

## **THE USE OF RESTRAINT, SECLUSION AND AVERSIVES IN SPECIAL EDUCATION SETTINGS**

### *I. Introduction*

Over the last several decades, children with disabilities have increasingly been afforded access to educational opportunities, as well as to the services and supports needed to make this access meaningful.<sup>1</sup> In order to accomplish this, the law has guaranteed them the right to a free and appropriate public education, as well as to protection against discrimination in public and private settings.<sup>2</sup> Despite these advances, they still remain subject to forms of discipline which nondisabled children are not.<sup>3</sup> Aversive, or punitive, behavioral interventions (aversives), restraint and seclusion are used in private and public special educational settings in ways that would likely never be contemplated for use on children in regular education, both as emergency measures and as behavioral modification as part of education or treatment.<sup>4</sup> Despite the intrusive and risky nature of these procedures, and the extent to which they are used, their use has gone unheard of by the public and unaddressed by the law to a large extent.<sup>5</sup>

This paper will examine the existing law on the use of aversives on children with disabilities and others placed in public and private special or alternative education settings. Part II will discuss aversives, how they are used and the controversy over this use in the educational, treatment and disability rights advocacy communities. Part III will discuss existing statutes and regulations on the subject, and the lack thereof, on both the state and federal level, as well as proposed legislation that would afford children further protection against the misuse of aversives. In part IV, the paper will examine existing case law on the use of aversives as well as related and analogous issues that may affect the analysis in future cases. Finally, Part V will discuss the protections for both children and people with disabilities that are envisioned or provided for in international human rights law and discuss to what extent if any they bear on the use of aversives on American children. Through discussing these existing measures and frameworks, it will show that the law as it stands is currently inadequate in addressing this issue. However, it will conclude that renewed public and legal interest in the question of how aversives should be used, if at all, provides reason for hope that the law will soon better protect children in special education settings.

### *II. The use of restraint, seclusion and aversives in public and private educational settings*

Aversive behavioral interventions (aversives) are procedures that seek to impose negative reinforcement, or punishment, for particular target student behaviors.<sup>6</sup> Restraint can be defined

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<sup>1</sup> See RUTH COLKER & JULIE K. WATERSTONE, SPECIAL EDUCATION ADVOCACY 1-2 (2011).

<sup>2</sup> See Individuals with Disabilities Education Act, Pub. L. No. 101-476, 104 Stat. 1142 (2004) (guaranteeing the right of children with disabilities to a free and appropriate education in the least restrictive setting); Rehabilitation Act of 1973 § 504, Pub. L. No. 93-112, 87 Stat. 355 (1973) (prohibiting discrimination against otherwise qualified individuals with disabilities in programs receiving federal funding); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (2008) (prohibiting discrimination against otherwise qualified individuals with disabilities in employment, government programs, public accommodations and telecommunications).

<sup>3</sup> See sources cited *infra* notes 6-11.

<sup>4</sup> See discussion *infra* Part II.

<sup>5</sup> See *id.* (the use of highly intrusive aversives has caused significant psychological trauma, physical injury and death in a number of cases); discussion *infra* Part III (current statutory and regulatory law provides inconsistent, and often insufficient, protection against the misuse of aversives).

<sup>6</sup> See, e.g., 115 Mass. Code Regs. 5.14(2) (2011) (defining aversives as “procedures involving things or events that, when presented contingent upon some specified behavior(s), have a decelerating effect upon that behavior.”)

as an intervention that limits a person's freedom of bodily movement.<sup>7</sup> There are several different types of restraint, namely physical (or manual) restraint by another human being, mechanical restraint by straps and other devices, and chemical restraint by psychiatric medication.<sup>8</sup> Seclusion is defined as putting a person in a room or area from which they are physically prevented from leaving.<sup>9</sup> Both restraint and seclusion can be used as aversives, but they can also be used for the purpose of containing a student that, in a teacher, administrator or staff member's estimation, poses an immediate threat to themselves or others.<sup>10</sup> Other practices that have been used as aversives in public schools, private facilities or both include contingent electric skin shock; deprivation of food, sleep, sensory input or social interaction; forced exercise or physical labor; and forced exposure to unpleasant stimuli such as the elements, noxious fumes or white noise.<sup>11</sup> The extent to which many of these aversive interventions are used is difficult, if not impossible, to know, as in many cases parents, investigators and others are not fully or at all informed of their use, and children, either by virtue of their disability or because of measures taken by schools and programs, are unable to tell anybody about it.<sup>12</sup> Investigations by

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<sup>7</sup> See NAT'L DISABILITY RIGHTS NETWORK, *SCHOOL IS NOT SUPPOSED TO HURT: INVESTIGATIVE REPORT ON ABUSIVE RESTRAINT AND SECLUSION IN SCHOOLS* 5 (2009) (defining restraint as manual methods, devices and medications that immobilize or restrict the bodily freedom of an individual).

<sup>8</sup> See *id.* (describing the different types of restraint).

<sup>9</sup> See *id.* (defining seclusion). Seclusion is distinct from simple time outs, in that, although a student in time out may be required to be in an area separate from the rest of the class and is prevented from participating in class activities, he or she is not physically prevented from leaving. See *id.* at 6.

<sup>10</sup> Compare, e.g., MERRIL WINSTON, PH.D., BCBA, *et al.*, *THE PREMATURE CALL FOR A BAN ON PRONE RESTRAINT: A DETAILED ANALYSIS ON THE ISSUES AND EVIDENCE* 27 (2009) (discussing the use of restraint in response to severe self-injurious and aggressive behaviors) with NAT'L DISABILITY RIGHTS NETWORK, *supra* note 7, at 14 (7 year old killed by the use of face down restraints after having blown bubbles in her milk while on time out); *Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers Testimony before the Comm. on Educ. And Labor, H.R.*, 111th Cong. 15-16 (statement of Gregory D. Kutz, Managing Director of Forensic Audits and Special Investigations, Gov't Accountability Office) [hereinafter "GAO Testimony on Restraint and Seclusion"] (teenager manually restrained in response to attempting to get food while being punished with "delayed lunch" for not finishing his schoolwork).

