations.[20] In this case, one of the plaintiffs, Kerri K., was diagnosed with Emotional Disturbance and Attention Deficit Hyperactivity Disorder (ADHD). Kerri K. was subjected to forty-five documented instances of restraint during a period of nine months.[21] Kerri K. alleged that she was retrained as many as seven times a day.[22] During one instance, Kerri K. became frustrated with her math assignment, which was a specifically identified behavioral "trigger" based on her previous assessments. Kerri K. reacted to this trigger by tearing her math book and kicking a classroom trash can. Instead of using any positive behavioral intervention or alternative strategies, school staff put Kerri K. into a "child control" restraint position.[23]

During another instance, after Kerri K. "cowered in the corner of one of the support rooms crying," two school staff members lifted Kerri K. and pinned her against the wall cabinets, with one staff on one side, and another on the other side of Kerri K. While Kerri K.'s feet were dangling off the ground, the school staff forcibly spread her legs apart using their own legs and bent her head between her legs, effectively putting her into a "team control position."[24] While Kerri K. was restrained, she repeatedly exclaimed that she was in pain. Eventually, the two staff members released her after she faintly cried, "I can't breathe."[25]

Other plaintiffs in this California case were similarly subjected to restraint and seclusion despite the fact that the children never demonstrated any violent or aggressive behavior.[26] The facts from *Kerri K. et al* illustrate that restraint and seclusion are often used during non-emergency situations on children with disabilities in special education. In addition, these

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[20] *Kerri K.*, *supra* note 10, at 19.

[21] *Id.* at 32.

[22] *Id.*

[23] *Id.* (A "child control" position "involves one or more adults holding [a] child's crossed arms' across his or her torso in a standing, seated or lying down position.").

[24] *Kerri K.*, *supra* note 10, at 32. The team control position involves "[t]wo staff members hold[ing] the individual as the auxiliary team members continually assess the safety of all involved and assisted, if needed." The adults using the technique must face the same direction as the Acting Out Person while adjusting, as necessary, to maintain close body contact with the individual"; "[k]eep their inside legs in front of the individual"; "[b]ring the individual's arms across their bodies, securing them to their hip areas"; "and "[p]lace the hands closest to the individual's shoulders in 'C-shape' position to direct the shoulders forward." *Kerri K.*, *supra* note 10, at 25.

[25] *Id.* at 34.

[26] *Id.*

interventions are repeatedly deployed against an individual by the same school staff. The repetitive administrations strongly suggest that the interventions were indeed ineffective in managing or altering the underlying behavior the school staff attempted to address. Ironically, Kerri K's Individual Education Plan (IEP) and Behavioral Intervention Plan (BIP) both documented that physical restraints would be counterproductive to her behavioral management.[27] The actions taken by the school staff blatantly disregarded the directive authority of the plaintiff's IEP and BIP.

Another plaintiff in *Kerri K.*, Sara S. was similarly restrained improperly and repeatedly in dangerous positions such as the "high-level hold" and the "transport position."[28] In addition, the school staff secluded Sara S. in a small "support room."[29] Following the restraint and seclusion instances, Sara S. developed anxiety and depression and was unable to receive further academic instruction for the remainder of the school year. She was also admitted to a psychiatric hospital immediately following one of the episodes of physical restraint.[30] Ultimately, Sara S. was no longer able to attend Marchus, and was compelled to enroll in a more restrictive program in a residential placement setting instead. This detrimental outcome essentially denied her a meaningful educational placement.

Students plaintiffs in *Kerri K.* filed a class action against Floyd I. Marchus School to challenge the illegal and abusive use of restraints and seclusion in non-emergency situations.[31] The causes of action included violations of the California Education Code for depriving students of a free and appropriate public education in the least restrictive environment, as well as violations under the California Constitution for violating the plaintiffs' rights to receive basic education services and be free from unreasonable seizure and excessive force.[32] In addition, plaintiffs also filed various state tort claims against the defendant school officials.[33]

B. More Detrimental Cases

Certainly, restraint and seclusion misuse causes various degrees of harm. The Government Accountability Office (GAO) published a summary of case studies examining death and abuses at public and private schools and

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[27] *Id.* at 9.

[28] *Id.* at 42.

[29] *Id.*

[30] *Id.* at 43.

[31] *Class Action Seeks to End Illegal and Abusive Restraints and Seclusion Practices Used Against Children with Disabilities in California*, DISABILITY RTS. EDUC. & DEF. FUND (May 15, 2019), https://dredf.org/2019/05/15/class-action-seeks-to-end-illegal-and-abusive-restraints-and-seclusion-practices-used-against-children-with-disabilities-in-california/.

[32] *Id.* at 69.

[33] *Id.* at 70–80.

treatment centers across the United States.[34] The details in these cases highlighted the extent of physical and psychological harms, as well as educational deprivation that the involved children with disabilities suffered.

The harsh facts in the GAO report suggests the risk of harm in using restraint and seclusion far outweighs any arguable benefits for controlling behaviors in classrooms. For example, in Texas, a fourteen-year old boy died after he was placed face down on the floor by a 230-pound teacher, who laid on top of him because the student did not stay seated in class.[35] Another sixth-grade special education student reportedly had his leg broken by the public school teacher who was trying to restrain him.[36] An eight-year old Illinois student, diagnosed with attention deficit hyperactivity disorder, was restrained to a chair by a teacher with masking tape and also had his mouth taped shut because the student would not remain seated.[37]

While the GAO's report casts light on the most extreme detriments of restraint and seclusion misuse, it also urges for regulations that would address this abusive issue at a national and systemic level. Ideally, there should be a legal framework to provide student plaintiffs with means of seeking redress for their physical, psychological and educational grievances. More importantly, this legal framework should also deter future abuses caused by routine restraint and seclusion in the education setting. The legal framework should also hold education policymakers accountable for any failure to create, implement, and monitor safe and effective policies and procedures for students requiring behavioral interventions.

III. THE LAW

A. Current Federal Laws and National Standards Governing Restraint and Seclusion

Within health care settings, the risks associated with the use of behavioral restraint and seclusion appear to be well recognized at the federal level. Federal authorities impose significant restrictions on when and how these measures can be used in a variety of contexts. For example, Title 42 of the Code of Federal Regulations imposes regulations on the care of patients who participate in the Medicare and Medicaid programs. The statute provides that restraint or seclusion may only be used to prevent imminent risk of physical harm when less restrictive interventions have been

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[34] *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 1.

[35] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 1, at 10.

[36] *Id.* at 6.

