

IN THE COURT OF APPEALS

STATE OF GEORGIA

DONALD LEE KING AND	)	
TINA MARIE KING,	)	
	)	COURT OF APPEALS
Appellants,	)	NO. A09A1567
	)	
vs.	)	
	)	
PIONEER REGIONAL EDUCATIONAL	)	
SERVICE AGENCY, <i>et. al.</i>	)	
	)	
Appellees,	)	

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MEMORANDUM OF LAW OF *AMICUS CURIAE*

COUNCIL OF PARENTS, ATTORNEYS AND ADVOCATES ("COPAA"), The  
ATLANTA LEGAL AID SOCIETY ("ALAS"), THE NATIONAL DISABILITY  
RIGHTS NETWORK ("NDRN") AND TASH

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TABLE OF CONTENTS

	Page
I. INTERESTS OF AMICUS CURIAE	1
COPAA	1
National Disability Rights Network ("NDRN")	4
TASH	5
Atlanta Legal Aid Society	6
II. INTRODUCTION AND SUMMARY OF ARGUMENT	7
III. DISCUSSION AND CITATION OF AUTHORITY	8
A. Jonathan Had Specific Protected Rights	8
B. Jonathan Was Confined By Defendants	11
1. The Facts Establish His Claim for Protection	11
2. The Section 1983 Standard was Misapplied	15

3.	State Education Law Establishes A Duty of Safety	20
C.	There is No Right to Use Locked Seclusions Rooms	22
D.	The State Educational Agency Has Duties to Children	23
E.	The State Failure to Regulate Seclusion Permitted Abuse	26
F.	Defendants Violation of Idea Support The Claims	27
G.	The Alpine Practice Of Confinement/Seclusion Was Extreme	28
	CONCLUSION	30
	APPENDIX OF AMICUS CURIAE	

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I. INTERESTS OF *AMICUS CURIAE*

*Amicus Curiae* file this brief in accordance with Rule 26 of the Georgia Court of Appeals. *Amicus Curaie* have not yet had the privilege of participating in this Court.

The Council of Parent Attorneys and Advocates (hereinafter "COPAA") is an independent, nonprofit organization of attorneys, advocates, and parents in 43 states and the District of Columbia who routinely advocate on behalf of students with disabilities in public schools. The primary goal of COPAA is to secure appropriate educational services for children with disabilities, echoing a Congressional finding that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1)(2004).

COPAA attorneys have participated in countless special education hearings and many cases concerning a child's mistreatment or unfortunate abuse or neglect in the school setting. COPAA has been *amicus curiae* in United States Supreme Court and Courts of Appeal including in *Forest Grove Sch. Dist. v. T.A.*, \_\_\_ U.S. \_\_\_, Case No. 08-305 (June 21, 2009); *Bd. of Education of New York v. Tom F.*, 552 U.S. 1 (2007); *Winkelman v. Parma City Sch. Dist.*, 550 U.S. \_\_\_, 127 S.Ct. 1994 (2006); *Arlington Cent. Sch. Dist. v. Murphy et al.*, 548 U.S. 291 (2006); and *Schaffer v. Weast*, 546 U.S. 49 (2005). COPAA has many attorney and parent members in Georgia.

COPAA focuses on providing training and resources to help each child obtain the free appropriate public education (FAPE) guaranteed by the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities in Education Improvement Act (collectively, "IDEA"), 20 U.S.C.A. §§ 1400 *et seq.* (West 2000 & Supp. 2006). COPAA brings to this Court the unique perspective of parents and advocates for children with disabilities and their first-hand experiences with the challenges faced by such children, whose success depends on the right to secure the FAPE promised by the IDEA. A key to this success is a safe educational environment based upon sound research-based principals of instruction and behavioral intervention.

COPAA also has a special interest borne by the concerns of parents of children with disabilities over the use and potential abuse of seclusion and restraint in public schools, including

isolated programs like Alpine. In June of 2008, after study and coordination with other organizations, COPAA adopted a "Declaration of Principles Opposing the Use of Restraints, Seclusion and Other Aversive Interventions Upon Children with Disabilities." APPENDIX EX. 1, <http://copaa.net/news/Declaration.html>. This has coincided with increased concerns throughout the United States and just completed Congressional hearings before the United States House of Representatives House Education and Labor Committee, May 19, 2009, "Examining the Abusive and Deadly Use of Seclusion and Restraint in Schools" <http://edlabor.house.gov/hearings/2009/05/examining-the-abusive-and-dead.shtml>, and a Report of the United States Government Accounting Office entitled "*Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers.*" See, <http://www.gao.gov/new.items/d09719t.pdf>. COPAA recently surveyed its members and identified one hundred eighty-five (185) reported incidents of aversive interventions in schools. In 71% of these reported incidents the child did not have a behavioral intervention plan containing research-based positive interventions, as required by Congress in IDEIA.

COPAA's "Declaration of Principles" is consistent with the literature as to the lack of evidence demonstrating effectiveness of restraint and seclusion and identifying the dangers it causes. COPAA urges safeguards including training of all persons on prevention and de-escalation strategies to reduce the misuse of seclusion, as well as standards that permit its use only in

emergency circumstances, lasting long enough only to ensure the immediate physical safety of the child and others, ensure prompt removal when the child has regained control and is no longer a danger, impose limits on construct of seclusion rooms, including fire and safety requirements and uninterrupted visual and aural observation supported by vigorous oversight and parental notice.

The National Disability Rights Network ("NDRN"), formerly the National Association of Protection and Advocacy Systems, is the non-profit membership association of protection and advocacy (P&A) agencies that are located in all 50 States, the District of Columbia, Puerto Rico, and the Territories. P&A agencies are authorized under various federal statutes to provide legal representation and advocacy services, and to investigate abuse and neglect of individuals with disabilities in a variety of settings. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. NDRN supports its members through the provision of training and technical assistance, legal support, and legislative advocacy and works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination. The P&A for the State of Georgia is a member of NDRN.

The P&As across the country have advocated on behalf of students and their families on education issues for over thirty years. They routinely represent or assist parents of children with

disabilities when a child has been subjected to abuse, neglect, and other mistreatment in schools. In January 2009 NDRN released a report, "School is Not Supposed to Hurt: Investigative Report on Abusive Restraint and Seclusion in Schools," to draw attention to the increasing numbers of children with disabilities facing injury and death due to abuse and neglect in school settings, including the use of restraint and seclusion. NDRN advocates for the elimination of abusive restraint and seclusion.

Over its 29 year history NDRN has an extensive history as *amicus curiae*. Recent examples include participation as *amicus curiae* before the United States Supreme Court in *Forest Grove School Dist. v. T.A.*, \_\_ U.S. \_\_, 2009 WL 1738644 (June 22, 2009); *Bd. of Education of New York v. Tom F.*, 552 U.S. 1 (2007); *Arlington Cent. Sch. Dist. v. Murphy, et al.*, 548 U.S. 291 (2006); *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2006); and *Clark v. Arizona*, 548 U.S. 735 (2006).

TASH is an international grassroots leader in advancing<sup>1</sup> inclusive communities through research, education and advocacy. Founded in 1975, as a volunteer-driven organization that advocates for human rights and inclusion for people with the most significant disabilities and support needs -- those most vulnerable to segregation, abuse, neglect and institutionalization. People with disabilities, by virtue of their disability, are often unable to speak out against abuses that would not be tolerated if they were

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<sup>1</sup> See, [http://copaa.net/pdf/UnsafeCOPAAMay\\_27\\_2009.pdf](http://copaa.net/pdf/UnsafeCOPAAMay_27_2009.pdf).

imposed on others or in more accessible or open environments. The inclusive practices TASH validates through research have been shown to improve outcomes for all people. TASH is particularly concerned about the use of restraint and seclusion in public schools, and advocates for the prevention of the use of such practices.

Atlanta Legal Aid Society is a Georgia non-profit law firm that assists poor persons in the five-county Metropolitan Atlanta area with their legal problems. Its TeamChild Project represents students with disabilities in public schools and provides self-help assistance to students and parents seeking appropriate educational services. TeamChild's mission is to ensure that the unmet medical, educational and mental health needs of Atlanta's low income youth are evaluated, identified and appropriately served in school tribunals, and in state and federal court.

ALAS's direct representation to students with disabilities focuses on securing a free, appropriate public education for the low income, disabled children of Atlanta. ALAS's interest in this case is to ensure that students with disabilities have a safe environment to receive their educational services, as ALAS has recognized that students with disabilities are uniquely vulnerable to use of seclusion which causes physical and emotional harm.

The need for overall school safety does not lessen the entitlement of a child with disabilities to properly administered positive behavioral interventions based on scientifically researched principles. Preventing the use of restraint and

seclusion is aligned within the larger context of fostering healthy school culture and overall school safety. Healthy schools maintain a climate of physical and emotional safety and trust that is crucial to learning and child development. Restraint and seclusion are practices that undermine all students' sense of safety and create the potential for unnecessary serious physical or psychological injury at the hands of those entrusted with their well-being. Procedures to keep all students safe, including those with the most serious behaviors, need to be embedded in a coherent system of graduated support that ensures the entitlement of a child with disabilities to appropriate instruction including safe, positive and effective behavioral interventions.

Amici respectfully urge the Court to consider the important issues related to the education and safety of children.

## II. INTRODUCTION AND SUMMARY OF ARGUMENT

The trial court dismissed claims arising from Jonathan's suicide by hanging in a barred seclusion cell at an isolated center for severely emotionally disordered students. During the fall of 2004 he was suspended from school and later hospitalized in a psychiatric facility. As a child with a disability, Jonathan's education was to be directed by an "individual education plan ("IEP") and a behavioral intervention plan ("BIP") and his "functional behavioral assessment, or "FBA," which evaluates the cause of his behaviors. He was to receive appropriate treatment.

Jonathan's death occurred while he was out of direct line of

sight of school staff after he was permitted to retain the rope belt given him by Defendant. Jonathan had calmed himself and asked to be let out. He stayed locked in a stark room as the policy of Defendants did not permit his release under these circumstances. He was denied the use of the bathroom and the staff member put in charge of his confinement was not informed of Jonathan's prior articulation of suicidal ideations. He was restrained from leaving.

Amicus Curiae address:

1. Jonathan's rights as a student to a safe educational setting and the Defendants' duty to keep him free from harm;
2. Georgia has not authorized the use of seclusion in public schools, making Defendants' practice illegal and *ultra vires*;
3. Jonathan's seclusion without safeguards was "confinement" and the creation of a known danger under 42 U.S.C. 1983;
4. Under IDEA and Georgia law, the State Defendants have clear legal responsibilities to Jonathan; and,
5. The seclusion practices were below the minimal standards of the professional and shocking in disregard of basic safeguards.

### III. DISCUSSION AND CITATION OF AUTHORITY

#### A. Jonathan Had Specific Protected Rights

IDEIA 2004, and O.C.G.A. § 20-2-152 and GaDOE R. & Reg. §§ 160-4-7-.01-.22 (2007), grant rights and create duties. Jonathan had a right to a free appropriate public education. 20 U.S.C. § 1401(9) (2004); 34 C.F.R. § 300.17 (2006); GaDOE R. & Reg. § 140-4-

7-.02 (2007). See *Rowley v. Hendrick Hudson Cent. Sch. Dist.*, 458 U.S. 176, 203 (1982)<sup>2</sup>. There is a related right to the "least restrictive educational environment." 20 U.S.C. § 1412(a)(5), 34 C.F.R. §§ 300.114-300.116 (2006); GaDOE § 160-4-7-.07(2007). See *Greer v. Rome City Sch. Dist.*, 950 F.2d 688(11<sup>th</sup> Cir. 1991).