<sup>11</sup> See generally N.Y. STATE EDUC. DEP'T, *OBSERVATIONS AND FINDINGS OF OUT-OF-STATE PROGRAM VISITATION: JUDGE ROTENBERG EDUCATIONAL CENTER* 9 (2006) (detailing the use of punitive restraint and seclusion, contingent electric skin shock, and sensory, food and social deprivation at a private residential school in Massachusetts); MAIA SZALAVITZ, *HELP AT ANY COST: HOW THE TROUBLED TEEN INDUSTRY CONS PARENTS AND HURTS KIDS* (2006) (providing an overview of private residential programs for youth that use aversives including seclusion, corporal punishment, forced exercise, social isolation and forced verbal abuse by other students in the form of "confrontation therapy"); ALEXIA PARKS, *AMERICAN GULAG: SECRET P.O.W. CAMPS FOR TEENS* 204-214 (2000) (describing behavioral modification practices at private residential programs for teens, including forced exercise, corporal punishment, denial of medical care, seclusion, being forced to eat one's own vomit and carrying one's own excrement in one's pockets); Complainant's First Amended Accusation/Statement of the Issues, In the Matter of the Accusations Against the Behavioral Research Institute of California, No. L230-1278 (Dep't of Soc. Serv., State of Cal. Jan. 29, 1982) [hereinafter BRI Complaint] (private residential program used techniques including restraint, food deprivation, hard pinches and exposure to noxious odors as forms of behavioral modification on children with severe developmental disabilities, prompting California Department of Social Services to remove its license).

<sup>12</sup> See, e.g., *Milonas v. Williams*, 691 F.2d 931, 936 (10th Cir. 1982) (private residential behavioral modification school censored student mail, discouraged outside visitors, and prohibited and punished students for making disparaging remarks about the program); BRI Complaint, *supra* note 11, at 17, 23 (private residential program failed to take child resident to a scheduled doctor's appointment because of evidence of bruising from the use of aversives, and would purposefully suspend students' treatment programs leading up to family and doctor visits so as not to leave evidence of harm caused by the aversives). Cf. YouTube video: *Teacher/Bully: How My Son Was Humiliated and Tormented by his Teacher and Aide* (Apr. 20, 2012), *available at*

government agencies and advocacy groups, however, reveal that aversives use occurs not only nationwide in both public and private settings, but also in offshore “specialty schools” attended by American youth.<sup>13</sup>

As far as how aversives are used in educational settings, some may only use restraint, seclusion or other aversives in emergency situations involving an imminent threat of violence or destruction.<sup>14</sup> For the same reason that it is difficult to know what or how much aversives educational programs use, it is also difficult to know to what extent these policies and regulations are being observed.<sup>15</sup> However, because of incidents that have been discussed in investigative reports, court cases and other sources, there is cause for concern about minor or even innocuous behaviors being used as pretense for “emergency” interventions on the basis that they could supposedly cause or lead to harm in some way.<sup>16</sup> Furthermore, a number of programs, many of them private and unregulated, more or less explicitly hold themselves out as providing aversive therapy in order to address disruptive or noncompliant behavior.<sup>17</sup> In some cases, objectively harmless behavior that would not in normal settings be considered even disruptive or noncompliant will be interpreted as such in the context of these settings, and thus be punished with the use of aversives.<sup>18</sup>

Over the decades, the use of aversives, restraint and seclusion has been a subject of much controversy. Teachers and care providers, and even a number of parents, assert that such interventions are necessary in order to prevent or stop seriously aggressive, self-injurious or destructive behaviors on the part of out-of-control individuals where all other attempts at de-

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<http://www.youtube.com/watch?v=tfkscHt96R0> (father of Autistic boy who had started acting aggressively at school placed a tape recorder on his child to determine whether anything in class could explain this change and discovered that his teachers were verbally and emotionally abusing the children in their care).

<sup>13</sup> See generally GAO Testimony on Restraint and Seclusion, *supra* note 10 (discussing a number of cases of serious injury or death due to restraint and seclusion in both public and private schools); N.Y. STATE EDUC. DEPT., *supra* note 11 (investigation revealing excessive use of aversives in a private residential program); *Residential Treatment Programs, Concerns Regarding Abuse and Death in Certain Programs for Troubled Youth: Testimony before the Comm. on Educ. And Labor, H.R., 111th Cong. 4* (statement of Gregory D. Kutz, Managing Director of Forensic Audits and Special Investigations, and Andy O’Connell, Assistant Director of Forensic Audits and Special Investigations, Gov’t Accountability Office) [hereinafter GAO Testimony on Residential Treatment Programs] (detailing the results of investigation into abuse and neglect at behavioral modification programs for American teenagers within the country and abroad); NAT’L DISABILITY RIGHTS NETWORK, *supra* note 7 (national disability rights umbrella network issues report on the use of restraint and seclusion in public special education classrooms).

<sup>14</sup> See, e.g., *infra* note 44 (providing examples of states which restrict the use of restraint and seclusion in public schools, private programs or both to emergency situations).

<sup>15</sup> See sources cited *supra* note 12; GAO Testimony on Residential Treatment Programs, *supra* note 13, at 1-5 (discussing in part the difficulty of obtaining information about private residential programs such as alternative boarding schools due to unclear information, and the lack of consistent oversight of programs).

<sup>16</sup> See, e.g., YouTube video: Tape Shows Teen Being Shocked 31 Times (Judge Rotenberg Center Trial) (April 15, 2012), available at <http://www.youtube.com/watch?v=7Mrkn3PpCrA> (Autistic young adult restrained on four-point board and electrically shocked 31 times for refusing to take off his coat when asked and then tensing up and screaming in response to the restraint and shocks, based on the belief that these behaviors were precursors to aggression or self-injurious behavior).

<sup>17</sup> See generally SZALAVITZ, *supra* note 11 (explaining the rise and success of the industry of “troubled teen” programs and schools relying on “tough love” aversive practices to address issues such as substance abuse, noncompliance and emotional problems in youth).

<sup>18</sup> See, e.g., NAT’L DISABILITY RIGHTS NETWORK, *supra* note 7, at 14 (deaths result from restraint used in response to innocuous behavior by special needs children in public school classrooms); *supra* note 11, at 14 (students subject to aversives in response to “behaviors” such as slouching, failing to maintain a neat appearance, and calling out in class for a tissue after sneezing at private program).

escalation have failed.<sup>19</sup> Even without the justification of immediate harm to self or others, proponents of educational or treatment methods that rely on or include “tough love” tactics, which often means or at least includes the use of aversives, insist that they are necessary in order to prevent serious problems down the line, such as drug use, hospitalization or incarceration.<sup>20</sup> The use of aversives, some would say, can actually be less restrictive than other interventions, such as psychiatric medication.<sup>21</sup> They assert that aversives can in fact be more effective in teaching appropriate behaviors than positive reinforcement-only treatment plans.<sup>22</sup> One argument that has been advanced based on this view is that children with disabilities have the right to, and parents of such children have the right to choose, effective treatment, which they say may in some instances include the use of aversives.<sup>23</sup> Under this view, limitations on the use of aversives, rather than the aversives themselves, amount to disability discrimination, as people without the severe kind of disabilities that they would say require the use of aversives can choose to receive intensive or risky forms of treatment without such restrictions.<sup>24</sup>

People who would ban or severely limit the use of aversives in educational or treatment settings, including other parents, professionals and educators as well as disability and youth rights (self-)advocates, point to the many instances of serious injury and death that such interventions have caused.<sup>25</sup> Additionally, they assert that the use of force and coercion can cause significant psychological trauma.<sup>26</sup> The level of intrusiveness and risk involved in their use, under this philosophy, is not justified, especially in response to mere noncompliance or minor disruptive behavior, as is often the case.<sup>27</sup> Aversives, critics of their use would say, are not even effective in addressing target behaviors of any type, or are at best short-term

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<sup>19</sup> See, e.g., WINSTON, *supra* note 10, at 27 (prone restraint necessary to prevent severe self-injurious and aggressive behavior); BETTY FRY WILLIAMS & RANDY LEE WILLIAMS, EFFECTIVE PROGRAMS FOR TREATING AUTISM SPECTRUM DISORDER: APPLIED BEHAVIOR ANALYSIS MODELS 240 (2010) (explaining how individuals with the most severe behavioral problems are often excluded from programs that do not use aversives, as such programs are not able to properly address their needs).