[37] *Id.* at 12.

determined to be ineffective to protect the individual, staff, or others.[38] In addition, the use of behavioral restraints and seclusion generally requires a physician's written order, [39] and there are specific time limitations applicable based on the age of the individual patients as follows:

> i) Each order for restraint or seclusion used for the management of violent or self-destructive behavior that jeopardizes the immediate physical safety of the patient, a staff member, or others may only be renewed in accordance with the following limits for up to a total of 24 hours:
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> (A) 4 hours for adults 18 years of age or older;
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> (B) 2 hours for children and adolescents 9 to 17 years of age; or
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> (C) 1 hour for children under 9 years of age.[40]

Although special education programs similarly receive direct federal funding like Medicare and Medicaid programs, there are no federal statutes or promulgated regulations that specifically address the use of restraint and seclusion in public or private schools.[41] The Children's Health Act of 2000 offered hope to some scholars and advocates when it amended Title V of the Public Health Service Act to target the practice of restraint and seclusion in medical and federally-funded residential facilities.[42] The Act declared that children in federally-funded, non-medical and community-based facilities have "the right to be free from physical or mental abuse, corporal punishment, and any restraints or involuntary seclusions imposed for purposes of discipline or convenience."[43] Unfortunately, the Act did not extend its protection to children in schools, frustrating many education advocates in the field.[44]

B. The Individuals with Disabilities Education Act (IDEA)

The IDEA is one of the key federal laws that provides major legal protections for students with disabilities in the education context. This law

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[38] 42 C.F.R. §§ 482.13(e)(2)–(3) (LEXIS current through the April 15, 2020 issue of the Federal Register).

[39] 42 C.F.R. § 482.13(e)(5) (LEXIS current through the April 15, 2020 issue of the Federal Register).

[40] 42 C.F.R. § 482.13(e)(8)(i) (LEXIS current through the April 15, 2020 issue of the Federal Register).

[41] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 1, at 3.

[42] Keeping All Students Safe Act (KASSA), H.R. 4247, 111th Cong. § 2(1) (2010).

[43] 42 U.S.C. § 290jj(a)(2) (2006).

[44] Alyssa Kaplan, Note, *Harm Without Recourse: The Need for a Private Right of Action in Federal Restraint and Seclusion Legislation*, 32 CARDOZO L. REV. 581, 586 (2010).

was first adopted in 1975 as the Education for All Handicapped Child Act (EHA), and the statute is designed to ensure that students with disabilities can access equal education opportunities as compared to students without disabilities.[45] Prior to the 1970s, many children requiring special education were categorically denied access to education opportunities. At the time, public schools in the United States only accommodated one-out-of-five children with disabilities.[46] Congress responded to these dire education needs by enacting a federal statute that would address the educational inequality among students with disabilities.[47] The statute was introduced shortly after Congress enacted the first disability civil rights law—section 504 of the 1973 Rehabilitation Act. As some scholars have noted, the EHA was Congress's response to the burden created by litigation pursuant to section 504 demanding equal education opportunities for students with disabilities.[48] While section 504 was the first national civil rights legislation that protected children from the denial of public education participation because of their disabilities, the law does not provide substantive requirements to address the unique educational needs of children with disabilities. In *Smith v. Robinson*, the United States Supreme Court described the EHA as a "comprehensive scheme set up by Congress to aid the States in complying with their obligations to provide public education for handicapped children."[49] In addition, the Court explained that the EHA "was an attempt to relieve the fiscal burden placed on State and localities by their responsibility to provide education for all handicapped children."[50] In particular, the EHA required all public schools accepting federal funds to provide equal access to education and free meals for children with physical and mental disabilities. The EHA also contained provisions requiring public school to provide evaluations and to create individualized educational plans for children with disabilities.

The EHA was later renamed and improved as the Individuals with Disability Education Act (IDEA) in 1990. After further amendments in 1997 and 2004, the IDEA continues to be the mainstay legal framework protecting the educational needs of students with disabilities. The IDEA aims to provide every student with a disability the access to a "free appropriate public education" (FAPE) that will meet the student's unique needs; the

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[45] DEREK W. BLACK, EDUCATION LAW: EQUALITY, FAIRNESS, AND REFORM 470 (2nd ed. 2016).

[46] U.S. DEP'T OF EDUC. OFF. OF SPECIAL EDUC. AND REHAB. SERV., HISTORY: TWENTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA (Apr. 17, 2020 at 1:10PM), https://www2.ed.gov/policy/speced/leg/idea/history.pdf.

[47] *Id.*

[48] *Id.*

[49] Smith v. Robinson, 468 U.S. 992, 1009 (1984).

[50] *Id.* at 1010.

education must be provided in the "least restrictive environment" possible.[51] In providing FAPE, the statute requires states to make specific educational plans called Individual Educational Programs (IEP) for every eligible student. The IEPs contain written statements of learning targets for students to meet.[52]

While IDEA is largely a federal funding statute for special education, the explicit procedural safeguards provide a private cause of action in a federal or state civil court[53] whenever state and local education agencies violate the IDEA. Failure to comply with IDEA provisions could bring federal sanctions to recipients, such as the loss of funding.[54] In private litigation, the IDEA allows plaintiffs to seek remedies in the form of injunctive and equitable relief against the state or local educational agencies.[55] Courts may grant equitable relief to ensure school programs or services are delivered according to the statutory framework of the IDEA. Specially, a plaintiff may seek relief if the state violates the core guarantee of the provision of FAPE, which should comprise of individually-tailored educational services for children with at least one of the thirteen qualifying disabilities.[56] In addition to the student's own right to a private cause of action, the United States Supreme Court, in a recent IDEA case, confirmed that parents may also exercise rights to bring an IDEA claim. In *Winkelman v. Parma City School District.*, the Court considered the statutory provision of §1415(a) of the IDEA, which expressly states that the IDEA "mandates that educational agencies establish procedures 'to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education'" and concluded that parents too, have their own right to bring an IDEA claim when their child is denied FAPE.[57] Therefore, the IDEA clearly imposes procedural obligations to engage parents in the planning of the student's education, and the statute provides parents with a private right of action to

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[51] Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400(d)(1), 1412(a)(5)(A) (2018).

[52] 20 U.S.C. § 1414(d)(1)(A)(i) (2018).

[53] 20 U.S.C. § 1415(i)(2) (2018).

[54] *See* Tom E. Smith, *IDEA 2004: Another Round in the Reauthorization Process*, 26 REMEDIAL AND SPECIAL EDUC. 314, 316 (2005). The 2004 reauthorization of IDEA provides a path for full funding in special education programs over a period of years through 2011. *See also* Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 520 (2007).

[55] *See* 20 U.S.C. § 1403(b) (2018) ("In a suit against a State for violation of this title, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as those remedies are available for such a violation in the suit against any public entity other than a State."). *See also* 20 U.S.C. § 1403(a) (2018) ("A State shall not be immune under the 11th amendment of the Constitution of the United States from suit in Federal court for a violation of this title [IDEA].").

[56] Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743, 747 (2017).

[57] *Winkelman*, 550 U.S. at 528.

enforce the procedural provisions when such safeguards are violated.

