



## COPAA Expresses Grave Concern Over S. 3895

### LANGUAGE LIMITS PROTECTION FOR CHILDREN

On September 29, 2010, Senator Christopher Dodd (D-CT) and Senator Richard Burr (R-NC) introduced S. 3895 to address abuse through the use of restraints, seclusion and aversive interventions in schools. It is well-documented that the use of restraint and seclusion in schools is neither effective nor therapeutic. Instead, it is mentally and physically abusive. Thousands of cases of restraint and seclusion occur in our nation's schools annually, often with tragic results, including the death of children.

COPAA is appreciative of Senator Dodd and Senator Burr's efforts to pass a bill in the Senate that sets forth minimum standards for states to protect children from what has historically been the unacceptable use of these methods and set up a structure to prevent future abuse. **However, we have grave concern regarding the provision that allows restraint and seclusion as planned interventions, and believe the current bill language weakens parents' and children's existing rights.**

COPAA supported the provisions as passed in HR 4247. We continue to support the need for a federal bill and minimum standards, and we are sensitive that some view passage of a Federal bill establishing minimal standards as a formidable step forward for many States.

Unfortunately, despite the many important provisions and minimum standards in S. 3895, the current draft of the bill permits inclusion of restraint and locked seclusion (defined as alone in a room or space from which a child is unable to exit, as a planned intervention in IEPs, behavior intervention plans or safety plans for students who have a documented history of behavior within the past two years that has created an imminent danger of serious bodily injury). This language weakens protections under IDEA, could allow important decisions to be made outside of the IEP process, will increase use of restraint and seclusion, and will diminish parent and student rights.

Allowing restraint and seclusion as a planned intervention in students' education plans, including behavior plans and Individualized Education programs (IEP) designed pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1414(d) has the effect of weakening or eliminating student and parent rights and is dangerous in ways that go beyond the obvious implications for other statutory and constitutional causes of action – by suggesting the notion that restraint and seclusion are somehow educational in nature, which they are clearly not.

COPAA supported H.R. 4247 and this Senate bill's predecessor S. 2860, explicitly because they prohibited restraint and seclusion as planned interventions. COPAA opposes S. 3895 allowing restraint and seclusion as planned interventions because:

**1) Contrary to popular belief, inclusion of restraint or seclusion on an IEP, behavior intervention plan, or safety plan will not protect students or make it easier for parents to argue that use of restraint or seclusion is abusive and constitutes a denial of FAPE.** Inclusion of restraint and seclusion in an IEP legitimizes these techniques as educational "methodologies" and makes abuse of them very hard to combat. Inclusion of restraint and seclusion in the IEP may provide eligible students access to remedies under

IDEA, but the remedies are limited. Furthermore, the language of this bill will establish the standard of care for any other claim.

**2) There is explicit legal danger in failing to prevent restraint and seclusion as planned interventions.** *Couture v. Board of Education of Albuquerque Public Schools*, 535 F.3d 1243 (10th Cir. 2008) and *C.N. v. Willmar Public Schools, Independent Sch. Dist. No. 347*, 591 F.3d 624(8th Cir. 2010), are two cases that vividly illustrate the legal danger inherent in explicitly failing to prohibit restraint and seclusion as a planned intervention in IEPs or in permitting them as a planned intervention. Once restraint and seclusion are included in an IEP, the practices are given the imprimatur of legitimacy simply because they were on the IEP. Parents who wish to challenge restraint and/or seclusion in an IEP face the hurdles inherent in exercising their due process rights, which include access to experts (whose costs are not reimbursable to parents), access to legal assistance (often beyond many families' financial means and not always geographically available), and the added deference accorded to educators.

**In other words, if a "technique" is in the IEP, even if using that technique worsens the behavior it was supposed to improve, it is up to the person who employed the technique in the first place to decide whether to continue its use.** And even if that decision was "pedagogical misjudgment" the parents/children cannot recover for resulting injury.