<sup>20</sup> See SZALAVITZ, *supra* note 11, at 5; GAO Testimony on Residential Treatment Programs, *supra* note 13, at 2, 4.

<sup>21</sup> See generally Matthew L. Israel, Ph.D., Behavioral Skin Shock Saves Individuals with Severe Behavior Disorders from a Life of Seclusion, Restraint and/or Warehousing As Well as the Ravages of Psychotropic Medication: Reply to the MDRI Appeal to the U.N. Special Rapporteur on Torture 3 (2010) (arguing that the use of contingent electric shock and other aversive interventions protects people with severe behavioral problems from the extensive use of medication and emergency restraint as well as long-term institutionalization that would ostensibly inevitably flow from their conduct otherwise).

<sup>22</sup> See, e.g., *id.* at 16.

<sup>23</sup> See *id.* at 48-50; WILLIAMS & WILLIAMS, *supra* note 19, at 226-227.

<sup>24</sup> Israel, *supra* note 21, at 48-50.

<sup>25</sup> See generally NAT’L DISABILITY RIGHTS NETWORK, *supra* note 7 (chronicling death and serious injury caused by the use of restraint and seclusion in schools); SZALAVITZ, *supra* note 11 (providing a history of the troubled teen industry and its practices, including numerous instances of serious harm or death resulting from residential programs’ “tough love” approach). Cf. POLYXANE COBB, A SHORT HISTORY OF AVERSIVES IN MASSACHUSETTS (2005) (parent of person with disabilities formerly placed at residential program explains the way that aversives have continued to be legal in Massachusetts despite its causing the death of a number of students).

<sup>26</sup> See NAT’L DISABILITY RIGHTS NETWORK, *supra* note 7, at 8 (discussing findings by numerous treatment and advocacy organizations that restraint, seclusion and other aversives cause psychological as well as physical harm).

<sup>27</sup> See, e.g., N.Y. STATE EDUC. DEP’T, *supra* note 11, at 12-15 (contingent electric skin shock used inappropriately in response to minor or completely innocuous behaviors); NAT’L DISABILITY RIGHTS NETWORK, *supra* note 7, at 14 (children killed as a result of unnecessary restraint in response to noncompliant or merely annoying behavior).

solutions.<sup>28</sup> Over the last few decades, the field of positive behavioral interventions and supports, based on reinforcement and analyzing the cause of problematic behavior in order to effectively address it, has advanced greatly.<sup>29</sup> When used properly, according to anti-aversives advocates, these techniques can prevent the (perceived) need for aversives, and even the emergency use of restraint and seclusion.<sup>30</sup> In contrast to the aforementioned right to effective treatment position, anti-aversives advocates argue that aversives, or at least some of the ways in which they are used, can constitute disability discrimination and even violations of human rights under domestic and international law.<sup>31</sup>

Although, or perhaps because, this controversy has been going on for a number of decades in certain advocacy and professional communities, there is limited or at best inconsistent government oversight of these practices.<sup>32</sup> This is only beginning to change in light of a number of highly-publicized incidents resulting in investigations, court cases and public scrutiny.<sup>33</sup> By and large, however, the use of aversives is largely unmonitored, especially in the private sphere.<sup>34</sup> Furthermore, even in instances where the state becomes aware of the serious injury or death of a child resulting from the use or misuse of aversives, these harms are frequently under-

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<sup>28</sup> See POLYXANE COBB, COALITION FOR THE LEGAL RIGHTS OF PEOPLE WITH DISABILITIES, *AVERSIVES: WHY THEY DON'T SUCCEED AND WHAT DOES 5-8* (2005); PAT AMOS, TASH, *WHAT RESTRAINTS TEACH* (2009) (arguing from the perspective of a person with a disability that the use of restraints is in fact counterproductive in that it teaches distrust and violence). See also Matthew L. Israel Ph.D *et al.*, *Treatment of Aggression with Behavioral Programming that Includes Supplementary Contingent Skin Shock*, 4 Behavior Analyst Online Journal 119, 157 (2008) (finding that for many people aversive therapy worked only on a short term basis and would have to be continually administered over the course of their lives to remain effective).

<sup>29</sup> See, e.g., NAT'L DISABILITY RIGHTS NETWORK, *supra* note 7, at 35-37 (discussing the efficacy and successful implementation of data-based positive behavioral supports, which impose rewards and consequences without the use of aversives in order to create a safe and productive school environment); Frank L. Bird & James K. Luiselli, *Positive behavioral support of adults with developmental disabilities: assessment of long-term adjustment and habilitation following restrictive treatment histories*, 31 J. Behav. Ther. & Exp. Psychiat. 5, 16-18 (2000) (demonstrating success in transitioning individuals with severe developmental disabilities from restrictive aversives-based programs to a program that relied on other, non-aversive treatments).

<sup>30</sup> See *id.*

<sup>31</sup> See LAURIE AHERN & ERIC ROSENTHAL, MENTAL DISABILITY RIGHTS INTERNATIONAL, *TORTURE NOT TREATMENT: ELECTRIC SHOCK AND LONG-TERM RESTRAINT IN THE UNITED STATES ON CHILDREN AND ADULTS WITH DISABILITIES AT THE JUDGE ROTENBERG CENTER* (2010) [hereinafter "MDRI"] (arguing that the use of aversives, especially as used in one particular facility, violates international human rights protections against torture); Letter from the American Association on Intellectual and Developmental Disabilities et al. to the Office of Disability, Department of Health and Human Services et al. (Sept. 30, 2009), available at [http://www.disabilitycoop.com/reports/090930\\_Judge\\_Rotenberg\\_letter.pdf](http://www.disabilitycoop.com/reports/090930_Judge_Rotenberg_letter.pdf) [hereinafter "Letter to Government Agencies"] (asking various federal agencies and international human rights organizations to take action to end the use of aversives at a particular facility on the basis that their use is unnecessary and inhumane).