"The fundamental objective of the IDEA is to empower disabled children to reach their fullest potential by providing a free education tailored to meet their individual needs." *Cory D. v. Burke Cty Sch. Dist.*, 285 F. 3d. 1294 (11<sup>th</sup> Cir. 2002). These rights are interpreted by "[t]he goals of IDEA [which] include 'ensur[ing] that all children with disabilities have available to them a free appropriate public education' and 'ensur[ing] that the rights of children with disabilities and parents of such children are protected.'" *Winkelman v. Parma Cty Sch. Dist.*, 550 U.S. 516, 523 (2005). In providing these rights "Congress placed every bit as much emphasis upon compliance with procedures giving parents ... a large measure of participation at every stage of the administrative process, ... as it did upon the measurement of the resulting IEP against a substantive standard." *Rowley*, at 205-206.

IDEA "imposes significant requirements to be followed in the

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<sup>2</sup> The jurisprudence of this Court has very little special education law. Contests concerning these services arise in hearings held by GaDOE pursuant to 20 U.S.C. § 1415(c)(2) and (f) (2004) and GaDOE R. & Reg. § 160-4-7-.12 (2007). One can then bring cases to state or federal court. 20 U.S.C. § 1415(i)(2). In Georgia this is almost always federal court, as when parents have filed in Georgia's courts, GaDOE and the LEAS have removed.

discharge of that responsibility." *Schaffer*, 126 S.Ct. at 531, quoting, *Rowley*, at 183. "Parents and guardians play a significant role in the IEP process." *Schaffer*, at 532. The parent must be a member of any team that makes any educational decisions. GaDOE R. & Reg. § 16-4-7-.06(5) (2007). "[E]ach public agency" must "obtain informed parental consent." GaDOE R. & Reg. § 16-4-7-.09(6) (2007).

This requires:

[t]he parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity . . . .

34 C.F.R. § 300.9(a) and (b) (2006). Parents receive "Prior Written Notice" ("PWN") before agencies change the program. GaDOE R. & Reg. § 16-4-7-.09(5) (2007). PWN must include a complete description of the proposed action, an explanation "why," and a description of all the "other factors." GaDOE R. & Reg. § 16-4-7-.09(5) (b) (2007).

IDEA protects the placement decision by requiring it be in the LRE, as close to home or his home school and:

(D) In selecting the LRE, *consideration is given to any potential harm or effect on the child or on the quality of services that he or she needs.*

34 C.F.R. §§ 300.116 (2006) (emphasis supplied); GaDOE R. & Reg. § 16-4-7-.07(2) (d) (2007). This, coupling with informed consent,

requires full disclosure, including the change in Alpine policy eliminating many of the safeguards, as parents may withdraw consent. Children with adverse behaviors should have an "FBA," GaDOE R. & Reg. § 160-4-7.21(20) (2007), to allow the "BIP" to treat with "positive behavior interventions." § 160-4-7.21(7) (2007).

#### B. Jonathan Was Confined By Defendants

The trial court dismissed Pioneer and its Alpine Center concluding that there was no special relationship to Jonathan under § 1983 and therefore no duty to protect him. (R146, Order 1, pp. 4-7. 8). It rejected the analogy to involuntarily commitment but failed to properly analyze the duty of a school which secludes the disabled child. Though some courts have held that compulsory attendance laws by themselves do not create special relationships, Jonathan was not free to walk away from his educational placement due to the interplay of Georgia's laws, his placement at Alpine under the special education laws, and his disability. The place to start is the admission by the Alpine administrator in comparing the seclusion room to a jail cell, who testified that they were "both confining." (Baghose Depo., p. 26, LL12-20).

##### 1. The Facts Establish His Claim for Protection

On September 16, 2004, a meeting was held as Jonathan's behaviors had "escalated so intensely and frequently that he "went well beyond" the provisions of his behavioral contract with his aggressive behaviors. Defendants increased his time at Alpine and discussed whether residential treatment in a state facility was

necessary. APPENDIX, NO. 7.

The seclusion room (or cell) was approximately 8x8 with a small door window approximately 5' off the ground, mostly covered by a piece of cardboard. There was a metal grating on the back of the window restricting observation. (Stover Depo., pp. 140-141.) A metal bar locked students in the room. (Baghose Depo., p. 25, L5-8). There was no toilet or water and a student needing to use the restroom had to be let released. (*Id.*, p. 25, L21; p. 66, L3.)<sup>3</sup>

Jonathan spent time at Charter Peachford<sup>4</sup>, a child psychiatric hospital, and he had been suspended from school for his behaviors. (E.g., Henning Depo., pp. 7-9.) An Alpine administrator observing his behavior on the October 26<sup>th</sup> and 27<sup>th</sup> called it "extreme," but discounted it as a "bid for attention." (Baghose Depo., p. 162). On October 26, 2004, he wrapped the hem of his shirt around his

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<sup>3</sup> The record has photographs of this cell. Plaintiffs filed a summary of Jonathan's seclusion from September 20, 2004 through his death on November 15, 2004. See, Exhibit B filed as APPENDIX 8. He was often locked in many times a day for nineteen (19) of the twenty-nine (29) days of school. The calculated daily average was 88.6 minutes or about 1 ½ hours. On 10/27/2004 he was locked in from 9:30 a.m. until 5:20 p.m., or 470 minutes. Records show that he was threatening to kill himself, that he was digging in his ear until it bled, that he said he was claustrophobic and screamed the walls were caving in, that he was saying he was going to break his arms off and beat himself with them to get out. *Id.* He often called for help. On 9/26/2004 he had to soil himself in the room. On 10/26/2004 he induced himself to vomit asking for help and to be let out. On the 26<sup>th</sup>, he was locked in from 9:40 a.m. to 12:30 p.m., and returned at 1:00 until 5:20 p.m. At other times, he was kept in the cell even though he was sitting quietly. *Id.*

<sup>4</sup> Its seclusion is strictly regulated by Georgia DHR rules.

neck while in the seclusion room. (Stover Depo., pp. 91-93.)

Defendants changed their time-out policies after placement was made and Plaintiffs were not aware of the change.<sup>5</sup> These included the deadly changes of allowing doors to be locked, the elimination of continuous monitoring to 15 minute intervals and of the requirement that the staff be in the room with the student, elimination limitations on the duration of confinement and of

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<sup>5</sup> One Parent testified:

Q Do you ever recall time-out---excuse me, let me try again. Do you ever recall Jonathan's placement in time-out ever being discussed with you by the Alpine officials?

A No.

Q What about at a meeting, at an IEP meeting, do you recall discussions about the use of time-out as an intervention form?

A I remember them talking about the use of a time-out room, but there was no discussion of often he went to the time-out room or how long he stayed in the time-out room or any of that kind of discussion.

T. King, Depo., p.173, LL8-18.

On the Parent's notice and ability to protect Jonathan:

Q Did she tell you anything about him wrapping pieces of the shirt around his neck?

A No.

Q That was not told to you?

A That was not told to me.

Q Did you see pieces of his shirt on the floor of the time-out room?

A I didn't look inside the time-out room. She opened the door and he came out and then she discussed his shirt being torn and that he had done it that day in the time-out room.

T. King, Depo., p.176, L15-25.

continuous auditory monitoring. Mr. Trotter, who placed and retained Jonathan in the seclusion room, testified by affidavit and deposition. Administrators testified that he had been trained on the seclusion room, (Dover Depo., pp. 68-75), but he swore that he had no such training. (Trotter Aff., ¶ 6, Trotter Depo., pp. 43-44). In training on November 10, 2004, he was told he would not be going into psychoeducational settings. (Trotter Aff., ¶ 3).

On Trotter's second work day, November 15, 2004, Jonathan was given a rope by staff to tie his pants up. (*Id.*, ¶ 7). When problems arose with other students, Trotter took him back to his class, but a fight broke out and Trotter decided to use seclusion. (*Id.*, ¶ 8).<sup>6</sup> He testified that "Jonathan became calm immediately after I took him out of the classroom." (*Id.*, ¶ 9). He was calm when placed in the seclusion room. (*Id.*, 10). Staff decided Jonathan would retain the rope belt when he was locked the child in the seclusion cell. (*Id.*, ¶ 11). Trotter had not been told about "any history of suicidal threats, gestures or self harm," and if he had known, he "would never have allowed Jonathan to keep the makeshift belt." (*Id.*, ¶ 11). The "extremely small window" had paper over it making it "almost impossible to see into the room," and it had a "grate covering it from the inside." (*Id.*, ¶ 12). After a few minutes, Jonathan said he was calm and promised to behave but was not let out as the 15 minutes had not expired. He became anger when kept inside, and then calmed and again asked to be let out. This

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<sup>6</sup> For convenience Mr. Trotter's affidavit is attached.

was denied again as it was not 15 minutes. (*Id.*, ¶ 13). He was only observed on the 15 minute intervals, as Trotter understood this to be the policy based on the logs. (*Id.*, ¶ 14). Jonathan then grew quiet and Trotter unable to see in, pushed open the door and to find Jonathan had hung himself with the rope. (*Id.*, ¶ 15). This creates fact questions on seclusion's danger. On causation:

- Q. If Jonathan ... had been subjected to continuous monitoring in the time-out room on November 15, 2004, would he have had an opportunity to hang himself?
- A. Had someone been watching him without taking their eyes off of him the entire time, he probably would not have been successful.

Stover Depo., pp. 205-06. Defendants created the risk of harm which was a legal cause of Jonathan's death.

## 2. The Section 1983 Standard was Misapplied

The trial court ruled that Plaintiff could not satisfy the threshold requirement for a constitutional tort because she could not establish that Defendants owed any due process duty to Jonathan. It effectively establishes a *per se* rule: because school children are not in the full custody of government officials, in the same sense as prisoners or committed patients, they deserve no substantive due process protection against physical harm.

The law is not so forbidding. The 11<sup>th</sup> Circuit's rule is that "[c]ompulsory school attendance laws alone are not a 'restraint of personal liberty' sufficient to give rise to an affirmative duty of

protection.” *Wyke v. Polk Cty. Sch. Bd.*, 129 F.3d 560, 569 (11<sup>th</sup> Cir. 1997) (citations omitted) (emphasis supplied). Thus in *Wyke*, school officials could not be held constitutionally responsible for a child’s suicide in his own home, even though they were aware of his suicidal tendencies and did not share them with his parents.

But *Wyke* is also not the last word. See *Hasenpus v. LaJeunesse*, 175 F.3d 168, 172 (1<sup>st</sup> Cir. 1999) (rejecting a bright line analysis that would insulate school officials from duty to protect student safety); see also *Safford Unif. Sch. Dist. #1 v. Redding*, \_\_ U.S. \_\_ [No. 08-479, June 25, 2009] (substantive due process duty to avoid unnecessary strip search of student).

This case involves much more than Jonathan’s forced attendance at school, as it satisfies two separate tests, each requiring a finding that Defendants had a constitutional duty to protect him against his suicide. First, his confinement against his will in a seclusion room satisfies the requisite Supreme Court standard:

[W]hen the State takes a person into its custody and holds him against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. ... The rationale for this principle is simple enough: 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. ... In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf -- through incarceration, institutionalization, or other similar restraint of personal liberty -- which is the "deprivation of liberty" triggering the protections of the Due Process Clause.