1. Free and Appropriate Public Education Standard under Rowley

The term "appropriate" within the IDEA statutory obligation to provide a "free appropriate public education" is probably the most litigated, and arises in many contexts. This is certainly true in the context of improper use of restraint and seclusion in special education. The Supreme Court laid down the standard for what is considered "appropriate education" in the landmark decision *Board of Education of the Hendrick Hudson Central School District v. Rowley* in 1982.[58] In *Rowley*, the Court held that schools are not required to maximize the potential of each disabled child, but instead, schools only need to follow the procedures set out in the IDEA and create an Individual Educational Program "reasonably calculated to provide some educational benefit to students with disabilities."[59] The plaintiff, Anne Rowley, was a deaf student enrolled in a public school in New York. The Rowley's felt that Anne should be provided a qualified sign-language interpreter because, without one, Anne could comprehend less than half of what is said during classroom instructions.[60] The Rowley's felt that the denial of a sign-language interpreter would deprive Anne of FAPE because Anne could only "achieve her full potential commensurate with the opportunity provided to other children" with the assistance of an interpreter.[61] The Court ultimately rejected the Rowley's argument that FAPE requires schools to provide maximum benefits to students with a disability. Instead, the Court accepted a much more limited standard, defining the substantive obligation of FAPE only as providing "some benefit" in students' education.[62]

Although *Rowley* remains good law today, some circuits recognized that the 1997 Amendment to the IDEA appeared to abrogate *Rowley* "some benefit" standard. The amendment aimed to "place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education."[63] For example, since 1997, the Sixth Circuit has interpreted the standard that governs FAPE as requiring a "meaningful educational benefit."[64] The IDEA was subsequently amended in 2004 after the passing of the No Child Left Behind Act in 2002, which

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[58] Rowley, 458 U.S. 176 (1982).

[59] *Id.* at 207.

[60] *Id.* at 215.

[61] *Id.* at 186.

[62] *Id.* at 200.

[63] Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 (2009).

[64] Deal v. Hamilton City Bd. of Educ., 393 F.3d 840, 862 (6th Cir. 2004); *See also* Oakstone Cmty. Sch. v. Williams, 2013 U.S. Dist. LEXIS 197022 (2013).

promised a high-quality education to all students, including those with disabilities.[65]

While some scholars have argued that this later amendment to the IDEA might have once again heightened the *Rowley* FAPE standard, courts continued to apply the "some educational benefit standard."[66]

C. The FAPE Challenge and Restraint and Seclusion Cases

Intuitively, the FAPE mandate seems to be an appealing starting point to address the inappropriateness of restraint and seclusion in special education settings. However, using the FAPE obligation as an enforcement tool has proven to be challenging for litigants. Caselaw suggests that the argument that restraint and seclusion interventions violate the IDEA provisions or denies FAPE has limited legal merit, both substantively and procedurally.

Various courts have adjudicated restraint and seclusion cases as a failure to provide FAPE and interpreted the *Rowley* standard differently. The case *CJN v. Minneapolis Pubic Schools* illustrates how the Eight Circuit used academic progress as a benchmark to measure whether an education program indeed met the standard of "some educational benefit" articulated in *Rowley*.[67] The student in *CJN* suffered from brain lesions and a long history of psychiatric illness.[68] The school placed him in a "special program for elementary needs" classroom, where he nevertheless misbehaved by kicking others and hitting staff members with a pencil.[69] The teachers placed him in "time-out" sessions and physically restrained him on a number of occasions. In spite of these interventions, he maintained academic progress, a fact that led the state hearing officer to dismiss his FAPE claim.[70]

Plaintiff argued that the use of restraint and seclusion violated the very nature of FAPE. He asserted that academic progress was not a sufficient benchmark of FAPE.[71] The Eighth Circuit nevertheless upheld the state hearing officer's decision, rejecting CJN's FAPE claim. Finding no FAPE violation, the court stressed that, even though academic progress itself is not proof of FAPE, it provides evidence that the student's behavioral problems were sufficiently addressed under the interventions such that he could

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[65] 20 U.S.C. § 1412(a)(16) (2018); 20 U.S.C. § 1412(a)(15) (2018); 34 C.F.R. § 300.39(b)(3)(ii) (2006).

[66] Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743, 747 (2017); *See generally* K.C. v. Mansfield Indep. Sch. Dist., 618 F. Supp. 2d 568, 575–76 (N.D. Tex. 2009).

[67] CJN v. Minneapolis Pub. Sch., 323 F.3d 630 (8th Cir 2003).

[68] *Id.* at 634.

[69] *Id.* at 634–35.

[70] *Id.* at 634.

[71] *Id.* at 637.

learn.[72] The Eighth Circuit concluded that making academic progress is highly relevant to the education benefit inquiry when analyzing whether a student has been denied FAPE.[73] The court further explained that the fact that plaintiff was subjected to an increased amount of restraint does not make his education inappropriate within the meaning of the IDEA.[74] Therefore, under the Eighth Circuit's analysis, whether the use of restraint and seclusion substantively fails the educational benefit standard does not depend on the amount or degree of restraint used on the student, but how effective or ineffective the interventions were in attributing to academic outcome.

As the dissent in *CJN* pointed out, the Eighth Circuit's reasoning is problematic because the mere demonstration of academic progress will allow school defendants to defeat any FAPE claims. This standard is based on a strong presumption in favor of the use of restraint and seclusion because in most cases, the students subjected to these interventions still manage to show some academic progress. The majority also justified its approval of the use of restraint by noting that it reduced the likelihood that CJN's behavior would escalate and require suspension. The dissent criticized this logic as troubling because, arguably, resorting to restraint and seclusion is a worse outcome for the student than school suspension. Substantively, the Eighth Circuit's use of academic progress as a standard to measure educational benefit begs the question of whether it is consistent with *Rowley*, or the 1997 Amendment standard of "meaningful educational benefit." While the *CJN* court did not address this question directly, the opinion implies that the demonstration of academic progress satisfies both the "some educational benefit" standard articulated in *Rowley* and the "meaningful educational benefit" standard that some courts read into the 1997 Amendment.

On the issue of whether the misuse of restraint and seclusion is a deviation from the FAPE standard, not all courts adopt the *CJN* academic progress benchmark. In *Alleyne v. N.Y. State Education Department*, the Northern District of New York expressly rejected the *CJN* logic that aversive interventions such as mechanical restraints should be used as long as the student is making academic progress[75]. In *Alleyne*, the court was presented with the issue of whether school officials have arbitrarily denied the student plaintiff FAPE in violation of IDEA when they passed emergency regulations that would authorize the use of aversive treatment, including the use of mechanical restraints in situations where the student exhibits self-

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[72] *Id.* at 638. (The 8th Circuit Court of Appeal stated that CJN's academic progress was indeed highly relevant to the educational benefit inquiry, "because it demonstrates that his IEPs were not only reasonably calculated to provide educational benefit, but, at least in part, did so as well.").