<sup>32</sup> See NAT'L DISABILITY RIGHTS NETWORK, *supra* note 7, at 10-13 (attributing the widespread misuse of restraint and seclusion to inconsistent state, and nonexistent federal, regulation on the issue); GAO Testimony on Residential Treatment Programs, *supra* note 13, at 5 (state regulations vary widely in whether and how they regulate private residential programs for youth).

<sup>33</sup> See, e.g., YouTube video: *Tape Shows Teen Being Shocked 31 Times (Judge Rotenberg Center Trial)* (April 15, 2012), available at <http://www.youtube.com/watch?v=7Mrkn3PpCrA> (video gone viral of young Autistic adult being repeatedly electrically shocked as part of an aversive-based treatment plan while restrained); CBS News, *School accused of putting autistic boy in bag* (December 23, 2011), [http://www.cbsnews.com/8301-201\\_162-57347613/school-accused-of-putting-autistic-boy-in-bag/](http://www.cbsnews.com/8301-201_162-57347613/school-accused-of-putting-autistic-boy-in-bag/) (last visited May 9, 2012) (incident involving 9 year old Autistic child restrained inside a duffel bag outside the classroom in a hallway as a disciplinary measure resulted in an online petition that gathered hundreds, and later thousands, of signatures).

<sup>34</sup> See, e.g., Lenore Behar *et al.*, *Protecting Youth Placed in Unlicensed, Unregulated Residential "Treatment" Facilities*, 45 Fam. Ct. Rev. 399, 401-402 (2007).

prosecuted.<sup>35</sup> Frequently, the state does not even take action to strip a program of its license to operate, or individual wrongdoers of their professional licenses, in these instances.<sup>36</sup> However, the increasing amounts of interest shown in the subject by lawyers, lawmakers, the federal government and the international community in recent years may lead to increased vigilance and steeper penalties for violations of existing law, in addition to the establishment of new laws.

### *III. Statutory and regulatory protections specifically addressing the (mis)use of aversives*

Even with recently renewed interest in the subject of aversives and their appropriate place in education and treatment, the law regarding their use is still far from consistent. At this point, there are no federal statutes or regulations specifically addressing this issue, though there are some that may be applicable to it in rare cases in the areas of disability discrimination and special education law.<sup>37</sup> For the most part, however, it is addressed by a wide variety of state laws and regulations.

As of the end of 2009, 27 states had any kind of binding laws or regulations that limited the use of restraint and seclusion in public schools.<sup>38</sup> Of the others, eight had non-binding policy guidelines on the subject.<sup>39</sup> A number of states also have licensing regulations on private special and alternative educational programs.<sup>40</sup> State laws and regulations differ across a number of axes, including but not limited to what law actually exists, what types of programs and settings it covers, what agencies establish the relevant regulations, how it defines certain terms, and, of course, what it allows, prohibits and requires.

The laws and regulations on aversives used in public schools, generally either passed by state legislatures or promulgated by state departments of education, vary in their content and in their strength. They often overlap with state laws on corporal punishment in schools, either including allowances for or limitations on aversives used on children with disabilities in particular or carving out an exception for their use on such students in what would otherwise be a total ban.<sup>41</sup> There are a number of factors that be used to define the strength of the protections they provide. Terms in the text of the law such as “emergency” or “isolation” may be strictly

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<sup>35</sup> See GAO Testimony on Restraint and Seclusion, *supra* note 10, at 25 (prosecutors rarely pursue cases involving death or injury due to restraint or seclusion so as not to retraumatize the victims, out of the belief that people with disabilities make unreliable witnesses, or out of fear that the jury will sympathize with the perpetrators for having to work with challenging students).

<sup>36</sup> See, e.g., *id.* at 9-10 (a significant amount of cases studied as part of the investigations resulted in teachers and aides who had seriously injured or killed students through the use of restraint and seclusion being able to continue to work in the field of education); The Comm. Of Mass. Dep’t of Early Education and Care, Investigation Report on JRC – 66 Kevin Clancy Way (2007) (investigation into incident at private residential facility in which one student had received 77 electric shock applications and another 29 without provocation on the orders of a prank caller resulting in findings of abuse and neglect, but no loss of licensure for the facility).

<sup>37</sup> See *infra* discussion at pp. 25-29 (applicability of the IDEA, Americans with Disabilities Act and Rehabilitation Act to cases involving the use of aversives).

<sup>38</sup> See Jessica Butler, Wrightslaw, Table A: State Laws (Statutes & Regulations) on Restraint and Seclusion Updated Through November 2009, <http://www.wrightslaw.com/info/restraint.regs.tablea.pdf> (last visited on May 9, 2012)

<sup>39</sup> See *id.*

<sup>40</sup> See sources cited *infra* notes 47-50.

<sup>41</sup> See, e.g., IOWA ADMIN. CODE . 281-103.2-8 (2012) (banning corporal punishment, but exempting from its definition the emergency use of restraint and seclusion); MICH. COMP. LAWS SERV. § 380.1312 (2012) (prohibiting the use of corporal punishment, but allowing for the use of restraint in emergencies or in order to protect property); UTAH CODE ANN. §§ 53A-11-801-806 (2012) (limiting the use of corporal punishment to cases in which the parents have provided written consent, but exempting from this rule the use of behavioral modification methods on children with disabilities).

defined for teachers staff and administrators, or by contrast be broad and allow for substantial discretion in determining what interventions are appropriate and legal.<sup>42</sup> Which aversive interventions states allow also varies, as some explicitly ban the use of certain procedures while others either outright allow them or do not specify which interventions are allowed and which, if any, are prohibited.<sup>43</sup> Closely related to that issue is that of under what circumstances a state allows the use of the aversives it does not ban, with the states with the strongest statutes and regulations limiting it to only the most drastic of situations.<sup>44</sup> Finally, the strongest laws also tend to include training and reporting requirements regarding a school's use of aversives. The former type of requirement mandates that a school, in order to use aversives, must train staff members to do so in a safe and legal manner in order to minimize both the use of these techniques and the injuries that they can cause.<sup>45</sup> Meanwhile, the latter type requires a school to inform parents of incidents in which aversives were used on their child, and possibly to file regular reports with the state on the overall use of such techniques, ensuring some degree of oversight and accountability.<sup>46</sup>

State regulation of aversives in private special and alternative education programs varies, if anything, more widely than that pertaining to their use in public schools. The most consistent thing about these rules is that they generally fall under licensing regulations for certain types of facilities.<sup>47</sup> Even in that respect, however, there is a lot of variation, in terms of which agencies are in charge of promulgating and enforcing these regulations, what type of programs they regulate, and what they allow, ban and restrict.<sup>48</sup> Like the regulations on the use of restraint,

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<sup>42</sup> Compare, e.g., ALA. CODE § 16-1-14 (2012) (allows public schools to “isolate or separate” pupils on the basis that, among other things, their “presence in the class may be detrimental to the best interest and welfare of the class as a whole,” without clearly defining what this would mean) with MD. CODE REGS. 13A.08.04.01-.06 (2012) (clearly defining what restraint and seclusion are and are not, and how and under what circumstances they may be used).