*DeShaney v. Winnebago Cty. Dept. of Soc. Sers.*, 489 U.S. 189, 200-01 (1989) (citations omitted) (emphasis supplied). The *DeShaney* Court's inclusion of "other similar restraint of personal liberty" shows that institutionalization is not the only confinement that may give rise to a constitutional duty of protection. Here, Jonathan's teachers took away his liberty by consigning him to seclusion; and deprived him of his "reasonable safety" by failing to guard against his suicide risk. Jonathan was locked up indefinitely, and could not leave, or eat or drink or urinate humanely. He was not being instructed, nor observed. He was in a barred room for long periods of time, without emergency need. Past

events illustration the nature of this confinement: defecating on himself, begging for release, wrapping cloth around his neck, screaming after being left inclusion, threats of self-harm.

Defendants argue that Jonathan was not confined, as a matter of law, because he could improve his behavior, as they say he held the "keys" to the jail in his own pocket. But Jonathan had no ability to unlock the seclusion cell. On the day in question he was confined against his will. As Defendants implicitly recognize, a fact-specific inquiry is required to determine "custody" -- whether a person has been deprived of liberty for constitutional purposes. See *Miller v. City of Phila.*, 174 F.3d 368, 375 (3d Cir. 1999). This inquiry "requires a court to consider the circumstances surrounding the [events] and then determine whether a reasonable person would have felt at liberty to leave." *Yarborough v. Alvarado*, 541 U.S. 652, 659 (2004) (considering whether accused was "in custody" during interrogation, for purposes of Miranda warnings.) Jonathan reasonably believed that he could not escape time-out, whatever theoretical freedom he had to run from school. The reality was he was locked into seclusion. School authorities had shown him their power as they confined him 19 out of 29 days. In one two-day stretch, he was locked in seclusion for 15 hours.

The reasonable person test also necessarily takes into account any special disabilities of the hypothetical person. Jonathan was a child. He had a behavioral impairment. By definition, he was removed to Alpine and once there secluded, as according to

Defendants, he was unable to control his behavior. In short, Jonathan could have believed and reasonably did believe that he had no choice but to obey his teachers' confinement orders and stay in the locked time-out cell, cut off from outside sympathy, and assistance. The reports of his crying for release and his threats of harm surrounding these requests make this clear. If he ran or resisted, he would be pursued, only earning yet more seclusion.

Additionally, custody is not the only way a state may create a substantive due process duty to protect. "[A] plaintiff may also show a duty on the state's part under Sec. 1983 by establishing that the plaintiff, as opposed to the general public, faced a special danger." *Cornelius v. Highland Lake*, 880 F.2d 348, 354 (11<sup>th</sup> Cir. 1989). A substantive due process "special relationship" does not require that the victim be confined as the inquiry is practical, looking at all the circumstances. A "special relationship" is created if the state increases the physical risk, whether directly, or indirectly by depriving a plaintiff of opportunity to protect himself or herself. *DeShaney*, at 201 ("[D]id it do anything to render him any more vulnerable[?]"). See *Estate of Smith v. Marasco*, 318 F.3d 497, 506-510 (3<sup>rd</sup> Cir. 2003).

Circumscribing physical movement obviously is one element of this "special relationship" calculus -- even if restrictions on movement fall short of custody. In *Cornelius*, for example, a city worker was required by her job duties to remain at city hall, near dangerous work-release inmates who then assaulted her. Yet, city

officials offered assurances that workers and residents were in no danger. Similarly here, teachers used their disciplinary and supervisory powers to segregate Jonathan in a place well suited to suicide by hanging and offered his family similar assurances.

Defendants increased Jonathan's risk of harm in other ways. Literally, they gave him the rope to hang himself in the face of recent suicide threats. They rejected the opportunity to take it away before putting him in seclusion. They placed him in isolation, with two consequences. First, he was cut off from all outside resources, heightening his sense of personal isolation and his suicidal feelings. Second, his isolation offered him the perfect opportunity to commit suicide, because no one was looking on. The school authorities kept no watch but left him alone behind the papered-over window. Defendants practice was to use this confinement to remove support and it subjected him to a known risk of harm. They had a constitutional duty to protect Jonathan.

### 3. State Education Law Establishes A Duty of Safety

O.C.G.A. § 20-2-690.1 requires compulsory attendance which sets criminal penalties. O.C.G.A. §§ 20-2-695 and 20-2-698 allow attendance officers to take custody of children who are not in school and O.C.G.A. § 20-2-699 empowers them to deliver the child who is absent back to the school. "Walking away" in Georgia is a criminal offense for parent and child. When O.C.G.A. § 20-2-731-732 which permits corporal punishment was passed in 1964 it contained a statement of purpose finding that teachers were in "*in loco*

*parentis*" with students at school. "As this statement of purpose makes clear in 1964 a teacher was deemed by the General Assembly to be serving '*in loco parentis*.' This statement further describes pupils as being in the 'care' of teachers. In this sense, teachers were thought to be caretakers in 1965 when the legislator enacted the Abuse Reporting Act." 1987 Ga. Opp. Atty. Gen. 67, 1987 WL 119588 (Ga. A.G.).<sup>7</sup> Since that opinion, O.C.G.A. § 20-2-215 makes aids and para-professionals, such as used at Alpine, "*in loco parentis*." This status further defines the educational environment. Next Georgia law requires local boards have disciplinary codes for student's behavior and enforce them. O.C.G.A. §§ 20-2-741, 750. O.C.G.A. § 20-2-738 gives teachers the authority to remove students "where the student's behavior is in violation of the student code of conduct." § 20-2-738(b). O.C.G.A. § 20-2-751.1 provides expulsion for bringing a weapon to school. O.C.G.A. § 20-2-766.1 provides for referral of parents to juvenile court for failing to take steps to improve a child's behavior. O.C.G.A. § 20-2-751.7 provides a process protecting students so they can report abuse by teachers and school employees to the Professional Standards Commission. The "Georgia Bullying Law" at O.C.G.A. § 20-2-751.4 requires policies which prohibit bullying by other students. School systems which fail in compliance are subject to loss of state funding under O.C.G.A. §§ 20-2-161 and 20-2-260. *Id.* These

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<sup>7</sup> This opinion of the Attorney General addressed whether O.C.G.A. § 19-7-5, enacted in 1965, allowed the investigation of teachers as caretakers for abusing students in school.

taken together meet the *DeShaney* standard of confinement, especially when applied to an isolated center where locked seclusion is part of the program.

C. There is No Right to Use Locked Seclusions Rooms

A fundamental question that must be answered is whether there is any source of law that allows Pioneer/Alpine and GaDOE to lock children in bare rooms in isolated centers for undefined periods of time in the absence of exigent circumstances. One day just before his suicide, Jonathan went to school in the morning, only to be locked in until 5:20 p.m. CITE, Ex. B, APPENDIX 8.

At its core, Georgia law has not given these psychoeducational centers any statutory or regulatory authority to use restraint or seclusion, or to develop programs using such practices. Defendant GaDOE has passed no rule other than the GNET enabling regulation at GaDOE R. & Reg. § 160-4-7-.15 (2007), despite § 160-4-7-.15(3)(a)(1) requiring it to regulate.<sup>8</sup> This is not a gap but the absence of power to seclude. There is no legal authority for Defendants to seclude.<sup>9</sup>

In Georgia, where government utilizes seclusion, the Georgia General Assembly has enabled it, see, O.C.G.A. § 37-3-165 (mistreatment and use of physical restraint in mental health

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<sup>8</sup> The former psychoeducational center rule was at GaDOE R. & Reg. § 160-4-7-.21 (2000). APPENDIX, NO. 9.

<sup>9</sup> Amici do not address the emergency situation when children are imminently dangerous to themselves or others. Such a use is within COPAA and other guidelines to maintain a safe environment.

facilities); O.C.G.A. § 37-4-124 (mistreatment and use of restraint and seclusion in habilitation); O.C.G.A. § 37-7-165 (mistreatment and use of physical restraints and seclusion in drug and alcohol facilities); and, O.C.G.A. § 31-8-109 (nursing home patients rights, including restraints, isolations or other restrictions on mobility), and the supervising agency has regulated it. E.g., GaDHR R. & Reg. §§ 290-4-2-.25; 290-4-2-.26; 290-4-4.07; 290-4-6-.03; 290-4-9-.02; 290-9-37.19. In permitting seclusion, these all set safeguards on its use. Sister states have enabling provisions and safeguards in the educational code. E.g., Tenn. Code Ann. §§ 49-1-1301-1306 (2009). In Tennessee, Alpine's seclusion is illegal. *Id.*

The RESA and Alpine Center must teach the rule of law, and in turn, must operate under it. What they have not been permitted to do is seclude or confine, as that is beyond their lawful authority.

#### D. The State Educational Agency Has Duties to Children

The State argument that it has no duty to children with disabilities is an issue this Defendant has lost many times. IDEA defines the State, 20 U.S.C. § 1401(32), and expressly abrogates its sovereign immunity, 20 U.S.C. § 1403, recognizing that states may be sued for their failures to children with disabilities. GaDOE R. & Reg. § 160-4-7.21(20) (2007) makes GaDOE "primarily responsible for the supervision" of schools. Essential to the operation of IDEA is the hierarchy of agency responsibility which is implemented through "cooperative federalism," *Schaffer*, 126 S.Ct. at 531; *GARC v. McDaniel*, 716 F.2d 1565, 1569 (11<sup>th</sup> Cir. 1983), and the provision

of "single agency responsibility." Contrary to GaDOE's contentions IDEIA unequivocally provides that "[e]ach state ... shall:

ensure that any State rules, regulations, and policies relating to this chapter conform to the purposes of this chapter ...

20 U.S.C. § 1407(a) (2004). IDEIA places a duty on GaDOE to have "in effect policies and procedures to ensure that the State meets each of the following conditions: ... a free appropriate public education, ... individualized education plans, least restrictive environment, ... [and] procedural safeguards. 20 U.S.C. § 1412(A)(1)-(6) (2004). In general,

IDEA delegates supervisory authority to the SEA, which is responsible for .... setting up policies and procedures to ensure local compliance with IDEA and filling in for the LEA by providing services directly to students in need when the LEA is either unable or unwilling to establish and maintain programs in compliance with IDEA.

*Gadsby by Gadsby v. Grasmick*, 109 F.3d 940, 943 (4<sup>th</sup> Cir. 1997). "[T]he legislative history indicates that § 1412(6) was included in the statute to 'ensure a single line of responsibility with regard to the education of handicapped children.' S. Rep. No. 94-168, at 24 (1975)." *Id.* at 944.

This report states further that while

different agencies may deliver services under IDEA, 'the responsibility must remain an essential agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency.'

*Gadsby*, at 944, citing, S. Rep. No. 94-168. Accord, *St. Tammany Parish Sch. Bd. v. St. of Louisiana*, 142 F.3d 776, 783-84 (5<sup>th</sup> Cir. 1988). *Todd D. by Robert D. v. Andrews*, 933 F.2d 1576, 1583 (11<sup>th</sup> Cir. 1991) held the GaDOE liable for the supervision and provision of special education to students with severe emotional impairments. This included children in need of a "regional or State center designed to meet the needs of such children." *Id.* at 1582.