[73] *Id.* at 638.

[74] *Id.* at 639.

[75] Alleyne v. N.Y. State Educ. Dep't, 691 F. Supp. 2d 322, 330 (N.D.N.Y. 2010).

injurious or aggressive behaviors.[76] The court rejected the defendant's argument that academic progress is a justification to uphold regulations permitting use of mechanical restraints. In addition, the court reasoned that academic progress cannot be the sole measure on whether the students received FAPE.[77]

Other courts, such as the Third Circuit Court of Appeals, adopt yet a different approach to address the threshold for IDEA violations, relying on an earlier U.S. Supreme Court opinion: *Honig v. Doe*.[78] *Honig* was not a restraint and seclusion case, but rather was a case regarding the indefinite suspension of two students with disabilities as a violation of the EHA.[79] Specifically, the Court was faced with the legal question of whether state or local school authorities may "unilaterally exclude disabled children from the classroom for dangerous or disruptive conduct growing out of their disabilities."[80] Ultimately, the Court held that school procedures such as "study carrels, timeouts, detention, or the restriction of privileges" are permissible under the statutory provisions of EHA, so long as there is no unilateral change of the placement by the school district.[81] The Third Circuit Court of Appeals adopted the same reasoning in *Melissa S. v. School District*.[82] In that case, the plaintiff alleged that the use of physical restraints and isolation to control Melissa S's behavioral outbreaks violated her right under the IDEA and FAPE because these interventions frequently left the student without an education aide and "the learning environment caused her to regress educationally."[83] The Third Circuit rejected the plaintiff's FAPE claim and held that the use of restraint and seclusion did not violate the IDEA so long as there is no placement change and the restraint and seclusion constitutes "normal procedures for dealing with children who are endangering themselves or others."[84]

Melissa S. relied on the "no placement change" standard set out in *Honig* to adjudicate a complaint of educational regression due to the frequent use of physical restraints and isolation, notwithstanding that the central issue in *Honig* was indefinite school suspension, not restraint and seclusion misuse. Since the appropriateness of restraint and seclusion was never evaluated in *Honig*, the Third Circuit's adoption of the "no placement change" standard seems misplaced. The *Honig* decision was a statutory interpretation of the

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[76] *Id.*at 327.

[77] *Id.* at 334.

[78] *See* Honig v. Doe, 84 U.S. 305 (1988).

[79] *Id.* at 308.

[80] *Id.*

[81] *Id.* at 325.

[82] Melissa S. v. Sch. Dist. of Pittsburgh, 183 F. Appx. 184, 186 (3rd Cir. 2006).

[83] *Id*.

[84] *Id.* at 188, citing *Honig*, 84 U.S. at 325–26.

"stay-put" provision within the EHA which "prohibits state or local school authorities from unilaterally excluding disabled children from the classroom for dangerous or disruptive conduct growing out of their disabilities during the pendency of review proceedings."[85] Conversely in *Melissa S.*, the Third Circuit faced the question of the possible deprivation of FAPE in violation of IDEA because the student was subjected to physical restraints and isolation. In other words, the central issue in *Melissa S.* was whether the administration of restraints and seclusion by the defendants substantively violated the FAPE guarantee. Although restraint and seclusion interventions effectively exclude students from their education program, the nature of this exclusion is much more transient compared to school suspensions. The standard used in *Honig* to evaluate the lawfulness of school suspensions seems inapposite when applied to the analysis of appropriateness of restraint and seclusion interventions. The Third Circuit likely adopted this standard because it conceptualized restraint and seclusion interventions as a form of disciplinary action similar to school suspension. This characterization is fundamentally flawed because it fails to consider how physical restraints, unlike school suspensions, are often used by school staff without much deliberation. Secondly, restraints are almost always physically offensive to a student, while school suspensions are much more benign in nature and do not implicate a student's bodily autonomy. Certainly, this standard used by the Third Circuit is concerning for plaintiffs because it is rare that inappropriate use of restraint and seclusion directly cause a change in educational placement.

1. FAPE under Endrew F.

The IDEA conditions federal funding on the compliance with statutory requirements for schools to deliver education through IEPs.[86] The IEP is a central piece to the delivery of FAPE. The adequacy of an IEP under IDEA was articulated in *Rowley* as "reasonably calculated to enable the child to receive educational benefit."[87] In the context of behavior management, IEP may include the "use of positive behavioral interventions and supports, and other strategies, to address that behavior" when the learning is impeded by the unique behavioral issues related to children's disabilities.[88] The IEP is the means by which special education and related services are "tailored to the unique needs" of a particular child.[89]

In *Endrew F. v. Douglas County School District RE-1*, the Supreme

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[85] *See Honig*, 84 U.S. at 306.

[86] 20 U.S.C. § 1400 *et seq*. (2018).

[87] *Rowley*, 458 U.S. 176 at 207.

[88] 34 C.F.R. § 300.324(a)(2)(i) (2017).

[89] *Rowley*, 458 U.S. 176 at 181.

Court stepped in once again, thirty-five years after *Rowley*, to consider parameters that define the substantive obligation under the IDEA.[90] In *Endrew*, the Court unanimously ruled that, under the IDEA, public school students with disabilities are actually entitled to more than "some benefits" or "merely more than de minimis" progress as interpreted by the Tenth Circuit Court of Appeal.[91] The Court indicated that IDEA must surely require more than just "some benefit," and the task in *Endrew* was to provide substantive guidance on student progress.[92]

In *Endrew*, an autistic high-school student's parents brought suit against the Douglas County School District for the denial of FAPE required by IDEA because he was failing to make meaningful progress towards his educational goals.[93] Endrew's parents believed that the IEP proposed by the school was inadequate to address his behavioral problems. Subsequently, Endrew's parent transferred him to a private school where the new school was able to identify Endrew's most problematic behaviors, and the new strategies used enabled Endrew to make a degree of academic progress.[94]

The plaintiffs appeared first before the administrative law judge, and then later before the Tenth Circuit Court of Appeal, and both held that the student had not been denied FAPE.[95] The Court recognized that a "merely more than minimis" progress standard is not consistent with the central purpose of IDEA and landed on the holding that the IDEA requires that "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[96] Like *Rowley*, the Court in *Endrew* explicitly declined to provide a "bright-line rule" or "to elaborate on what 'appropriate' progress will look like from case to case."[97] Instead, the Court explained that deference should be given to the "expertise and exercise of judgment by school authorities."[98]

At first glance, the *Endrew* standard seemed to have raised the "floor" established in *Rowley*, and would be advantageous for restraint and seclusion plaintiffs. However, like *Rowley*, *Endrew* never articulated a definitive test for the adequacy of educational benefit nor did the Court elaborate on "what 'appropriate' progress will look like from case to case."[99] The lack of clarity provides little guarantee as to how any particular IDEA challenge might turn

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[90] *See* Endrew F. v. Douglas Cnty. Sch. Dist., 137 S. Ct. 988 (2017).