<sup>43</sup> See, e.g., OR. ADMIN. R. 581-021-0061-0062 (2012) (explicitly allows restraint and seclusion to be included as part of a behavioral support plan developed by the school and a students' parents to address destructive, self-injurious, aggressive or disruptive conduct, but only for when all less restrictive options would not be effective); UTAH CODE ANN. §§ 53A-11-801-806 (2012) (explicitly allows unspecified “behavioral reduction interventions for students with disabilities”); CAL. CODE REGS. tit. 5, § 3952 (prohibits any intervention “designed or likely to cause physical pain; which denies adequate sleep, food, water, shelter, bedding, physical comfort, or access to bathroom facilities; that precludes adequate supervision of the individual, or which deprives the individual of one or more of his or her senses.”)

<sup>44</sup> See, e.g., ALA. CODE § 16-1-14 (2012) (may or may not in fact allow for the use of seclusion if it is considered to be “in the best interest and welfare of the class as a whole”); CONN. GEN. STAT. §46a-152 (restraint and seclusion may only be used in schools and facilities to prevent “immediate or imminent injury to the person or others” in the absence of a less restrictive alternative); NEV. REV. STAT. ANN. § 388.521-.5315 (medical restraints allowed with a medical order, and physical restraints can be used to protect people or property from an immediate threat)..

<sup>45</sup> Compare IOWA ADMIN. CODE . 281-103.2-.8 (2012) (all school employees must receive adequate and periodic training that teaches both alternatives to the use of restraint and seclusion and safe ways in which to use it) with MICH. COMP. LAWS SERV. § 380.1312 (imposing no training requirement for staff using emergency restraint or seclusion).

<sup>46</sup> Compare CAL. CODE REGS. tit. 5, § 3952 (requiring that parents be notified within one school day of the use of an emergency intervention on their child, and that schools annually file with the Department of Education, reporting all of their emergency interventions to the state) with UTAH CODE ANN. §§ 53A-11-801-806 (2012) (imposing no reporting requirement for the use of restraint, seclusion or behavior reduction interventions).

<sup>47</sup> GAO Testimony on Residential Treatment Programs, *supra* note 13, at 5.

<sup>48</sup> *Id.* Compare OR. ADMIN R. 413-215-0061 (2012) (private residential programs' behavioral modification practices regulated under Department of Human Services, banning an extensive but non-exhaustive list of “harsh punishments,” only allows restraint as a last resort to prevent harm to a student's self or others, and establishes staff training and parental notification requirements for the use of aversives) with MONT. ADMIN. R. 24-181-301 (2012) (Montana regulations are under the Department of Labor and Industry, allowing programs to have students

seclusion and aversives in public school, they vary in strength.<sup>49</sup> The enforcement options available under all of these different types of regulations include investigations by the relevant state agencies and possible loss of license in the case of confirmed violations.<sup>50</sup>

Recent renewal of interest in the subject of aversives has led to a number of states passing new or additional laws and regulations on their use in recent years. In 2010, New Hampshire passed such a statute protecting children in schools and treatment facilities, supplementing its existing regulations on the use of aversives in public schools.<sup>51</sup> This statute limited restraint use to situations in which there is “substantial and imminent risk of bodily harm to the child or others.”<sup>52</sup> It further banned all restraint aside from relatively safe forms of physical restraint, as well as several other kinds of aversives, outright.<sup>53</sup> With regards to the type of physical restraint that the statute allows for, it imposed a number of restrictions, involving the permissible duration of, monitoring of the student by staff during, and staff training for use of restraint.<sup>54</sup> In terms of reporting requirements, it established that teachers schools must provide both parents, the school’s own administrators and the state Departments of Education and of Health and Human Services with information on incidents involving the use of restraint.<sup>55</sup>

The following year, the Massachusetts Department of Developmental Services passed an amendment to its regulations on behavioral modification in state-licensed facilities, which includes residential schools for children with developmental disabilities.<sup>56</sup> This amendment bans what the regulations term as “Level III aversives,” which include but are not limited to contingent electric shock, physical punishment and non-emergency restraint and seclusion, in the

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discipline one another within limits, decide whether students can visit or communicate with their families and develop their own policy with regards to informing parents of the use of aversives, but mandates that staff receive training “relative to behavioral management” and restricts the use of restraint to emergency last resort measures).

<sup>49</sup> *See id.* (while both Oregon and Montana have and have had numerous residential programs within their borders, the former’s regulations are rather stronger than the latter’s, both by covering more and allowing less); S.C. CODE ANN. REGS. § 61-103 (11) (provides only that “[d]iscipline shall be fair and consistent and must be administered based on the individual’s needs and treatment treatment plan. Discipline shall not include corporal punishment.”); ALASKA ADMIN. CODE TIT. 7 § 50.435 (2012) (prohibits a number of aversives and places a large number of restrictions on the use of seclusion in particular).

<sup>50</sup> *See, e.g.*, 22 Va. Admin. Code § 40-151-80 (A)(2012) (allows the Department of Social Services to revoke a program’s license for violations of state law or regulations); Utah Admin. Code r. 501-8-23 (2012) (provides for the immediate revocation of an outdoors or wilderness program’s license if a program is found to be in violation of the rules).

<sup>51</sup> N.H. REV. STAT. ANN. §§ 126-U:1-13 (2010). *See also* N.H. CODE ADMIN. R. ANN. ED. 1113.04-.09 (2012) (regulations on aversives existing in New Hampshire prior to the passage of the restraint law).

<sup>52</sup> N.H. REV. STAT. ANN. § 126-U:5.

<sup>53</sup> *Id.* § 126-U:4 (prohibiting restraint that endangers a child’s life or health; intentionally exposing a child to unpleasant sensory experiences for the purposes of behavioral control; intentionally inflicting pain, including for the purposes of enforcing compliance; and “[a]ny technique that unnecessarily subjects the child to ridicule, humiliation, or emotional trauma”); *Id.* § 126-U:6 (prohibiting chemical restraint and most forms of mechanical restraint).

<sup>54</sup> *Id.* § 126-U:11 (requiring that restraints last only so long as students pose a substantial and imminent risk of harm, and no longer than 15 minutes without approval from supervisors within the program, with staff monitoring the student constantly); § 126-U:5 (requiring that all staff using physical restraints be trained to do so).