In *Todd D.* the issue was the failure GaDOE to enforce its duty to implement "cooperative agreements" among various state agencies to assure that services were available. In *GARC v. McDaniel*, 716 F.2d 1565 (11<sup>th</sup> Cir. 1983) liability was found against GaDOE for failure to consider year-around services for children. It had failed to regulate and had issued decisions against such services, allowing the federal court to conclude that it had implemented an illegal policy. *Helms v. McDaniel*, 657 F.2d 800 (5<sup>th</sup> Cir. 1981, Unit B) the held the Georgia Board liable for breach of the IDEA due process procedures. Other courts have imposed liability for a State's failure to supervise or regulate. E.g., *Kruelle v. New Castle County*

Sch. Dist., 642 F.2d 687, 697 (3d Cir. 1981) ; Jose P. v. Ambach, 669 F.2d 865, 870-71 (2d Cir. 1982); Kerr Center Parents Assn. v. Charles, 897 F.2d 1463, 1470-72 (9th Cir. 1990). Courts have admonished DOE's for not managing special education. Garrity v. Gallen, 522 F. Supp. 171, 223-24 (D.N.H. 1981); Duane B. v. Chester-Upland Sch. Dist., 1994 LEXIS 18755 at \*27 (E.D. Pa. 1994). This duty can extend to other agencies. Parks v. Pavokovic, 753 F.2d 1397 (7<sup>th</sup> Cir. 1985). It was error to hold that GaDOE had no duty.

E. The State Failure to Regulate Seclusion Permitted Abuse

Under IDEA's "cooperative federalism," Schaffer, 126 S.Ct at 531, GaDOE had a duty to regulate these programs. Such laws are federal laws that "offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." New York v United States, 505 US 144, 167 (1992). IDEA has codified this duty at 20 U.S.C. § 1407(a) (2004), providing for the passage of State regulations. This then impacted the provision at 20 U.S.C. § 1412(A)(11), "State Educational Agency Responsibility for General Supervision," requiring the State require that its regulated standards are applied by all programs. *Id.*

Turning to Pioneer, RESAs are a creation of the General Assembly to provide shared services to local systems. O.C.G.A. § 20-2-270. The State defines the geographic areas, and, their employees are treated as if employees of a local school system. O.C.G.A. § 20-2-270(b) and (e). See GaDOE R. & Reg. § 160-4-7-.21(28) (defining

local agencies as including the RESAs). RESA services are defined by O.C.G.A. § 20-2-270.1.<sup>10</sup> GaDOE R. & Reg. 160-4-7-.15 (2007) is the enabling rule for this psychoeducational network, renamed the "Georgia Network for Educational and Therapeutic Support" to provide "comprehensive special education and therapeutic support for the children served." § 160-4-7-.15(1)(a). Children are eligible only if they have "an emotional and behavioral disorder" whose documented "severity" in its "duration, frequency and intensity" allow the placement. GaDOE R. & Reg. § 160-4-7-.21(2000). Defendant must

[d]evelop regulations and procedures pertaining to the operation of GNETS programs, ....

§ 160-4-7-.15(3)(a). See O.C.G.A. § 20-2-272(c). GaDOE has passed no rules on seclusion for the RESAs. Defendant failed to regulate Alpine Center's seclusion, assuming it could seclude at all.

#### F. Defendants Violation of Idea Support the Claims

Jonathan's circumstances required special protection as the *quid pro quo* for his removal from his neighborhood school and in the balance of his special education rights. IDEA alters the customary relationship between schools and child. "[I]t is not a novel proposition to say that parents have a recognized legal interest in the education and upbringing of their child." See, e.g., *Pierce v. Society of Sisters*, 268 U. S. 510, 534-535 (1925) (acknowledging 'the liberty of parents and guardians to direct the upbringing and

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<sup>10</sup> Alpine has no right to exist outside the RESA no right to set its own rules. See, GaDOE R. & Reg. 160-4-7-.15 (2007).

education of children under their control')", *Winkelman v. Parma Cty Sch. Dist.*, 550 U.S. 516(2006), yet IDEA permits schools to seek orders to require evaluations overriding parental objection, 34 C.F.R. § 300.300 (c). As with any authority, IDEA also creates duties Defendants breached. The vehicle for managing behavior is the BIP which requires positive behavioral supports, 34 C.F.R. § 300.324(a) (2(i) coupled with "informed consent." Defendants cannot contend its brand of seclusion used on November 15, 2003 was a "positive behavioral strategy." Thus, even if seclusion had been authorized, Defendant's practice rested outside IDEA, prohibited by the Plaintiffs' IDEA rights of content, notice and due process.

**G. The Alpine Practice Of Confinement/Seclusion Was Extreme**

Defendants' seclusion practices were so devoid of professional justification and lie so outside the mainstream of acceptable conduct that it raises a jury question of deliberate indifference. The COPAA "Declaration of Principles" recognizes that restraints and seclusion are a failure of less restrictive educational programming and interventions which: (1) should be used only to control acute or episodic behaviors which pose a clear and present eminent physical danger to the child or others; (2) should only last as long as necessary to resolve the actual risk of harm. Minimum necessary safeguards include that a child never be locked in a room, closet, box or other place from which the child cannot freely exit, and that the space (and child) be continually observed for the entire period of confinement. APPENDIX 1. As it would violate the Tennessee

statute, Jonathan's seclusion breaches all of these standards.

The Council for Children with Behavioral Disorders, of the Council for Exceptional Children, "Policy Statement on Restraint and Seclusion" provides that seclusion be used only when the physical safety of the student or others is in "immediate danger," that restraints not be used as "punishment to force compliance," or as a substitute for "appropriate educational support," and that all students "in seclusion must be continuously observed by an adult both visually and orally for the entire period of the seclusion." *Id.* APPENDIX 2. These are supported by the research and by other similar standards.<sup>11</sup> Defendants fail to meet these basic standards.

The constant use of seclusion in a barred and bare room for hours almost every day is not education, nor therapeutic, nor appropriate under IDEA or the standards of the profession. Defendants had abandoned basic protections without notice to Plaintiffs. Only indifference explains why Defendants never questioned the effectiveness of its seclusion on Jonathan.

If this Court focuses on the raw use of seclusion, it is cruel beyond measure to substitute it for treatment, outside IDEA's requirement of positive research based interventions. If one focuses

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<sup>11</sup> Zabel, M., "Timeout Used With Behaviorally Disordered Students," *Behavioral Disorders*, 12, 15-21 (1986); Busch, A.B., "Seclusion and Restraint: A Review of Recent Literature," *Harvard Review of Psychiatry*, 8, 261-270 (2000); Ryan, J.B., "Physical Restraint in School," *Behavioral Disorders*, 29(2), 154-168 (2004); Ryan, J.B., "State Policies Concerning the Use of Seclusion Timeout in Schools," *Education and Treatment of Children*, 30(3), 1-25 (2007).

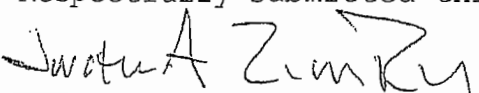
on Jonathan's death, this child was calm but unable to gain his release from the locked room where he hung himself after crying out for release, - the very definition of confinement. Punishment for punishment's sake, in the absence of a pedagogical basis for almost daily incarceration, is the essence of deliberate indifference. Alpine was Jonathan's school. He had committed no crime. He died in a cold cell beyond observation and hope, locked away in restraint of his liberty, strangling on the rope given him by Defendants.

#### CONCLUSION

Amici respectfully urge the Court return the case for trial. It cannot be gainsaid that repetitive locking a child in a bare and barred seclusion room while denying him the rights to go to the bathroom, or walk the yard, and denying him release when he calms, with a rope given to him after suicidal threats, in the absence of training and under a policy which limited observation, is shocking and outrageous conduct, entitling jury consideration.

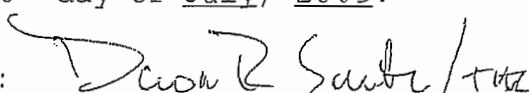
Respectfully submitted this 6<sup>th</sup> day of July, 2009.

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CERTIFICATE OF COMPLIANCE

Amici certifies that the foregoing is presented in Courier New 12, in compliance with the Rules of the Georgia Court of Appeals.

## APPENDIX OF AMICUS CURIAE

EXHIBIT	DESCRIPTION
1.	COPAA (2008) - "Declaration of Principles Opposing the Use of Restraints, Seclusion and Other Aversive Interventions Upon Children with Disabilities." (See also, <a href="http://copaa.net/news/Declaration.html">http://copaa.net/news/Declaration.html</a> )
2.	Council for Exceptional Children, by Council for Children with Behavioral Disorders (2009) - "Policy Statement on Restraint and Seclusion."
3.	Cover Sheet, United States House of Representatives House Education and Labor Committee, May 19, 2009, "Examining the Abusive and Deadly Use of Seclusion and Restraint in Schools" (See also, <a href="http://edlabor.house.gov/hearings/2009/05/examining-the-abusive-and-dead.shtml">http://edlabor.house.gov/hearings/2009/05/examining-the-abusive-and-dead.shtml</a> )
4.	Summary Sheet, Government Accounting Office, Mental Health: Improper Restraint or Seclusion Use Places People at Risk, No. 99-176 (September 7, 1999).
5.	Summary Sheet, Government Accounting Office, Mental Health: Extent of Risk From Improper Restraint or Seclusion Is Unknown, <u>T-HEHS-00-26</u> , (October 26, 1999)
6.	Summary Sheet, Government Accounting Office, Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers, 1. <u>GAO-09-719T</u> , (May 19, 2009)

7. IEP Placement Minutes - September 16, 2004.
8. Exhibit B, Plaintiffs Summary of Seclusion Records and Logs, September 19, 2004 - November 14, 2004.
9. GaDOE R. & Reg. § 160-4-7-.21 (2000) (now repealed and replaced by GaDOE R. & Reg. § 160-4-7-.15 (2007)).



Council of Parent Attorneys and Advocates  
A national voice for special education rights and advocacy



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COPAA Declaration of Principles  
Opposing the Use of  
Restraints, Seclusion, and Other Aversive Interventions  
Upon Children with Disabilities  
June 2008

**Background:**

The Council of Parent Attorneys and Advocates is a national voice for special education rights and advocacy. Our primary goal is to secure effective appropriate educational services for children with disabilities and to protect their educational and civil rights.

COPAA is concerned about the use of restraints, seclusion and aversive interventions as part of educational programs for children with disabilities. Restraints, seclusion and aversive interventions are neither educational nor effective. Instead, their harms and dangers are well-documented. Inappropriately used, they amount to child abuse.

Restraints include physical force, mechanical devices or drugs that temporarily restrict freedom of movement or control behavior. Seclusion includes the use of locked rooms or other spaces from which students are unable to leave voluntarily. Aversive procedures use painful stimuli in response to behaviors that are deemed unacceptable by their caregivers. All aversive techniques have in common the application of physically or emotionally painful stimuli.

Children should receive effective positive behavior supports developed within a comprehensive, professionally-developed plan of behavioral accommodations, supports, and interventions. But, too often school personnel who have not been thoroughly trained in research-validated methods for promoting positive behavior change and crisis de-escalation resort to inappropriate abusive methods. Abusive methods not only place the student at risk of serious physical and psychological harm, but also violate his or her dignity and right to be free from abusive treatment.

Although some states have standards and regulations regarding restraints, seclusion and aversive interventions, the existing laws are not uniform and may not be enforced. Other states provide little or no protection for children at all. Because there is no monitoring on a national level, the full extent of death, injuries, and harm from the use of these techniques is unknown.

Every child is entitled to be treated with dignity and respect. No child with a disability should be subjected to abusive treatment under the guise of providing educational services. Civilized nations protect the human rights of all of their citizens and residents, particularly those who are unable to advocate for themselves, including children.