[91] *Id.* at 992.

[92] *Id.* at 999.

[93] *Id.* at 996–97.

[94] *Id*.

[95] *Id.* at 997.

[96] *Id.* at 991.

[97] *Id.* at 1001.

[98] *Id*.

[99] *Id*.

out. The implication of the *Endrew* holding on restraint and seclusion cases could mean that school authorities will be given deference whenever there is a dispute on the appropriateness of restraint and seclusion interventions. It is pertinent to note that the *Endrew* standard retained the factor of "reasonableness" in the language of its holding. Limited restraint and seclusion case law applying the *Endrew* standard[100] casts uncertainty as to whether evidence such as empirical data or expert testimony on the adverse effects of restraint and seclusion may tip the scale in plaintiff's favor in terms of reasonableness. The degree of deference to be given to school authorities on the question of appropriateness remains to be the biggest hurdle for plaintiffs if they want to challenge the FAPE requirements. A foreseeable argument by school authorities could very well be that in light of the student's propensity of aggressive behavioral outbursts, the school has no choice but to use physical restraints to maintain classroom order.[101] Since restraint and seclusion misuses do not always result in a complete lack of educational progress, the school would conclude that the amount of progress nevertheless was indeed "appropriate" in light of the child's circumstances.

D. Failed Implementation of Individual Education Plan (IEP)

As reflected in the caselaw, many circuits have concluded that the substantive right described in *Rowley* was not so robust after all.[102] This is because *Rowley* expressly declined to "establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act."[103] As illustrated by the cases previously discussed, litigants have been largely unsuccessful in overcoming the substantive threshold to allege a viable FAPE violation claim in their restraint and seclusion cases. Over the years, various circuits attempted to define the parameters of a standard within the meaning of *Rowley's* decision, but this result in major inconsistencies amongst the various jurisdictions.

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[100] *See* McCarthy v. Scottsdale Unified Sch. Dist. No. 48, 409 F. Supp. 3d 789, 801 (D. Ariz. 2019). The District of Arizona cited once to *Endrew* in its discussion of the background law, but did not adjudicate plaintiff's denial of FAPE claim by applying the *Endrew* standard because the plaintiff failed to exhaust administrative remedies. *See* Emma C. v. Torlakson, 2018 U.S. Dist. LEXIS 141094 (N.D. Cal. 2018). The Court cited to *Endrew* in its discussion about the requirements of individualized education programs ("IEPs") under the meaning of IDEA, "the plan must be 'tailored to the unique needs' of each child and crafted in manner consistent with the procedural requirements described in the government statute and regulators." *Id.* at 25. However, the central legal inquiry was whether the state collects enough data to evaluate whether school districts are the IEPs. Once again, the *Endrew* standard was not directly applied to evaluate the substantive requirement of FAPE.

[101] *See generally* Parrish v. Bentonville Sch. Dist., No. 5:15-CV-05083, 2017 U.S. Dist. LEXIS 41149 (W.D. Ark. 2017) (This case is an example where the court accepted the school's argument that it had no choice but to use physical restraints to control the student's behavior).

[102] L.J. v. Sch. Bd., 927 F.3d 1023, 1210 (11th Cir. 2019).

[103] *Rowley*, 458 U.S. 176 at 202.

As an alternative to the substantive FAPE denial or inadequacy argument, some litigants tested an alternative approach, framing their arguments against the use of specific restraint and seclusion techniques as a failure to implement IEPs.[104] Restraint and seclusion techniques are sometimes expressly included in a student's IEP as the "last-resort," emergency behavioral management tactics.[105] In circumstances in which the administration of restraint and seclusion techniques falls outside of the parameters set out in the student's IEP, litigants may construct their allegations as an IEP implementation failure. An examination of the IEP implementation jurisprudence could be instructive for the restraint and seclusion application.

As some scholars point out, IEP implementation could be considered the "third dimension" that emerged after the procedural and substantive dimensions of FAPE established in *Rowley*.[106] This third dimension of FAPE is thought to have "largely escaped analysis in the legal literature" and was not addressed in *Rowley*, but has become increasingly prominent in recent years.[107]

1. The Benefit-Based Approach

On the issue of when courts may conclude that a school has failed to properly implement the IEP, the Fifth Circuit articulated a two-step benefit-based approach in *Houston Independent School District v. Bobby R.*[108] The *Bobby R*. court held that, first, "a party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP."[109] Second, the party must show that the student had received more than a trivial benefit from the IEP.[110]

The Fifth Circuit in a subsequent decision, *Houston Independent School District v. V.P. ex rel. Juan P.*, applied this two-step test and reached the conclusion that the school in that case failed both the implement prong and the benefit prong of the analysis.[111] In the *V.P. ex rel. Juan P.* analysis,

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[104] *See generally* A.T. v. Baldo, No. 18-16366, 2019 U.S. App. LEXIS 38325 (9th Cir. 2019). *See also* Payne v. Peninsula Sch. Dist., 653 F.3d 863 (9th Cir. 2010).

[105] See generally CJN v. Minneapolis Pub. Sch., 323 F.3d 630 (8th Cir 2003).

[106] Perry A. Zirkel & Edward T. Bauer, *The Third Dimension of FAPE under the IDEA: IEP Implementation*, 36 J. OF THE NAT'L ASS'N OF ADMIN. L. JUD. 409, 411 (2016).

[107] *Id.* at 412.

[108] *See* Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 (5th Cir. 2000).

[109] *Id.* at 348–49 (citing Gillette v. Fairland Bd. of Educ., 725 F. Supp. 343 (S.D. Ohio 1989)).

[110] *Id.* 349–350.