<sup>55</sup> N.H. REV. STAT. ANN. § 126-U:7 (requiring that schools make reasonable efforts to inform parents of the use of restraint verbally within 24 hours, and that they do so in writing in 2, and that personnel who use physical restraints submit detailed reports to their supervisors on the exact nature of the incidents); *Id.* §§ 126-U:8-9 (requiring schools to provide, and the Departments of Education and of Health and Human Services to review, records relating to incidents of restraint).

<sup>56</sup> *See* 115 MASS. CODE REGS. 5.14(4)(b) (2011).



context of DDS-regulated facilities including residential special education schools.<sup>57</sup> However, they grandfather in the use of such interventions on children who had court-approved treatment plans that included them as of 1 September 2011.<sup>58</sup>

Lastly, in March of 2012, Wisconsin passed its first law on the use of restraint and seclusion in public schools.<sup>59</sup> The statute limits their use significantly, stating that they are only permissible when a student poses a “clear, present and immediate risk” to him or himself or others and when there is no less restrictive alternative available, and specifically prohibits the punitive use of restraint.<sup>60</sup> It bans mechanical and chemical restraints and unmonitored seclusion, and limits physical restraints that would endanger students’ health and safety.<sup>61</sup> Finally, it imposes both staff training and parental notification requirements for the use of aversives.<sup>62</sup>

Two federal laws addressing the use of aversives in schools and private programs have also been introduced in recent years, though neither of them has been passed or signed into law as of yet. The first of the two is the Keeping All Students Safe Act,<sup>63</sup> which addresses the use of restraint and other aversives in public and private schools that receive federal funding.<sup>64</sup> It would place an absolute ban on the use of techniques including mechanical and chemical restraint, dangerous forms of physical restraint, seclusion, and “aversive behavioral interventions that compromise health and safety.”<sup>65</sup> It goes beyond even most strong state bills in requiring that restraint can only be used when a student’s behavior immediately poses a danger of serious bodily injury to self or others; where the restraint does not interfere with the student’s ability to communicate; and where less restrictive interventions have been ineffective.<sup>66</sup> Under this law, aversives could not be written into a child’s special education plan.<sup>67</sup> Furthermore, they could only be used by trained staff.<sup>68</sup> As far as notification goes, the law would require schools to inform and debrief parents of incidents of physical restraint, and require state educational agencies to provide the federal government with data on the amounts and types of such incidents

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<sup>57</sup> See *id.* 5.14(4)(b)(3).

<sup>58</sup> See *id.* 5.14(4)(b)(4). This exception was included for the express purpose of avoiding litigation instigated by facilities that would attempt to overturn the regulations. DEPARTMENT OF DEVELOPMENTAL SERVICES, RESPONSE TO TESTIMONY AND WRITTEN COMMENTS TO PROPOSED AMENDMENTS TO BEHAVIOR MODIFICATION REGULATIONS: 115 C.M.R. 5.14 20 (2011).

<sup>59</sup> 2011 Senate Bill 353, 2011-2012 Legislature (Wis. 2012).

<sup>60</sup> *Id.* at §§ 2-3.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at § 4 (parents must be notified within one business day of a use of restraint or seclusion on their child, and provided with a written description of the incident within two business days); *Id.* at § 5 (staff must receive training in order to use restraint, which includes learning how to prevent the use of restraint and how to meet the reporting requirements).

<sup>63</sup> S. 2020, 112th Cong. (2011).

<sup>64</sup> *Id.* § 4.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* §4(A). The law also requires that school staff use the least amount of force necessary. *Id.* §4(B). Finally, it requires the restraint to end if the child’s health is at risk, if the child stops being a danger to him or herself or others, or if other, less restrictive interventions become feasible. *Id.* § 4(C).

<sup>67</sup> S. 2020, 112th Cong. § 4(E) (2011).

<sup>68</sup> *Id.* § 4(D) (requiring staff training by a state-approved crisis intervention training program, except in cases of emergency). A state-approved training program would involve training staff in preventing the use of restraint where possible, in using it safely otherwise; in first aid; and in using positive behavioral supports. *Id.* § 2(14).

on a yearly basis.<sup>69</sup> Though there would be no private right of action under this law, it authorizes the federal government, through the Secretary of Education, to withhold funding from noncompliant schools; require such schools to make and implement a corrective action plan with regards to their use of aversives; and seek to force schools to change through litigation where necessary.<sup>70</sup>

The second federal law that has been proposed is the Stop Child Abuse in Residential Programs for Teens Act of 2011.<sup>71</sup> This law, as its title suggests, would specifically address the treatment of youth in private residential programs, including special education settings.<sup>72</sup> It places absolute prohibitions on deprivation-based aversives and on any “[a]cts of physical or mental abuse designed to humiliate, degrade, or undermine a child’s self-respect.”<sup>73</sup> It goes on to limit the use of restraint and seclusion to that provided for under federal laws for other types of facility, that allow it only when used by trained staff in order to protect a student or others where other, less restrictive interventions have failed.<sup>74</sup> It contains some parental notification and training requirements, though framed differently than those in other laws.<sup>75</sup> Namely, they focus more on reporting instances of child abuse and teaching staff members to recognize and respond to it than on doing so with regards to the use of aversives in general.<sup>76</sup> Finally, it imposes a requirement that children in such programs have reasonable access to a telephone in order to report abuse and neglect to state authorities.<sup>77</sup> Like the Keeping All Students Safe Act, this law would not establish a private right of action for the purposes of enforcement. Instead, it allows for the imposition of civil penalties through the federal Department of Health and Human Services, and for the U.S. Attorney General to seek equitable or other relief through the courts under its provisions.<sup>78</sup> It also allows the former to conduct investigations and disseminate information on child abuse and neglect in individual private residential programs.<sup>79</sup>

Although much of the existing law is at this point inconsistent in a number of ways, recently passed or proposed legislation and regulation suggests a trend in the direction of stronger protections against the misuse of aversives.<sup>80</sup> Specifically, the new laws explicitly

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<sup>69</sup> *Id.* § 3(A)(iv)(I) (requiring verbal or electronic communication and written notification to the parents within 24 hours of the use of a restraint on a child, and a debriefing session between the student, the parents and representatives of the school); *Id.* § 6 (requiring state educational agencies to report information on the use of restraint in their schools to the Secretary of Education).

<sup>70</sup> *Id.* § 8.

<sup>71</sup> H.R. 3126, 112th Cong. (2011).

<sup>72</sup> *Id.* § 2(4)(A) (covered programs include but are not necessarily limited to behavioral modification programs, wilderness programs, boot camps and therapeutic boarding schools).

<sup>73</sup> *Id.* § 3(a)(1)(B), (D). Banned deprivation techniques include “withholding of essential food, water, clothing, shelter, or medical care necessary to maintain physical health, mental health, and general safety.” § 3(a)(1)(B).

<sup>74</sup> *Id.* § 3(a)(1)(C) (citing 42 U.S. § 290jj).