*Accordingly, COPAA adopts the following declaration of principles regarding the restraint, seclusion, and abuse of children.*

Declaration of Principles

1. Behavioral interventions for children must promote the right of all children to be treated with dignity and receive necessary educational supports and programming in a safe and least-restrictive environment. Positive and appropriate educational interventions should be used; restraints, seclusion and abusive techniques should not.



2. Policies should stress the importance of employing non-physical techniques. They should emphasize prevention, positive behavioral intervention policies, and de-escalation techniques to help students manage their own conduct. These practices teach children to build social relationships and skills they need to progress to adulthood. They also create an environment that values healthy relationships, conflict resolution skills, and each person. All members of a school community benefit from this, all children and adults.

3. Repeated use of restraints or seclusion should be viewed as the failure of educational programming and the likelihood that supports, educational methodologies, and placement are inadequate. Children whose behavior impedes their learning or that of others should receive appropriate Functional Behavioral Assessments and Behavioral Intervention Plans which incorporate appropriate positive behavioral interventions.

4. Restraints to control acute or episodic aggressive behavior should only be used under the following circumstances: (a) The student's actions pose a clear, present and imminent physical danger to himself/herself or to others. (b) Less restrictive measures have not effectively de-escalated the risk of injury. (c) The restraint should only last as long as necessary to resolve the actual risk of danger or harm. (d) The degree of force applied may not exceed what is necessary to protect the student or other persons from imminent bodily injury.

In addition,

(i) A restraint may be used in an emergency situation only if elements (a)-(d) exist. The existence of each element and circumstances surrounding use of the restraint must be documented immediately in the child's records.

(ii) Particular care must be taken when a restraint is considered for incorporation in an IEP or other educational planning document because of the danger that repeated use of restraints pose. We believe that restraints should be incorporated in an IEP or similar plan only in the very rarest of situations, where the child truly presents a risk of serious danger and less restrictive de-escalation methods have failed. There must be documented evidence that all elements in principle 4 exist and that the child has received a comprehensive Functional Behavioral Assessment and has a comprehensive positive behavioral plan. The child's educational plan must require the IEP team, 504 team, or other appropriate professionals to closely monitor implementation of the plan for appropriateness and effectiveness. In all situations involving restraints, parents must receive notice of their procedural safeguards, including rights to an independent educational evaluation, and must give fully-informed consent.

(iii) Parents must receive full and complete information about every incident in which restraint is used; including its potential dangers and risks, and the training received by personnel.

5. Certain techniques are so harmful and dangerous, and an affront to human rights and dignity, that they should be banned outright.

a. Mechanical restraints and prone restraints (e.g., with a child face down) should never be used. Movement limitation may never be used as a punishment or as a substitute for appropriate educational support.

b. Aversive techniques should never be used on children as planned consequences of behavior or symptoms. No child should be subjected to pain or noxious stimuli, such as electric skin shock, ice applications, hitting, slapping, pinching, kicking, hurling, strangling, shoving, deep muscle squeezes, use of noxious inhalants or unpleasant tastes, loud noises, or other similar stimuli. Meals may not be withheld and children should never receive limited nutrition or hydration, or food or drink that is intentionally altered to make it distasteful. Clothing and shelter may not be withheld as part of a behavior control method.

c. A child should never be locked in a room, closet, box, or other place, or put in another place from which the child cannot freely exit. A child may be placed in an appropriate locked, safe confined space if there is an absolute emergency

because the child possesses a dangerous weapon or otherwise poses an imminent danger of serious bodily harm to self or others. In such a situation, a child may be placed in locked confinement only while awaiting the arrival of law enforcement or crisis intervention personnel; and the child must be continuously observed by an adult for the entire period of the locked confinement. COPAA does not support the use of rooms from which children cannot exit for time-out or any other situations.

d. If a child is placed in such a locked, safe space, parents must be immediately informed in writing, including the specific danger involved, and all circumstances surrounding the event, including the action taken. This must also be placed in the child's educational record. Parents must receive their procedural safeguards and the child should receive a comprehensive functional behavioral assessment.

6. School districts must always allow parents to make reasonable visits to their children's classroom and schools. Parents are an integral part of the school community and have a right to observe their children. Because of the dangers that restraints and seclusion pose, parents must be immediately informed of any use of seclusion or restraint, as must senior administrators.

7. No restraint or seclusion may be used if medically or psychologically contraindicated for a child.

8. Standards of excellence should be adopted for safe management of disruptive and assaulting behavior. Schools districts should adopt policies requiring the use of positive behavior interventions and de-escalation techniques, as well as the training of all school personnel on how to implement positive behavior support plans. Senior Administrators (i.e., the school principal or designee) must ensure the implementation of these policies.

9. All personnel who may be involved in using restraint or seclusion must receive comprehensive training in a research-validated program for positive behavior interventions and crisis management. If the use of a particular restraint or form of seclusion is approved for use with any student in an emergency or dangerous situation, all personnel must receive training in its appropriate use and dangers.

10. It is important that schools and educational facilities, through their senior administrators, gather and report data on each of restraint, seclusion, and aversive interventions; on deaths, injury, lasting psychological effects, and other harm; and on the use of positive behavioral interventions and de-escalation methods. Senior administrators should analyze trends within the school and among schools to ensure restraints and seclusion are used only in the rarest of situations, when absolutely necessary, and that positive behavioral interventions and de-escalation techniques are used in almost all situations.

11. State Education Agencies must undertake strong monitoring and enforcement programs to prevent the abuse of children in any educational setting. A comprehensive national mechanism must also be developed, monitors the use of restraints, seclusion, and aversive interventions, as well as any resulting deaths, injury, significant psychological impact, or other harmful consequences.




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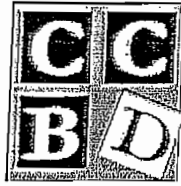
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## The Council for Children with Behavioral Disorders

*A Division of the Council for Exceptional Children*

CCBD'S POSITION SUMMARY  
ON

### Physical Restraint & Seclusion Procedures in School Settings

Approved by the Executive Committee on 5-17-09

This document is a summary of policy recommendations from two longer and more detailed documents available from the Council for Children with Behavioral Disorders (CCBD) regarding the use of physical restraint and seclusion procedures in schools.

#### Declaration of Principles:

- CCBD supports the following principles as related to the use of restraint or seclusion procedures:
  - Behavioral interventions for children must promote the right of all children to be treated with dignity.
  - All children should receive necessary educational and mental health supports and programming in a safe and least-restrictive environment.
  - Positive and appropriate educational interventions, as well as mental health supports, should be provided routinely to all children who need them.
  - Behavioral interventions should emphasize prevention and creating positive behavioral supports.
  - Schools should have adequate staffing levels to effectively provide positive supports to student and should be staffed with appropriately trained personnel.
  - All staff in schools should have mandatory conflict de-escalation training, and conflict de-escalation techniques should be employed by all school staff to avoid and defuse crisis and conflict situations.
  - All children whose pattern of behavior impedes their learning or the learning of others should receive appropriate educational assessment, including Functional Behavioral Assessments followed by Behavioral Intervention Plans which incorporate appropriate positive behavioral interventions, including instruction in appropriate behavior and strategies to de-escalate their own behavior.



## Recommendations:

- CCBD believes that physical restraint or seclusion procedures should be used in school settings only when the physical safety of the student or others is in immediate danger.
- Mechanical or chemical restraints should never be used in school settings when their purpose is simply to manage or address student behavior (other than their use by law endorsement or when students in travel restraints in vehicles). Their use for other instructional related purposes should be supervised by qualified and trained individuals and in accord with professional standards for their use.
- Neither restraints nor seclusion should be used as a punishment to force compliance or as a substitute for appropriate educational support.
- CCBD calls for any school which employs physical restraint or seclusion procedures to have a written positive behavior support plan specific to that program, pre-established emergency procedures, specific procedures and training related to the use of restraint and seclusion, and data to support the implementation of the principles of positive behavior supports in that environment as well as data regarding the specific uses of restraint and seclusion.
- All seclusion environments should be safe and humane and should be inspected at least annually, not only by fire or safety inspectors but for programmatic implementation of guidelines and data related to its use.
- Any student in seclusion must be continuously observed by an adult both visually and aurally for the entire period of the seclusion. Occasional checks are not acceptable.
- CCBD calls for federal, state, and provincial legislation or regulation which would require the implementation of:
  - Recognition that restraint and seclusion procedures are emergency, not treatment, procedures.
  - Requirement that preventive measures such as conflict de-escalation procedures be in place in schools where restraints or seclusion will be employed.
  - Requirements that individualized safety plans are created for students whose behavior could reasonably be predicted to pose a danger. Those safety plans for students with disabilities must be created by the student's IEP team and included as a part of the IEP. These plans can also be created for students without disabilities.
  - Requirements that comprehensive debriefings occur after each use of restraint or seclusion and that reports of the incident are created.
  - Requirement that data on restraints and seclusion are reported to an outside agency such as the state or provincial department of education.
- CCBD does not believe that "guidelines" or "technical assistance documents" are generally adequate to regulate the use of these procedures since abuses continue to occur

in states or provinces where guidelines are in place and these guidelines have few mechanisms for providing oversight or correction of abuses.

- CCBD calls for additional research regarding the use of physical restraint and seclusion with students across all settings.

**White Papers from which these recommendations are drawn:**

Council for Children with Behavior Disorders (May, 2009). *CCBD Position on the Use of Physical Restraint Procedures in School Settings*. Reston, VA: Author.

Council for Children with Behavior Disorders (May, 2009). *CCBD Position on the Use of Seclusion Procedures in School Settings*. Reston, VA: Author.

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Home » Hearings » Examining the Abusive and Deadly Use of Seclusion and Restraint in Schools:

## Examining the Abusive and Deadly Use of Seclusion and Restraint in Schools

Full Committee Hearing  
10:00 AM, May 19, 2009  
2175 Rayburn H.O.B.  
Washington, DC

On Tuesday, May 19, the House Committee on Education and Labor held a hearing to examine abusive and deadly uses of seclusion and restraint in U.S. schools. Seclusion and restraint are physical interventions used by teachers and other school staff to prevent students from hurting themselves or others

[Archived Webcast »](#)

[Rep. George Miller \(CA\) Opening Statement »](#)

Witnesses:

- [Ann Gaydos »](#)  
Mother of a victim  
Monument, Colorado
- [Elizabeth Hanselman »](#)  
Assistant Superintendent for Special Education and Support Services  
Springfield, Illinois
- [Mary V. Kealy, EdD. »](#)  
Assistant Superintendent for Pupil Services  
Loudoun County Public Schools  
Virginia
- [Greg Kutz »](#)  
Managing Director  
Forensic Audits and Special Investigations  
U.S. Government Accountability Office  
Washington, D.C.
- [Reece L. Peterson, Ph.D. »](#)  
Professor of Special Education  
University of Nebraska  
Lincoln, Nebraska
- [Toni Price »](#)  
Mother of a victim who died  
Killeen, Texas

Additional Items Submitted for the Record

[Letter from AASA explaining Dr. Kealy's absence at the hearing](#)

For shorter video excerpts of testimony, [please visit our YouTube channel.](#)

[Schedule »](#)

July 8 - 10:00 AM  
Early Childhood, Elementary and Secondary Education Subcommittee and Healthy Families and Communities Strengthening School Safety through Prevention of Bullying

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[Starting Tomorrow, Student Loan Payments Become More Affordable for Millions of Americans Press Release](#)