[111] Houston Indep. Sch. Dist.v. V.P. ex rel. Juan P., 582 F.3d 576, 587–88 (5th Cir. 2009).

however, the Fifth Circuit stressed the relevance of an inquiry to "educational benefit" in its analysis of the implementation prong of the test.[112] In particular, the court explained that, in determining if a school has failed to implement "substantial or significant" provisions of the IEP, the question to consider is whether the student derived an education benefit from the services set out in the IEP.[113]

Subsequent to these Fifth Circuit decisions, the Third Circuit and the Fourth Circuit also adopted this two-part approach in other failure-to-implement cases, finding the overall educational benefit as determinative of this test from *Bobbi R.*[114] Specifically, the Third Circuit has cited to *Bobbi R.* to explain that, for a plaintiff to prevail on a failure-to-implement IEP claim, the plaintiff must show "that the school failed to implement substantial or significant provisions of the IEP, as opposed to a mere *de minimis* failure, such that the disabled child was denied a meaningful educational benefit."[115]

This intertwined two-part implementation test is problematic in its interpretation and application. Though textually the implementation prong of this test appears to be a procedural or quantitative inquiry into the implementation of the IEP, the Fifth Circuit effectively reduced the test to a one-step, substantive *Rowley* inquiry into educational benefit. Certainly, in the context of restraint and seclusion cases, this test will be detrimental to the argument of improper use of restraint and seclusion as an IEP implementation failure. The construct of this test will squash this argument because behavioral intervention is usually one of many components of a student's IEP and the restraint and seclusion provision rarely takes up a substantial portion in the contents of a particular student's IEP. If ultimately the *Rowley* standard would apply in an implementation inquiry, a plaintiff's implementation argument will likely fail because one will find some educational benefit in a student's comprehensive IEP, despite a variance in the implementation of the behavioral component of the student's IEP. Therefore, restraint and seclusion litigants likely cannot rely on this Fifth Circuit two-part test for their IEP implementation argument.

2. The Material Failure Approach

In *Van Duyn ex rel. Van Duyn v. Baker School District*, the Ninth Circuit considered the "substantial or significant" standard of *Bobby R.*, but articulated a one-step test where proofing a denial of educational benefit is

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[112] *Id.* at 587.

[113] *Id*.

[114] *Melissa S*., 183 F. Appx. at 187; O.S. v. Fairfax City. Sch. Bd., 804 F.3d 354, 360–61 (4th Cir. 2015); Sumter City. Sch. Dist. 17 v. Heffernan, 642 F.3d 478, 484–86 (4th Cir. 2011).

[115] *Melissa S*., 183 F. Appx. at 187 (citing Bobby R., 200 F.3d at 349).

not required.[116] The plaintiff in *Van Duyn* alleged that the school district failed to implement a key portion of his IEP and thereby deprived him of FAPE by the IDEA.[117] The factual records indicated variances in the school's implementation of the specificity of the IEP. For example, Van Duyn's IEP included a behavior management plan that was to be implemented full-time, yet the school failed to set up his daily schedule before starting each school day and his behavior was not consistently recorded on a behavior card, as outlined in his IEP.[118] While most IDEA cases challenge the formulation of an IEP, this Ninth Circuit case considered the failure to implement IEP as a violation of the IDEA.[119] Ultimately, the *Van Duyn* court held that "a *material failure* to implement an IEP violates the IDEA" and it further explained that "a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP."[120]

The Ninth Circuit conducted a heavily factual inquiry in its materiality analysis.[121] Plaintiff's implementation failure allegation ultimately failed in part because the court deemed the IEP as lacking clarity in its construct.[122] The court's logic was that an allegation of material failure of implementation could not prevail if the IEP itself contains ambiguity such that the school is not clearly instructed on how the IEP should be implemented. It is important to note that under the *Van Duyn*'s standard, the material failure in implementation relates largely to the extent of discrepancy in services, whereas under *Bobby R.*, the test for implementation failure hinges largely on which of the "substantial or significant provisions" of the IEP has the school failed to implement.

The *Van Duyn* materiality standard in implementation cases could be a promising approach in some restraint and seclusion cases, provided that the student's IEP was drafted with adequate specificities. In order to allege a material failure of IEP implementation, the court under *Van Duyn* would look for clear instructional definitions on behavioral management technique that the IEP outlines. The IDEA appears to offer procedural mechanism to protect students from the improper use of restraint and seclusion when the IEP explicitly prohibits such use. While courts typically do not interpret the

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[116] Van Duyn ex rel. Van Duyn v. Baker Sch. Dist., 502 F.3d 811 (9th Cir. 2007).

[117] *Id.* at 814.

[118] *Id.* at 816.

[119] *Id.* at 819.

[120] *Id.* at 822.

[121] *Id.* at 824.

[122] *Id.* (The court identified that the IEP was unclear in describing how certain behavioral interventions such as the daily behavior card, social stories and quiet room should be used in the elementary school. The court also pointed out some ambiguity on whether plaintiff's IEP requires schoolwork to be presented at his level.)

IEP as a contract, the *Van Duyn* decision confirms that the IDEA offers procedural protection against the material discrepancy of IEP implementation.[123] It is important to note that the case law applying the *Van Duyn* standard has largely been limited to unpublished court opinions that focus on failure to implement IEP generally. Failure to implement IEP in the context of restraint and seclusion would be somewhat of a pioneer argument and would be highly jurisdiction dependent.

E. Mootness in IDEA Claims

One important feature of IDEA is its administrative safeguards. The IDEA requires an aggrieved party to invoke a state's administrative procedures before seeking judicial remedies at a federal or state court.[124] To begin, a dissatisfied parent may file a complaint with the local or state educational agency.[125] The intention of this procedural requirement is to ensure that any dispute of a student with disabilities is first analyzed by an administrator with expertise who may promptly resolve the technical educational issues.[126] The purpose of this mechanism is to afford state and local agencies the first opportunity to conduct full exploration of the issues and to promote judicial efficiency. Hence, the doctrine of administrative exhaustion is a key procedural element for those seeking remedies under the IDEA.

While the administrative exhaustion requirement serves as a mechanism for efficient dispute resolution in the formation of an IEP, this doctrine at times creates a procedural hurdle for restraint and seclusion litigants. Like any other type of IDEA challenges, plaintiffs in restraint and seclusion cases must file their complaint administratively and exhaust all available remedies to resolve their concerns before they can access judicial remedies. The administrative exhaustion requirement could be a practical barrier for aggrieved restraint and seclusion plaintiffs, especially in the most outrageous cases where significant harm to the student ensued.

The Eighth Circuit case *C.N. v. Willmar Public School* illustrates how the administrative exhaustion doctrine creates a practical barrier in bringing a viable IDEA challenge.[127] C.N. was a third-grade student who was tested for Autism Spectrum Disorder, but diagnosed with communications disorder and attentional and hyperactivity problems.[128] She attended Willmar Public School and had an IEP created through the collaborative efforts of the IEP

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[123] *Id.* at 826.

[124] 20 U.S.C. § 1415(i)(2) (2018).

[125] 20 U.S.C. § 1415(b)(6) (2018).

[126] J.S. v. Attica Cent. Sch., 386 F.3d 107, 112 (2nd Cir. 2004).

[127] C.N. v. Wilmar Pub. Sch., 591 F.3d 624 (8th Cir. 2010).