<sup>75</sup> H.R. 3126, 112th Cong. § 3(a)(1)(N) (2011) (requiring that parents of program attendees be notified immediately if there is an on-site investigation of a report of child abuse or neglect; a violation of state licensing standards; or a violation of the law as established under this bill).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* § 3(a)(1)(E).

<sup>78</sup> *Id.* § 3(b)(2) (owners and operators of programs in violation of the law may be liable for civil penalties of up to \$50,000 per violation); *Id.* § 4 (if civil penalties are insufficient, the federal Assistant Secretary for Children and Families of the Department of Health and Human Services can refer a case to a state Attorney General’s office for further investigation and prosecution).

<sup>79</sup> H.R. 3126, 112th Cong. § 3(b)(1), (c).

<sup>80</sup> Compare discussion *supra* pp. 14-19 (overview of new and potential laws on the subject of aversives) with *supra* notes 41-46 and accompanying text (explaining what factors make an aversive law strong).

prohibit a number of techniques entirely, and places significant limits, beyond those established in many if not the majority of previously existing state law, on the use of those practices that they still allow.<sup>81</sup> In particular, if passed, the federal Keeping All Students Safe Act would provide safeguards that exist in few, if any, states, in particular on the issue of what interventions are allowed and under what circumstances, on a consistent national level.<sup>82</sup> However, even with these new and stronger laws, the issue of enforcement, either through litigation or by other means, would determine to what extent their provisions would meaningfully prevent the trauma, injury and death that can result from the use of aversives.

#### *IV. Aversives and the courts*

On a federal constitutional level, public schools have been afforded with significant leeway in their use of corporal punishment, not just on children with disabilities but on all children in their care. In *Ingraham v. Wright*,<sup>83</sup> the Supreme Court held that corporal punishment does not violate their rights under the Eighth Amendment or the Fourteenth Amendment.<sup>84</sup> This holding included the conclusion that, because the Eighth Amendment's prohibition on the use of cruel and unusual punishment applies only in the context of people convicted of criminal offenses, it did not cover corporal punishment as used in schools.<sup>85</sup> With regards to the plaintiff's claim for procedural due process as guaranteed under the Fourteenth Amendment, the Court held that the Constitution did not require a hearing or any other procedural safeguards because of the traditional place that corporal punishment has had in school and because, in its view, state criminal and civil law provided adequate protection against abuse.<sup>86</sup> While it touched on the fact that students' substantive liberty interests were implicated in the use of corporal punishment, it held that corporal punishment was still permissible so long as it was not excessive, as it constituted only a minimal violation of these interests, and that other civil and criminal laws provided adequate protection from abuse.<sup>87</sup> In the end, it was unwilling to intrude on schools' rights and responsibilities in providing education, especially given what it saw as the widespread acceptability of corporal punishment as a means of discipline.<sup>88</sup>

Also, while people in schools and other institutions have a right to be free from bodily restraint and punishment, courts afford such institutions with significant amounts of deference in balancing this right against other interests and deciding how, and how much, to burden these rights when this balancing occurs. In *Youngberg v. Romeo*,<sup>89</sup> which established this right in a case involving the use of restraint on a person institutionalized in a state hospital, the Supreme Court held that the only requirement for imposing such burdens is that "professional judgment" be used in deciding to do so.<sup>90</sup> This imposes a very low standard for schools and facilities to meet in justifying even very restrictive and intrusive practices. One illustration of this can be

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<sup>81</sup> See notes and accompanying text.

<sup>82</sup> Keeping All Students Safe Act. S. 2020, 112th Cong. § 4 (2011).

<sup>83</sup> 430 U.S. 651 (1977).

<sup>84</sup> *Id.* at 683.

<sup>85</sup> *Id.* at 667-671 (basing their decision, at least in part, on the theory that school children do not need the protections of the Eighth Amendment because schools are open institutions and thus lend themselves less to the kinds of abuse in the justice system that the Eighth Amendment is meant to protect against).

<sup>86</sup> *Id.* at 681-682.

<sup>87</sup> *Id.* at 682.

<sup>88</sup> *Id.* at 676, 682.

<sup>89</sup> 457 U.S. 307 (1982).

<sup>90</sup> *Id.* at 322.

found in *Heidemann v. Rother*,<sup>91</sup> in which the Eighth Circuit Court of Appeals found no violation of substantive due process where a girl with physical and developmental disabilities was left on the floor while restrained by a blanket wrapped tightly around her at her school on several occasions.<sup>92</sup> It found that the school physical therapist had had her wrapped in the blanket for her security and comfort, and that thus her substantive due process rights had not been violated, as this decision fell within the range of valid professional judgment.<sup>93</sup> It in fact went so far as to say that, in order to hold otherwise, it have needed to find that there had been a “*substantial departure* [emphasis in the original text] from professional judgment, practice, or standards,” creating, if anything, a higher burden for plaintiffs to meet than that established in *Youngberg*.<sup>94</sup>

The Equal Protection Clause of the Fourteenth Amendment also provides little recourse for students with disabilities injured by the use of aversives. For the purposes of the Equal Protection Clause, people with disabilities are not considered a suspect class.<sup>95</sup> The effect of this is that the government can treat people with disabilities differently than those without so long as it has a rational, nondiscriminatory basis for doing so.<sup>96</sup> As *Heidemann* establishes, providing acceptable care as part of a student’s education, defined as the product of the sort of professional judgment discussed above, is considered a legitimate government interest that would satisfy the rational basis test.<sup>97</sup> However, the use of aversives is almost always presented by providers who use it as being justified based on the grounds of either care or safety, both of which are considered legitimate governmental interests.<sup>98</sup> Thus, there would be few, if any, instances in which a court working under the existing framework could find that the use of aversives on a child with a disability in school would violate the Equal Protection Clause.

All this being said, where corporal punishment is “arbitrary, capricious or wholly unrelated to the legitimate state goal of maintaining an environment conducive to learning,” it can constitute a violation of a student’s Fourteenth Amendment and Fifth Amendment substantive due process rights.<sup>99</sup> For instance, in *Jefferson v. Ysleta Independent School Dist.*, the Fifth Circuit Court of Appeals held that the conduct a teacher who had tied a second grader to a chair for two school days and denied her access to the bathroom was constitutionally

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<sup>91</sup> 84 F.3d 1022, 1031-1032 (8th Cir. 1996).

<sup>92</sup> *Id.* at 1025-1026 (plaintiff was apparently so tightly restrained in the blanket that her mother was unable to get it off by herself when she found the girl left on the floor of the classroom, with flies crawling into her mouth while she was restrained); 1031.

<sup>93</sup> *Id.* at 1029-1031.

<sup>94</sup> *Id.* at 1030.