[News of the Day: New Plan Ties Reduced College Loan Payments to Income Blog Post](#)

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[Disability Issues \(1\)](#)

[Early Childhood \(7\)](#)

[Elementary and Secondary Education \(33\)](#)

[Higher Education \(17\)](#)

[Literacy and Adult Education](#)

[Other Education and Youth Issues \(26\)](#)

[Teacher Issues \(3\)](#)

[Labor \(25\)](#)

[Competitive Workforce \(13\)](#)

[Health Care \(4\)](#)

[Retirement and Pensions \(12\)](#)

[Wages and Benefits \(24\)](#)

[Worker Rights \(25\)](#)

[Worker Safety and Health \(18\)](#)





## Mental Health: Improper Restraint or Seclusion Use Places People at Risk

HEHS-99-176 September 7, 1999

Full Report (PDF, 39 pages)

### Summary

Only 15 states systematically alert protection and advocacy agencies about mentally ill or retarded people who have died as a result of improper restraint or seclusion in residential treatment settings. Most agencies receive reports only from state facilities, so that even these reporting systems are not comprehensive. Reports of deaths cannot always be thoroughly investigated because the agencies have had difficulty gaining access to medical records. From partial information from 51 such agencies, GAO identified 24 deaths associated with restraint or seclusion in fiscal year 1998. Fragmentary reporting suggests the actual number may be higher. No federal regulations govern the use of restraint or seclusion in psychiatric hospitals, residential treatment centers for children, or community group homes. Most state regulations do not apply to privately run facilities. Some states have found that reducing the use of restraint and seclusion improves safety for patients and staff alike. The Health Care Financing Administration (HCFA) should extend to people in any treatment setting funded by Medicare and Medicaid the same policies on restraint and seclusion that now protect individuals in long-term care settings and hospitals. HCFA should also improve reporting and require staff training in applying restraint and seclusion and in alternative ways to deal with potentially violent situations. GAO summarized this report in testimony before Congress; see: *Mental Health: Extent of Risk From Improper Restraint or Seclusion Is Unknown*, by Leslie G. Aronovitz, Associate Director for Health Financing and Public Health Issues, before the Senate Committee on Finance. GAO/T-HEHS-00-26, Oct. 20 (eight pages).

GAO noted that: (1) improper restraint and seclusion can be dangerous to both people receiving treatment and staff, but the full extent of related injuries and deaths is unknown; (2) there is no comprehensive reporting system to track such injuries and deaths or the rates of restraint and seclusion use by facility; (3) GAO's telephone survey of 51 state Protection and Advocacy agencies (P&A) found that only 15 states have any systematic reporting to alert these agencies to any deaths that occur among individuals in residential treatment settings; (4) even these reporting systems are not comprehensive, because most agencies that receive reports get them only from state facilities; (5) on the basis of the partial information available from these 51 agencies, GAO identified 24 deaths associated with restraint or seclusion during fiscal year 1998; (6) because reporting is so fragmentary, GAO believes many more deaths related to restraint or seclusion may occur; (7) data on use of restraint and seclusion are also fragmentary because most facilities are not required to report these data to oversight agencies; (8) federal and state regulations governing restraint and seclusion for individuals with mental illness and mental retardation are inconsistent across types of facilities; (9) the federal government regulates the use of restraint and seclusion in nursing homes and state Intermediate Care Facilities for the Mentally Retarded, but until recently, no federal regulations governed their use in other facilities, such as psychiatric hospitals, residential treatment centers for children, or community group homes; (10) in July 1999, the Health Care Financing Administration (HCFA) issued an interim final rule with revised Medicare conditions of participation for hospitals that address restraint and seclusion use; (11) although this is a positive first step, people in residential treatment centers and group homes participating in the Medicaid Home and Community-Based Waiver program have limited federal protection; (12) while some states have regulations in place governing the use of restraint and seclusion, often these regulations do not apply to privately operated facilities; and (13) on the basis of the experience of several states, having regulatory protections and reporting requirements can reduce the use of restraint and seclusion and improve safety for patients and staff.





## Mental Health: Extent of Risk From Improper Restraint or Seclusion Is Unknown

T-HEHS-00-26 October 26, 1999

Full Report (PDF, 16 pages)

### Summary

Only 15 states systematically alert protection and advocacy agencies about mentally ill or retarded people who have died as a result of improper restraint or seclusion in residential treatment settings. Most agencies receive reports only from state facilities, so that even these reporting systems are not comprehensive. Reports of deaths cannot always be thoroughly investigated because the agencies have had difficulty gaining access to medical records. From partial information from 51 such agencies, GAO identified 24 deaths associated with restraint or seclusion in fiscal year 1998. Fragmentary reporting suggests the actual number may be higher. No federal regulations govern the use of restraint or seclusion in psychiatric hospitals, residential treatment centers for children, or community group homes. Most state regulations do not apply to privately run facilities. Some states have found that reducing the use of restraint and seclusion improves safety for patients and staff alike. The Health Care Financing Administration (HCFA) should extend to people in any treatment setting funded by Medicare and Medicaid the same policies on restraint and seclusion that now protect individuals in long-term care settings and hospitals. HCFA should also improve reporting and require staff training in applying restraint and seclusion and in alternative ways to deal with potentially violent situations. This report summarizes the September 1999 report, GAO/HEHS-99-176.

GAO noted that: (1) as GAO recently reported, improper restraint and seclusion can be dangerous to people receiving treatment for mental illness or mental retardation and to staff in treatment facilities; (2) while there is no comprehensive system to track injuries or deaths, GAO found that at least 24 deaths that state protection and advocacy agencies (P&A) investigated in fiscal year 1998 were associated with the use of restraint or seclusion; (3) GAO believes there may have been more deaths because only 15 states require any systematic reporting to P&As to alert them to serious injuries and deaths; (4) GAO also found that federal and state regulations that govern the reporting of injuries and deaths and that govern the use of restraint and seclusions are not consistent for different types of facilities; (5) the experience of several states demonstrates that having regulatory protections and reporting requirements can reduce the use of restraint and seclusion and improve safety for individuals receiving treatment as well as for facility staff; and (6) in GAO's September 1999 report, GAO made several recommendations that, if adopted, should improve the safety of patients and staff in a variety of treatment settings.





Highlights of GAO-09-719T, a testimony before the Committee on Education and Labor, House of Representatives

## SECLUSIONS AND RESTRAINTS

### Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers

#### Why GAO Did This Study

GAO recently testified before the Committee regarding allegations of death and abuse at residential programs for troubled teens. Recent reports indicate that vulnerable children are being abused in other settings. For example, one report on the use of restraints and seclusions in schools documented cases where students were pinned to the floor for hours at a time, handcuffed, locked in closets, and subjected to other acts of violence. In some of these cases, this type of abuse resulted in death.

Given these reports, the Committee asked GAO to (1) provide an overview of seclusions and restraint laws applicable to children in public and private schools, (2) verify whether allegations of student death and abuse from the use of these methods are widespread, and (3) examine the facts and circumstances surrounding cases where a student died or suffered abuse as a result of being secluded or restrained.

GAO reviewed federal and state laws and abuse allegations from advocacy groups, parents, and the media from the past two decades. GAO did not evaluate whether using restraints and seclusions can be beneficial. GAO examined documents related to closed cases, including police and autopsy reports and school policies. GAO also interviewed parents, attorneys, and school officials and conducted searches to determine the current employment status of staff involved in the cases.

#### What GAO Found

GAO found no federal laws restricting the use of seclusion and restraints in public and private schools and widely divergent laws at the state level. Although GAO could not determine whether allegations were widespread, GAO did find hundreds of cases of alleged abuse and death related to the use of these methods on school children during the past two decades. Examples of these cases include a 7 year old purportedly dying after being held face down for hours by school staff, 5 year olds allegedly being tied to chairs with bungee cords and duct tape by their teacher and suffering broken arms and bloody noses, and a 13 year old reportedly hanging himself in a seclusion room after prolonged confinement. Although GAO continues to receive new allegations from parents and advocacy groups, GAO could not find a single Web site, federal agency, or other entity that collects information on the use of these methods or the extent of their alleged abuse.

GAO also examined the details of 10 restraint and seclusion cases in which there was a criminal conviction, a finding of civil or administrative liability, or a large financial settlement. The cases share the following common themes: they involved children with disabilities who were restrained and secluded, often in cases where they were not physically aggressive and their parents did not give consent; restraints that block air to the lungs can be deadly; teachers and staff in the cases were often not trained on the use of seclusions and restraints; and teachers and staff from at least 5 of the 10 cases continue to be employed as educators. The table contains information on four of these cases.

Examples of Case Studies GAO Examined

Victim information	School	Case details
Male, 14, diagnosed with post traumatic stress	Texas public school	<ul style="list-style-type: none"> <li>230 lb. teacher placed 129 lb. child facedown on floor and lay on top of him because he did not stay seated in class, causing his death.</li> <li>Death ruled a homicide but grand jury did not indict teacher. Teacher currently teaches in Virginia.</li> </ul>
Female, 4, born with cerebral palsy and diagnosed as autistic	West Virginia public school	<ul style="list-style-type: none"> <li>Child suffered bruising and post traumatic stress disorder after teachers restrained her in a wooden chair with leather straps—described as resembling a miniature electric chair—for being “uncooperative.”</li> <li>School board found liable for negligent training and supervision; teachers were found not liable, and one still works at the school.</li> </ul>
Five victims, gender not disclosed, aged 6 and 7	Florida public school	<ul style="list-style-type: none"> <li>Volunteer teacher's aide, on probation for burglary and cocaine possession, gagged and duct-taped children for misbehaving.</li> <li>No records that school did background check or trained aide.</li> <li>Aide pled guilty to false imprisonment and battery.</li> </ul>
Male, 9, diagnosed with a learning disability	New York public school	<ul style="list-style-type: none"> <li>Parents allowed school to use time out room only as a “last resort,” but school put child in room repeatedly for hours at a time for offenses such as whistling, slouching, and hand waving.</li> <li>Mother reported that the room smelled of urine and child's hands became blistered while trying to escape.</li> <li>Jury awarded family \$1,000 for each time child was put in the room.</li> </ul>

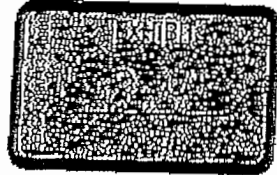
Sources: Records including police reports, court documents, and interviews.

View GAO-09-719T or key components. For more information, contact Gregory Kutz at (202) 512-6722 or kutzg@gao.gov.



Handwritten initials and date: 9/20/04

ALPINE Program  
Psychoeducational Services  
1300-A Athens St. / P.O. Box 2459  
Gainesville, Georgia 30503  
Office (770) 532-9981 Fax (770) 532-6386



Special Education Placement Committee Minutes 13

Handwritten initials: gth

Student: [redacted] File #: 2571 D.O.B.: 7/31/91 Date: 9/16/04  
Parent/Guardian: [redacted] System: HALL School/Grade: Chestnut Middle  
Purpose of Conference: Planning  Placement  Review  Other

I. Summarized Discussion: Parental Rights were presented to parent/guardian and reviewed. Parent Initials: \_\_\_\_\_

Committee met to discuss placement for Jonathan - he most recently spent 30 days in MPC for violation of terms of probation. (Parental rights reviewed - minutes taken by HALL Co.) When [redacted] returned to Chestnut Middle rules & expectations were reviewed. [redacted] was encouraged to cooperate & become a productive class member. On first day back to school, [redacted] began to exhibit oppositional behaviors (refused academic work & verbal disrespect to staff) - resource officer needed to be called - [redacted] began to bully other students \* (continued on page 2 of 2)

II. Options/Services Considered (include supplementary aides and services, special education services, related services, etc.):

- 1. Regular Education
- 2. EBD resource
- 3. EBD Self-contained
- 4. ALPINE
- 5. Other Alternative School
- 6. Other \_\_\_\_\_
- 7. Other \_\_\_\_\_
- 8. Other \_\_\_\_\_
- 9. Other \_\_\_\_\_
- 10. Other \_\_\_\_\_

III. Options/Services Rejected and Rationale:

1, 2 & 3) - [redacted] has not been successful at home school even with self-contained services. 5) Alternative placement remains an option if [redacted] not successful at Alpine.