[128] *Id.* at 627.

team. C.N.'s IEP included a behavioral intervention plan which authorized the use of restraint holds and seclusion "when C.N. exhibited various target behaviors" despite C.N.'s mother's objections.[129] The plaintiff alleged a violation of FAPE under the IDEA due to improper and overzealous use of seclusion and restraint techniques on C.N. The plaintiff also alleged mistreatments by school personnel, including the pulling C.N.'s hair, yelling and shouting to demean and belittle her, forcing C.N. to hold certain posture at a desk, and once denying her the use of a restroom, thereby causing an accident. The report also indicated that the special education teacher "choke[d] her and that the restraints hurt her very much."[130]

Given the despicable facts, C.N.'s parents felt that an immediate transfer was necessary for her physical and psychological safety. C.N. was subsequently transferred out of the District in Willmar and attended a different school within the District in Atwater, Minnesota.[131] C.N.'s parents did not request a due process hearing until after C.N. was transferred to her new school in Atwater. When they later filed the IDEA challenge against the school district in Willmar, the district court held, and the Eighth Circuit affirmed, that C.N. failed to exhaust available administrative remedies and hence C.N.'s IDEA claim was dismissed.[132]

The administrative remedies and the exhaustion doctrine in C.N. failed to account for situations where the aggrieved student and family may have a compelling reason to remove the student from their original school in order to avoid further exposure to gravely dangerous interventions. C.N.'s case was considered moot because the original school district was no longer responsible for complying with the IDEA's mandate on C.N.'s education. Instead, the new school district would assume such obligations. The Eighth Circuit relied on an earlier case within the jurisdiction, concluding that "[i]f a student changes school districts and does not request a due process hearing, his or her right to challenge prior educational services is not preserved."[133] In the absence of any judicial exceptions to the administrative exhaustion doctrine, restraint and seclusion litigants facing unsafe and ineffective behavioral interventions are precluded from seeking judicial remedies unless they file for an administrative hearing prior to the school transfer. As much of a safeguard as it is for facilitating direct and efficient educational disputes, this procedural feature of the IDEA appears to leave restraint and seclusion litigants a practical bind. Litigants must effectively choose between staying at the defendant school to preserve their right to access judicial remedies, or move to a potentially safer school environment and lose their chance to

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[129] *Id.* at 628.

[130] *Id.* at 627.

[131] *Id.* at 629.

[132] *Id.*

[133] Thompson v. Bd. of Spec. Sch. Dist., 144 F.3d 574, 579 (8th Cir. 1998).

further judicial access.

F. The Interplay between the IDEA and the Americans with Disability Acts (ADA) and Section 504 of the Rehabilitation Act

Restraint and seclusion litigants may opt for companion claims under the ADA or section 504 of the Rehabilitation Act.[134] The ADA and section 504 are anti-discrimination statutes that prohibit discrimination against children with disabilities.[135] In education, both the ADA and section 504 prohibit discrimination against an otherwise qualified disabled individual in public accommodations and any federally assisted programs, including all public schools and private schools receiving funding under the IDEA for educating children with disabilities.[136] The protection afforded by the ADA and section 504 in higher education is rather easy to understand because of its application to promote inclusive admissions. In the context of K-12 education, the ADA and section 504 ensure that children with disabilities are not excluded from access to appropriate education. Often, ADA and section 504 cases involve disputes between school districts and parents on the issue of permitting accommodation to enable participation in educational activities. Specifically, courts have interpreted section 504 as "demanding certain 'reasonable' modifications to existing practices in order to 'accommodate' persons with disabilities."[137]

Among students with disability-associated behaviors that substantially impedes their learning, the provision of appropriate behavioral interventions, such as Positive Behavioral Interventions and Supports (PBIS), is a form of accommodation under section 504.[138] Therefore, the failure to provide effective behavioral interventions to students with disability, by means of using harmful restraint and seclusion, is a violation of section 504.

In a sense, the negative prohibition against discrimination under section 504 and ADA seems to impose narrower obligations on schools than the IDEA which requires more affirmative crafting of an IEP according to its substantive requirements. Nevertheless, the protection for children with disabilities in education offered through the section 504/ADA and the IDEA overlap. The Supreme Court recently clarified that the ADA or section 504 are "separate vehicles," "no less integral than the IDEA for ensuring the rights of handicapped children."[139] The Court reiterated that the IDEA "does

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[134] *See* Fry v. Napolean Cmty. Sch., 137 S. Ct. 743, 752 (2017).

[135] 42 U.S.C. § 12101 et seq. (2009); 29 U.S.C. § 794 (2016).

[136] *See* 29 U.S.C. § 794(2)(A) (2016).

[137] *Fry*, 137 S. Ct. at 749 (citing Alexander v. Choate, 469 U.S. 287, 299-300 (1985)).

[138] 34 C.F.R. § 104.3(j)(2)(ii) (2017).

[139] *Id.* at 750.

not prevent a plaintiff from asserting claims under such laws even if . . . those claims allege the denial of an appropriate public education."[140]

In *Fry v. Napoleon Community Schools, et al.*, the Supreme Court confirmed that litigants are free to bring both an IDEA claim and a section 504/ADA claim together. However, one procedural caveat is that these section 504/ADA companion claims may also be subjected to the administrative exhaustion requirement like an ordinary IDEA[141] claim. In *Fry*, the plaintiff parents alleged that the school district refused to "reasonably accommodate" their daughter's use of a service animal, and therefore discriminated against their daughter as a person with disabilities in violation of both the ADA and section 504. The lower court dismissed the Fry's' ADA and section 504 claims, stating that they have failed to exhaust the IDEA's administrative procedures. The lower court's logic was that exhaustion must be satisfied whenever "the genesis and the manifestations" of the complained-of harms were "educational" in nature.[142] The Supreme Court in *Fry* explicitly rejected the lower court's interpretation of the exhaustion requirement for ADA and section 504 claims. Instead, the Court held that the requirement to exhaust IDEA remedies before seeking relief under the ADA or section 504 depends on whether the "gravamen of a complaint against a school concerns the denial of a FAPE."[143]

Denial of the "reasonable accommodation" to use a service animal was the crux of the *Fry* case. In *Fry*, the gravamen of the plaintiff's complaint did not concern the appropriateness of an educational program. Interestingly, the Court stressed that the "the 'substance' of, rather than the labels used in, the plaintiff's complaint" would be the guidepost to determine whether IDEA exhausting is necessary for ADA and section 504 claims.[144]

Applying the *Fry* holding to restraint and seclusion cases, the relevant question is whether plaintiffs' ADA and section 504 may inevitably be dismissed on the basis of failure to exhaust administrative remedies under IDEA. Typically, a plaintiff may frame their ADA and section 504 allegation for misuse of restraint and seclusion as acts and omissions of the conduct of the defendant which denied the plaintiff the benefits of a public education on the basis of plaintiff's disability. Since physical restraint and seclusion techniques withdraw and exclude a student from participating in their education and the techniques would otherwise not be deployed but for the student's disabilities, plaintiff may argue that this is a form of discrimination. Under *Fry's* holding, plaintiffs may be exempt from the IDEA exhausting requirement if their ADA and section 504 claim centers

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[140] *Id.*

[141] 20 U.S.C. § 1415(l) (2018); 34 C.F.R. § 104.3(j)(2)(ii) (2017).