**3) The IDEA requires that to the extent possible, services included on a student's IEP be based on peer-reviewed research.** Proponents of restraint and seclusion have cited no research, peer-reviewed or otherwise, to establish that restraint and seclusion serve any legitimate educational purpose or that they are even effective. In fact, the only peer-reviewed research of which COPAA is aware demonstrates that restraint and seclusion do not have any treatment or educational value and that no amount or type of staff training can assure their safe use. (Haimowitz, Urff, and Huckshorn, 2006; Harper, 2003; Nunno, Holden, and Tollar 2006).

**4) An IEP is supposed to be the prescription for the student's education — an IEP consists of goals, specially designed instruction, supplementary aids and services and supports for school personnel to assure a student receives educational benefit.** The need for restraint or seclusion is caused by the absence of appropriate educational interventions, or the failure of appropriate educational interventions. In purely practical terms, in a due process hearing, it is much harder to challenge something that doesn't need to be in the IEP than to advocate for an intervention to be added to the IEP.

**5) Planned use of restraint and seclusion as an intervention is inconsistent with preventing and reducing their use.** Including restraint and seclusion in IEPs will increase, rather than decrease their use, thereby undercutting the purpose of the legislation. Including the techniques in an IEP may in fact, not only increase, but **mandate** their use. Additionally, a comparison of the settings in which children receive services offers persuasive reasons why restraint and seclusion should be prohibited as a planned intervention in schools. Restraint and seclusion cannot be included as planned interventions in treatment plans in children's mental health and other health care settings; they are harmful and non-therapeutic as planned interventions. Notably, these are settings with clinical staff.

**6) In our members experience with mental health, institutions serving individuals with developmental disabilities and in the ICF-MR regulations; trying to allow restricted use, then regulate and oversee, has been a failure and resulted in simply authorizing the use of restraint and seclusion.** Furthermore, restraint and seclusion was always approved as a matter of professional courtesy to the ordering professional even where there was a mandatory system of review and approval. In 15 years of data reviewed its use had never been denied or limited.

## Policy Recommendations for S. 3895

1. **Language should be clear that the intent of the legislation is to prevent and reduce seclusion and restraint and that an IEP should never include or require the use of such techniques.** For students who have restraint and seclusion imposed upon them for exhibiting behaviors that place selves or others in danger of serious bodily injury – the student support team, or when applicable the IEP team, shall meet to develop a positive behavior intervention plan based upon the results of a comprehensive, data-driven functional behavioral assessment (FBA) by a qualified team of professionals.

The positive behavior intervention plan shall include a clearly defined set of strategies, agreed upon by the team, that:

- a) are based upon the conclusions of the FBA
- b) address the environmental changes, modifications to instruction, the physical or social environment, or other supports intended to proactively prevent the dangerous behavior,
- c) promote pro-social alternative and replacement behaviors,
- d) define consequence strategies, including de-escalation techniques to manage and reduce the effectiveness of the problem behavior if it does occur to reduce or prevent the need for restraint or seclusion,
- e) considers any medical and/or psychological conditions of the student known by the parents or members of the IEP team that may be contraindications for behavior interventions, and,
- f) establish the method for collecting data to evaluate the success of the plan and the date by which the plan's implementation and effectiveness will be reviewed by the team.

2. **The definition of "student" in the private school context should not be a student who is enrolled in a private school and who is "receiving a free appropriate public education at the school..."** Clearly, whether or not a student is receiving FAPE should not be the defining characteristic of whether he or she is a student, since the student could be enrolled and might or might not be appropriately receiving all the special education and related services on his or her IEP.

3. **The bill must specify that an FBA be conducted or reviewed within a specific time period following the debriefing session.** Language should require that an effective FBA have been conducted and the resulting BIP implemented with fidelity prior to the beginning of the two year countdown. Otherwise, it is quite possible that the student's history of dangerous behavior could be the result of inappropriate and/or ineffective educational services and the student have restraint or seclusion added to an IEP because of a documented history of behavior that would not necessarily have occurred had he or she received appropriate services.

4. **Finally, it is critical that technical language changes occur to assure that nothing in the Act weakens existing protections and rights under IDEA, Section 504 of the Rehabilitation Act, or any other rights or remedies otherwise available to students or the families of students under Federal or State law (including regulations).**