IV. Final Decisions and Rationale (include an explanation of the extent, if any, to which the student will NOT participate in the regular class:

Full Day Alpine: Begin: 9/20/04  
Review By: 5/30/05

Mother will transport a.m. - into HALL Co. Bus P.M.

Signature of Committee Participants (Name & Title):

- |  |  |
|--|--|
| 1. <u>Shane Henning</u> <input checked="" type="checkbox"/> Agree/Disagree | 6. <u>[redacted] / asst principal</u> <input checked="" type="checkbox"/> Agree/Disagree |
| 2. <u>[redacted] principal</u> <input checked="" type="checkbox"/>         | 7. <u>[redacted] / asst principal</u> <input checked="" type="checkbox"/>                |
| 3. <u>[redacted]</u> <input checked="" type="checkbox"/>                   | 8. <u>[redacted]</u> <input checked="" type="checkbox"/>                                 |
| 4. <u>[redacted] / Special Coord</u> <input checked="" type="checkbox"/>   | 9. <u>[redacted]</u> <input checked="" type="checkbox"/>                                 |
| 5. <u>[redacted] / Committee</u> <input checked="" type="checkbox"/>       | 10. _____ <input type="checkbox"/>   |

(03/03) White-File Yellow-School Pink-Parent



[redacted] began to pull his pants down very low around his knees, later he left the principal's office - lay down on an office couch. When re-directed showed aggressive posturing toward school personnel. [redacted] expressed concerns that [redacted] behavior contract was violated - school requested that [redacted] behavior escalated so intensely & frequently that he went well beyond the provisions of contract with his aggressive behavior. [redacted] states that [redacted] meds have been changed often - now [redacted] Concerta, Lexipro, Risperdal. Committee discussed possibly looking at O.T.P. placement or Eagle Ranch. Difficulty w/ O.T.P. may be the [redacted] has allergy to Peas & Weeps. Placement at Alpine discussed - Ms. Henny states that Alpine has an "age appropriate" class - however, unlike [redacted] last placement at Alpine where a strong male figure was present in the room - this class has 2 females as teachers - Ms. Henny is concerned that, should aggression increase - law enforcement might need to be used. [redacted] was questioned about his actions - his response "I don't know". Committee concerned about [redacted] seeming lack of an "emotional component" to [redacted] behavior - behavior appear to be driven largely by a Conduct Disorder - however - committee members note that Alpine was last setting where [redacted] had some degree of success. [redacted] notes that she has concerns about [redacted] behavior on the school bus. Alpine will accept Hall on I.T.P. - will review & prepare either a new IEP or an Addendum to present IEP.

Prodney Osborne - Supervisor - juvenile court - 770 531 6932  
 Lindsay Ash - P. Officer - 770 531 6987

## Jonathan King - Seclusion Room Stays From 9/20/04 to 11/15/04

Source: Alpine Seclusion Room Logs

Date	Time In	Time Out	Total Stay (in minutes)	Note
9/20/2004	11:22 a.m.	11:45 a.m.	23	
9/27/2004	1:00 p.m.	1:10 p.m.	10	
9/28/2004	9:10 a.m.	11:30 a.m.	140	At 9:30 and 9:15, Adams noted that JK was "Lying or Sitting" and "Quiet"; "Soiled in T.O. Room"
10/21/2004	11:59 a.m.	12:15 p.m.	16	
10/21/2004	12:35 p.m.	12:45 p.m.	10	
10/22/2004	12:10 p.m.	12:45 p.m.	30	In room 15 mins. after quiet and under control
10/22/2004	1:15 p.m.	1:30 p.m.	15	
10/25/2004	10:40 a.m.	10:45 p.m.	5	
10/25/2004	11:15 a.m.	11:45 a.m.	30	Asked to go to restroom at 11:25 and continued to "plead" until 11:45 to go
10/26/2004	9:40 a.m.	12:30 p.m.	170	Induced vomiting at 9:50 a.m.; "let me out" at 10:23 a.m.; "claustrophobic/help!" plea noted by monitor; noted to be "Lying or Sitting" and "Quiet" at 10:00, 10:45, 11:00 to 12:30
10/26/2004	1:00 p.m.	5:20 p.m.	260	"Ripped hem from tee shirt and wrapped around neck" at 1:55 p.m.; "lack of emotion" noted by monitor; noted to be "Lying or Sitting" and "Quiet" at 1:15, 2:45, and 3:15 - 5:00 p.m.; "sleeping" at 3:45
10/27/2004	9:30 a.m.	5:20 p.m.	470	"Threatening to kill himself"; "digging in ear, making it bleed" at 10:10 a.m.; "continuing to pleading" and "claiming claustrophobia (sic.)" at 10:15 a.m. and asking to go to the restroom; "going to break his arms off and beat himself with them!" at 11:20 a.m.; "walls caving in" at 11:55 a.m.; "claiming to 'freak out'"; "this is stupid"
11/3/2004	1:55 p.m.	2:15 p.m.	20	
11/5/2004	8:05 a.m.	1:55 p.m.	350	Noted to be "Verbally contract to control behavior" and "Not threatening" at 9:15 a.m.; noted to be "Lying or Sitting" and "Quiet" from 11:45 a.m. until 1:45 p.m."
11/8/2007	9:53 a.m.	10:30 a.m.	37	Noted to be "Lying or Sitting" and "Quiet" the entire time
11/10/2004	1:35 p.m.	1:50 p.m.	15	
11/11/2004	1:40 p.m.	1:50 p.m.	10	
11/12/2004	12:15 p.m.	12:53 p.m.	38	Sheet improperly completed by Stover
11/15/2004	9:25 a.m.	deceased	35	Noted to be "Quiet", "Not threatening", and "Lying or Sitting" at 10:00 a.m.
Total Minutes			1684	
Total Hours			28.1	
Average stay (in minutes)			88.6	



## APPENDIX OF AMICUS CURIAE

EXHIBIT	DESCRIPTION
1.	COPAA (2008) - "Declaration of Principles Opposing the Use of Restraints, Seclusion and Other Aversive Interventions Upon Children with Disabilities." (See also, <a href="http://copaa.net/news/Declaration.html">http://copaa.net/news/Declaration.html</a> )
2.	Council for Exceptional Children, by Council for Children with Behavioral Disorders (2009) - "Policy Statement on Restraint and Seclusion."
3.	Cover Sheet, United States House of Representatives House Education and Labor Committee, May 19, 2009, "Examining the Abusive and Deadly Use of Seclusion and Restraint in Schools" (See also, <a href="http://edlabor.house.gov/hearings/2009/05/examining-the-abusive-and-dead.shtml">http://edlabor.house.gov/hearings/2009/05/examining-the-abusive-and-dead.shtml</a> )
4.	Summary Sheet, Government Accounting Office, Mental Health: Improper Restraint or Seclusion Use Places People at Risk, No. 99-176 (September 7, 1999).
5.	Summary Sheet, Government Accounting Office, Mental Health: Extent of Risk From Improper Restraint or Seclusion Is Unknown, <u>T-HEHS-00-26</u> , (October 26, 1999)
6.	Summary Sheet, Government Accounting Office, Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers, 1. <u>GAO-09-719T</u> , (May 19, 2009)

7. IEP Placement Minutes - September 16, 2004.
8. Exhibit B, Plaintiffs Summary of Seclusion Records and Logs, September 19, 2004 - November 14, 2004.
9. GaDOE R. & Reg. § 160-4-7-.21 (2000) (now repealed and replaced by GaDOE R. & Reg. § 160-4-7-.15 (2007)).

160-4-7-.21 PSYCHOEDUCATIONAL PROGRAMS FOR STUDENTS WITH SEVERE EMOTIONAL AND BEHAVIORAL DISORDERS OR AUTISM.

(1) PROGRAM DEFINITION.

(a) Services for students with severe emotional and behavioral disorders or autism may be provided by psychoeducational programs. All programs may accept students ages birth through 21 years. Students ages three through 21 may be served by the program staff in classes, direct services or other settings as appropriate.

(b) The major admission requirements shall be the presence of an emotional and behavioral disorder or autism severe enough to require this special treatment program. Students with secondary disabilities, such as, but not limited to, an intellectual disability, learning disability, neurological disability, hearing loss or developmental delay, shall be accepted if the primary disability is a severe emotional and behavioral disorder or autism.

(2) ELIGIBILITY AND PLACEMENT.

(a) A student shall be considered for psychoeducational program services based upon a comprehensive case study and eligibility report that documents the severity of the duration, frequency and intensity of one or more of the characteristics of the disability category of emotional and behavioral disorders (EBD) or documents the characteristics of the disability category of autism.

(3) OPERATIONAL REGULATIONS AND PROCEDURES RULES.

(a) Department responsibilities. In compliance with a provision of the budget, Psychoeducational Programs for Students With Severe Emotional and Behavioral Disorders or Autism, the department shall receive funds appropriated by the Georgia General Assembly. The department shall:

1. Develop regulations and procedures pertaining to the operation of psychoeducational programs, subject to review and approval of the state board.
2. Review proposals for funding and make recommendations to the state board.
3. Award funding to an approved fiscal agent for the operation of a program to serve students with severe emotional and behavioral disorders or autism ages birth through 21.

(b) Fiscal agent responsibilities.

1. If a majority of the systems served by the psychoeducational program desire to change the fiscal agent, the vote shall be taken no later than April 1 to be effective for the ensuing fiscal year. The fiscal agent responsibility may be transferred to a regional education service agency (RESA) or a school system provided the new fiscal agent agrees to serve for a minimum of three years. The fiscal agent shall do the following.



- (i) Serve as fiscal agent for the receipt and disbursement of all grant funds.
- (ii) Transfer funds to restricted program accounts upon receipt of all grant funds, including maintenance and operation, instructional materials and media and sick leave.
- (iii) Maintain appropriate bookkeeping procedures to ensure the expenditure of funds as indicated in the approved proposal. (For information concerning procedures, the *Financial Management for Georgia Local Units of Administration* shall be used.)
- (iv) Provide appropriate information as required by the department, including the following.

- (I) March, October and annual reports of services to students.
- (II) March, October and annual reports of services to parents.
- (III) Annual documentation of proposal objectives.
- (IV) Quarterly financial reports.
- (V) Annual demographic data.

(c) Advisory board.

1. The advisory board comprised of the superintendents of the school systems served, shall meet at least quarterly.
2. Responsibilities of the board shall include, but are not limited to, the following.
  - (i) Review and endorse the proposal for funding, including service delivery model, staffing pattern, objectives and budget.
  - (ii) Review service delivery model and recommendations for program improvement.
  - (iii) Review services data quarterly.
- (d) Budget/fiscal management.
  - (a) Guidelines for the budget are established to cover all areas of expenditures.
    1. Budgets shall be determined annually according to appropriations and population to be served by each program.
    2. Management of program budgets shall be consistent with state fiscal policy.