[142] *Fry*, 137 S. Ct. at 752.

[143] *Id.* at 756.

[144] *Id.* at 755.

on the idea that restraint and seclusion misuse is a disability-based discrimination.

In *Fry*, the Court explicitly acknowledged that litigants could make a disability-based discrimination claim separate and distinct from issues that relate to FAPE obligation under the IDEA. The Court also recognized that a litigant may come to a "late-acquired awareness that the school had fulfilled its FAPE obligation and that the grievance involves something else entirely," and that this is considered "strategic calculations about how to maximize the prospects of such a remedy."[145] Therefore, the *Fry* opinion articulated that, when the ADA and section 504 claim is separate and distinct from an IDEA claim, plaintiffs are not bound by the IDEA exhaustion requirement nor are defective in pursuing the IDEA remedial process.

IV. RECOMMENDATIONS

Although FAPE denial is one of the most common allegation made by plaintiffs in restraint and seclusion cases, neither the *Rowley* standard and the subsequent *Endrew* decision provides a bright-line rule that addresses when an educational agency might have violated the substantial obligations under the IDEA when the misuse of restraint and seclusion causes an educational deprivation and injurious impact. Despite *Endrew's* clarification on the "appropriateness" standard, perhaps elevating the baseline requirements that many lower courts have chosen to adopt since *Rowley*, the assessment of adequacy of a student's IEP with respect to the choice of behavioral interventions remains highly deferential to school authorities. The Court in *Endrew* explicitly cautioned lower courts against taking the "absence of a bright-line rule" as "an invitation . . . to substitute their own notions of sound educational policy for those of the school authorities which they review."[146] The deference to school authorities advocated in *Endrew* is based on a heavy presumption that school authorities possess expertise and sound judgment in every aspect of education for students with a disability. Arguably, the inappropriate use of restraint and seclusion interventions is an indication of poor understanding and incompetency in student behavioral management. A high degree of deference to school authorities in this context would be inappropriate. If courts would ultimately defer to school authorities on the issue of "appropriate" educational progress or adequacy of IEP, this interpretation of IDEA would significantly constrain the substantive regulatory function of the IDEA.

On the contrary, the IDEA contains a robust procedural framework to facilitate educational program development and draws on a highly collaborative approach among educators, parents, and other related services

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[145] *Id.* at 757.

[146] *Endrew*, 137 S. Ct. at 1001.

professionals. This procedural framework may offer a more viable cause of action allowing restraint and seclusion plaintiffs to craft a "failure to implement IEP" allegation when the school fails to execute the parameters of behavioral interventions specified in the student's IEP. Certainly, this highlights the necessity of drafting an IEP with specificities, and the burden is on the parents. Some advocates recommend parents to include a "No Consent" Letter in the student's IEP as a way to heighten protection against the use of aversive techniques by school teachers and staff.[147] While jurisdictions are split in their evaluation of what constitutes material failure of IEP implementations, restraint and seclusion litigants may rely on this approach by making showings of material discrepancy in the student's IEP in those jurisdictions that adopt the Ninth Circuit's material approach.

In most cases, IDEA is not the only possible cause of action in restraint and constraint litigation. The ADA and section 504 of the Rehabilitation Act protect qualified individuals from discrimination by a public entity. To maintain a disability discrimination claim under these statutes, the plaintiff must show that the defendant school is deliberately indifferent to a harm to the plaintiff's protected right to equal access of public education and that the school failed to act upon the knowledge of this harm.[148] In other words, the plaintiff must show that the school knows that the inappropriate use of restraint and seclusion is a form of discrimination for reasons related to a student's disabilities, and nevertheless fails to employ effective measures to accommodate the student to participate in education. A true section 504 and ADA claim is doctrinally distinct from an IDEA claim which focuses on the IEP. In *Fry*, the Court discussed this distinction and clearly cautioned litigants that, if their underlying claim is an allegation of substantive violation of FAPE yet lacks the discriminatory intent required under section 504 and the ADA, they are subject to the administrative exhaustion requirement under the IDEA procedural provisions before judicial consideration of their section 504 and ADA claim.[149] Hence, litigants must be mindful that, although section 504 could be an alternative cause of action, the IDEA poses direct procedural implications if a plaintiff inevitably fails to prove that restraint and seclusion is a discriminatory conduct.

V. CONCLUSION

The misuse of restraint and seclusion of students with disabilities is an issue that demands a robust and systemic scheme of regulations. Aggrieved plaintiffs have turned to the IDEA for redress, but caselaw indicates that the

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[147] Courtney Hansen, *Why Your Child Needs a "No Consent" Letter for Restraint and Seclusion, Inclusion Evolution: Parents, Students, and Teachers' Guide to Inclusion* (Feb. 27, 2019), https://www.inclusionevolution.com/child-needs-no-consent-letter-restraint-seclusion/

[148] Duvall v. Cnty. of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001).

[149] *Fry*, 137 S. Ct. at 752.

IDEA has largely failed to function as a tool to sanction schools that deploy restraint and seclusion inappropriately. The substantive obligation required by the IDEA has been up for judicial interpretation and application since *Rowley*. The recent *Endrew* opinion provides some additional clarification on what might constitute an appropriate educational program within the meaning of FAPE, but the Court left major uncertainties as to how a school might nevertheless violate the guarantee of FAPE when the education program falls under the line of adequacy. In the context of restraint and seclusion misuse, the IDEA could theoretically be used as a sanction if plaintiffs could prove that using restraint and seclusion as a choice of behavioral intervention substantively deprives the student of a FAPE. The way many appellate courts have adjudicated FAPE claims in restraint and seclusion cases nevertheless suggests that the IDEA is ineffective to prosecute systemic flaws in educational practices. The purpose of IDEA has always been to focus on an individualized educational program, yet the abuse involved in restraint and seclusion cases calls for a level of reform far beyond individual students. While it is common for plaintiffs to file parallel claims under state torts and other codified state statutes regulating restraint and seclusion either directly or indirectly,[150] these causes of action at most redress plaintiffs after the fact, in the forms of compensatory damages and monetary settlements. Despite the challenges that litigants face, IDEA cases will likely continue to reach lower courts because parents of IDEA eligible students are motivated to file FAPE denial claims for tuition reimbursement if the student is ultimately transferred from a public school to a private school.

Children with disabilities in the United States are perpetually at risk of abusive restraint and seclusion. The physical and emotional trauma as a result of restraint and seclusion should never be part of a student's education experience. In light of the inadequate protection that existing disability and education legal frameworks provide, future effort should focus on policy advocacy to aim at a nation-wide abolishment of restraint and seclusions.

[150] *See generally* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 1, at 33–58; *see generally Kerri K.*, *supra* note 10.