3. Deviations in the project budget shall be approved by the fiscal agent and submitted in writing to the department for approval as outlined in the proposal guidelines.

4. Indirect cost is only allowable on the state grant and shall be calculated using one percent. Indirect cost may be negotiated for providing such services as accounting, data processing and purchasing.

(e) Budget/personnel.

1. The procedure outlined below shall be used for personnel in programs.

(i) Minimum salary schedules for professionals shall be consistent with either the Professional Standards Commission requirements or Georgia Merit System rating in the area of job responsibility.

(ii) Personnel salaries shall not exceed those being paid local school system personnel with similar training, experience and position.

(iii) Any positions established that are not described in the approved proposal shall be justified in writing with a complete job description attached and submitted for prior approval to the department.

(iv) Personnel employed as teachers shall meet the state certification requirements. Others shall meet licensing or certification requirements in their respective professional area, e.g., psychiatrist, psychologist, social worker or be eligible for an appropriate State of Georgia Merit System rating.

(v) Sufficient personnel to operate a psychoeducational program shall be employed and described in the proposal approved by the fiscal agent and school systems served. These shall include sufficient leadership and supervisory personnel, instructional staff to include teachers and paraprofessionals, and clinical support staff.

(f) Budget/operation.

1. The procedure outlined below shall be followed in regard to costs of operation and equipment.

(i) Travel expense reimbursement shall be based on state travel regulations for local school systems.

(ii) State funds shall not be utilized to buy snacks or rewards for students.

(iii) Installation of equipment or renovation of a facility on property not legally the property of the fiscal agent shall be prohibited.

(iv) Expenditures for purchases or lease of vehicles or reimbursement for pupil transportation is not an allowable budget item, except in those cases where vehicles were purchased prior to FY 75.

(v) Insurance coverage may be contracted for program contents.

(vi) Insurance coverage may be contracted for liability on pupil transportation vehicles unless already covered by pupil transportation grants.

(vii) Insurance coverage may be contracted for professional liability and/or accident and health when provided to all staff by the fiscal agent.

(g) Program operation.

1. The procedure outlined below shall be followed in regard to program operation.

(i) Each program shall operate eight hours daily, 240 days each fiscal year.

(ii) Classes in the 0-14 age program shall operate a minimum of 200 days each fiscal year. The recommended maximum class size is eight.

(iii) Classes in the adolescent program shall operate 330 minutes per day, five days per week, 180 days each fiscal year. The recommended maximum class size is ten.

(4) This rule shall become effective July 1, 2000.

Authority O.C.G.A. § 20-2-270; 20-2-274.

Adopted: August 10, 2000

Effective: July 1, 2000

SUPERIOR COURT OF HALL COUNTY  
STATE OF GEORGIA

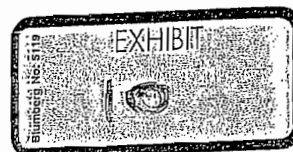
DONALD LEE KING and, )  
TINA MARIE KING, )  
 )  
Plaintiffs, ) CIVIL ACTION FILE NO.:  
 )  
vs. ) 2006CV3323A  
 )  
PIONEER REGIONAL EDUCATIONAL )  
SERVICE AGENCY, et al. )  
 )  
Defendant. )

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AFFIDAVIT OF KENNETH TROTTER, JR.

1.

My name is Kenneth Trotter, Jr. I am an adult resident of Forsyth County, Georgia. I am over the age of eighteen and I suffer from no mental disabilities. I make this affidavit based upon facts and information that are true and correct based upon my personal knowledge. I am providing this affidavit to Orr & Orr LLP, which firm I understand represents Don and Tina King, who are the Plaintiffs in the above case. I am providing this affidavit to Orr & Orr LLP and I have communicated with Orr & Orr LLP voluntarily, understanding that I am under no obligation to communicate with Orr & Orr LLP. In fact, I have wanted to "tell my story" for some time now. I have been specifically advised by Orr & Orr LLP that I am not required to give this affidavit and I give this affidavit of my own volition.



2.

On November 12 and 15, 2004, I worked as a substitute teacher at the Alpine Psychoeducational Program in Gainesville, Georgia ("Alpine"). Prior to starting work at Alpine, I did not have any experience serving as a teacher, substitute, or in any other official capacity in psychoeducational or other educational settings, although I had observed my wife's classroom on various occasions.

3.

On or about November 10, 2004, I attended a three-hour training session sponsored by the Pioneer Regional Educational Service Agency ("Pioneer") to obtain a substitute teaching certificate. I received no training on seclusion or "time-out" rooms during that training session. I recall raising questions regarding the fact that I would be working in a psychoeducational setting and asking what I needed to know to prepare me. The instructor indicated the training was not designed for the psychoeducational setting. That three-hour session was the only formal training I had received from Pioneer prior to going to work at Alpine.

4.

November 12, 2004 was my first day of work at Alpine. That day I recall that Stan Stover, the Director of Alpine, was sitting by the seclusion room in the

hallway at Alpine. Mr. Stover was monitoring a student who I later learned to be Jonathan King. Mr. Stover indicated that he had a phone call to make and asked if I could watch Jonathan for a few minutes.

5.

Before Mr. Stover left the vicinity of the seclusion room on November 12, I recall looking into the room and seeing that Jonathan had his shoes on. I asked Mr. Stover if I was supposed to take Jonathan's shoes. Mr. Stover said, "I'm very familiar with this child and he likes himself too much to hurt himself," or words to very similar effect. Mr. Stover also indicated to me that Jonathan had never shown any tendency to harm himself. I was not at the seclusion room when Mr. Stover put Jonathan in it on November 12.

6.

Mr. Stover did not provide me with any instruction on November 12 or at any other time regarding the use of the seclusion room or Alpine's or Pioneer's policies and procedures regarding the seclusion room. The only training that I recall receiving regarding the seclusion room from anyone at Alpine or Pioneer came when I was sitting by the hallway seclusion room on November 12 at Mr. Stover's request. A female staff member of Alpine came by the seclusion room and asked me why I had not filled out the log sheet properly. I indicated to her that I did not know anything about the log sheet and I had not put the student in

the seclusion room. She showed me the log sheet that was nearby and showed me how to fill codes into the log sheet. I had never seen the log sheet before that time and nobody from Pioneer or Alpine gave me any further instruction regarding the seclusion room at that time or at any other time.

7.

On November 15, 2004, I was working in Jonathan's class as a substitute teacher along with Lynn Adams, a teacher. Jonathan arrived at school that day with baggy pants that appeared not to fit his waist. I recall that Jonathan asked me that morning if he could go and get something from Mr. Jackson to help hold his pants up. Ms. Adams allowed Jonathan to go to Mr. Jackson's room and I recall that Jonathan got a piece of string or cord to hold his pants up.

8.

I recall that as the students were having breakfast that day, Lynn Adams indicated that there was a problem and that I would have to take some students back to the classroom. Among the students I took back to the classroom was Jonathan King. When we got back to the classroom, Jonathan started trying to fight with another student. I decided that Jonathan needed to go to the seclusion room.

9.

I took Jonathan into the hallway. I recall that Jonathan became calm

immediately after I took him out of the classroom. I took Jonathan to Doug Jackson's classroom and asked Mr. Jackson if there was a seclusion room in Mr. Jackson's room. Mr. Jackson said there was not and that he used the one in the hallway. Mr. Jackson and I took Jonathan to the seclusion room in the hallway.

10.

Jonathan was calm when Mr. Jackson and I arrived at the seclusion room with him. Mr. Jackson put Jonathan into the seclusion room. I knew Jonathan had the makeshift belt around his waist. I asked Mr. Jackson whether we needed to take that makeshift belt from Jonathan. At that point, Mr. Jackson asked Jonathan if he needed to take the makeshift belt from Jonathan or would he behave. Jonathan indicated that he would behave. I deferred to Mr. Jackson's judgment on whether to leave Jonathan with his makeshift belt, since it was only my second day at work at Alpine and Mr. Jackson was the one who had given the makeshift belt to Jonathan. Mr. Jackson put Jonathan in the seclusion room. When we put Jonathan in the seclusion room, he was calm at first. Mr. Jackson went back to his class after putting the bar on the seclusion room door and I remained to monitor Jonathan.

11.

Nobody at Alpine ever indicated to me before I placed Jonathan in the seclusion room on November 15 that Jonathan had any history of suicidal

threats, gestures, or self-harm. If I had known that Jonathan had threatened suicide in the past while in the seclusion room, I never would have allowed him to keep the makeshift belt and I would not have deferred to Mr. Jackson.

12.

On November 15, the window in the seclusion room door had a piece of paper over it. It was almost impossible to see into the room that day through the extremely small window in the door. It was especially difficult if not impossible to see the area immediately in front of the inside of the door, since the window had a grate covering it inside the room, was in the top part of the door, and was small.

13.

I spoke with Jonathan after he went in the seclusion room on November 15. I told Jonathan that I needed him to be quiet for 15 minutes and I would let him out. After approximately 5 minutes, Jonathan told me that he was calmed down and that he would behave. Since it had not been 15 minutes, I again told Jonathan I was not going to let him out. Jonathan became angry when I declined to let him out. Jonathan indicated at least once more that he was calm and wished to be let out. I declined each time because 15 minutes had not elapsed and Jonathan became angry each time.

14.

While Jonathan was in the seclusion room, I looked in the window at him every 15 minutes because that is what I understood the policy to be at Alpine based upon the seclusion room log sheet. I have asked myself since this happened whether I should have watched Jonathan constantly, but I was only following the school policy as I understood it.

15.

After Jonathan had been in the seclusion room for a period of time, he became quiet. I decided I would let him out a few minutes early as a reward. It had been approximately 12 minutes since my last visual check when I looked in the window and saw Jonathan's feet. When I tried to open the door, it seemed like Jonathan was leaning against it. Figuring Jonathan was trying to keep me from entering, I pushed my way in. When I got inside, I realized that Jonathan had the makeshift belt around his neck and had hung himself with it. I immediately called for help.

16.

Lynn Adams came to my assistance and commenced CPR. I recall that the EMT's arrived shortly thereafter and took over resuscitation efforts. I do not recall that Jonathan had any pulse or breathing at any time after I found him on the floor.

17.

I recall that I gave a tape recorded statement at Alpine days after the incident. I believe the man who took my statement was either from Pioneer or the Hall County School District.

This 5/31/ day of May, 2007.

Kenneth W. Trotter, Jr.

Kenneth Trotter, Jr.

Sworn and subscribed before me

this 31 day of May, 2007.

Kathleen M. Savage

Notary Public

My commission expires 9/22/09 >

Notary Public, Hall County, Georgia  
My Commission Expires September 22, 2009

IN THE COURT OF APPEALS  
STATE OF GEORGIA

DONALD LEE KING AND )  
TINA MARIE KING, )  
 ) COURT OF APPEALS  
Appellants, ) NO. A09A1567  
 )  
vs. )  
 )  
PIONEER REGIONAL EDUCATIONAL )  
SERVICE AGENCY, *et. al.* )  
 )  
Appellees, )

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing *Brief of Amicus Curiae* by depositing said document in the U.S. mail, addressed properly, with adequate postage, to counsel, and by sending a readable electronic copy to all counsel of record, as follows:

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This 6<sup>th</sup> day of July, 2009.

BY:

JONATHAN A. ZIMRING, Esq.  
Georgia Bar No. 785250  
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