<sup>95</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-446 (1985) (no higher level of scrutiny for equal protection purposes where it comes to people with intellectual disabilities, as the court presumes that they are unable to advocate and provide for their own needs under the law and thus in need of differentiation from others; that they are not politically powerless to attract the attention of lawmakers; and that there is no prejudice or antipathy directed at them by lawmakers passing measures that affect them differently from nondisabled people).

<sup>96</sup> *Id.* at 446 (“To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose.”).

<sup>97</sup> *Heidemann*, 84 F.3d at 1031.

<sup>98</sup> *See, e.g.*, sources cited *supra* notes 19-24; *Heidemann*, 84 F.3d at 1031 (providing acceptable care as part of someone’s education plan is a legitimate government interest for the purposes of equal protection). *Cf.* *Bell v. Wolfish*, 441 U.S. 520, 538-539 (1979) (security is a legitimate institutional goal that can be used as justification for restricting the rights of people in institutional settings).

<sup>99</sup> *Jefferson v. Ysleta Independent School Dist.*, 817 F.2d 303, 305-306 (5th Cir. 1987) (quoting *Woodard v. Los Fresnos Independent School Dist.*, 732 F.2d 1243, 1246 (5th Cir. 1984)).

impermissible.<sup>100</sup> The teacher, the court held, should have been aware that general legal principles did not allow for this type of treatment, which had caused the student emotional distress and humiliation and which had impeded her learning.<sup>101</sup> At the same time, the plaintiff had been restrained as part of some unspecified “instructional technique,” and the court implied that the inquiry would be quite different if she was instead being “properly punished or disciplined” by being tied to the chair.<sup>102</sup> Given the extra deference that courts tend to afford educators and treatment professionals with when it comes to addressing the needs of children with disabilities, it is highly likely that the use of aversives – that is to say, restrictive measures imposed for punitive reasons – would have to be downright egregious in nature and effect in order to merit court intervention on constitutional grounds.<sup>103</sup>

One last theory of constitutional protection against the use of at least some aversives is that it violates students’ rights under the Fourth Amendment, which protects against unreasonable searches and seizures. Specifically, the New York Court of Appeals in *Peters v. Rome City School Dist.*<sup>104</sup> found that the use of restraint and seclusion on a student with disabilities on 75 different occasions within one school year constituted a seizure, or rather a series thereof, for the purposes of the Fourth Amendment.<sup>105</sup> It went on to say that the jury in the court below had properly reached the conclusion that these seizures had been unreasonable, and thus constitutionally impermissible.<sup>106</sup> Few cases would be likely to rise to this level of excessiveness, and not all aversives would count as seizures for the purposes of the Fourth Amendment.<sup>107</sup> However, the reasonableness inquiry involved in such a case would seem to leave somewhat less discretion than the professional judgment standard that comes up in addressing Fourteenth Amendment questions.<sup>108</sup>

It is even harder to establish liability of a private school or facility for federal constitutional violations than it generally is to do so in a public school setting. This is because 42 U.S.C. § 1983, the federal civil rights statute under which a student can sue a school or program for violations of a constitutional right, requires him or her to show that that program was acting under the color of state law – something which is obviously the case with public schools but much less so with private ones.<sup>109</sup> In order to do this, a plaintiff must prove either

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<sup>100</sup> *Id.* at 304, 305.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 305.

<sup>103</sup> See *Ingraham v. Wright*, 430 U.S. 651, 676, 682 (1977) (corporal punishment not by itself to be violative of the rights of schoolchildren); *Heidemann v. Rother*, 84 F.3d 1022, 1031-1032 (8th Cir. 1996) (the use of restraint by itself is not a violation of substantive due process where professional judgment is involved).

<sup>104</sup> 747 N.Y.S.2d 867 (2002).

<sup>105</sup> *Id.* at 864-865, 870.

<sup>106</sup> *Id.* at 870.

<sup>107</sup> *Id.* at 864-865, 870 (the plaintiff was restrained and secluded on 75 different occasions over the course of a single school year, leading the court to conclude, for the purposes of another claim, that the jury could well have found the defendant’s conduct to be “outrageous” as well as unreasonable for the purposes of the Fourth Amendment. Compare *U.S. v. Mendenhall*, 446 U.S. 544, 553-554 (1980) (“We adhere to the view that a person is ‘seized’ only when, by means of physical force or a show of authority, his freedom of movement is restrained.”) with sources cited *supra* note 11 (aversives include social deprivation, forced exposure to noxious sensory experiences and other techniques that do not necessarily restrict a person’s freedom of movement).

<sup>108</sup> Compare *Peters*, 747 N.Y.S. at 870 (75 instances of restraint and seclusion were unreasonable seizures under the Fourth Amendment) with *CJN v. Minneapolis Public Schools*, 323 F.3d 630, 639-640 (a much increased use of restraint on a student with disabilities was permissible under the IDEA, which relies on a professional judgment standard similar to that used for the purposes of addressing violations of constitutional rights).

<sup>109</sup> 42 U.S.C. § 1983

that the defendant private entity performs a traditional state function or that there was a close nexus between the state and the private entity with regards to the conduct at issue in the case.<sup>110</sup> Courts have set a high bar for plaintiffs to meet in establishing either.<sup>111</sup> This extends to cases involving private schools, treatment programs and combinations thereof. First of all, neither private alternative education nor inpatient mental health treatment is considered a traditional state function for the purposes of establishing state action.<sup>112</sup> Furthermore, courts have held that even significant state funding and regulation of a program by itself is insufficient to establish a sufficiently close nexus between the state and a program or school.<sup>113</sup>

However, in one case, *Milonas v. Williams*,<sup>114</sup> the Tenth Circuit Court of Appeals found that the state's involvement with a private educational and detention facility for troubled youth was significant enough to enjoin several of the facility's practices, including the regular and largely punitive use of restraint and seclusion, under § 1983.<sup>115</sup> The defendant in the case, Provo Canyon School for Boys ("Provo Canyon"), did not only receive significant amount of financial support from state agencies, local school districts and federal funds, but also was the subject of extensive regulations specifically on the treatment of students in residential programs.<sup>116</sup> Additionally, many students at Provo Canyon had been placed there by their school districts or by juvenile courts.<sup>117</sup> Finally, Provo Canyon had entered into numerous detailed contracts with the state concerning its treatment of students.<sup>118</sup> These factors, in the court's view, constituted a "sufficiently close nexus" to establish state action under § 1983.<sup>119</sup> In addition to this, it held that the coercive and unnecessary use of restraint and seclusion, among other things, amounted to violation of Provo Canyon students' substantive due process rights under the Fourteenth Amendment, and enjoined these practices to the extent that they were not being used in response to emergency situations.<sup>120</sup>

Since the *Milonas* case was decided in 1982, though, few courts have decided to follow its lead. In particular, the Third Circuit Court of Appeals in *Robert S. v. Stetson School*<sup>121</sup> explicitly criticized and rejected its holding, ruling that the Tenth Circuit had given undue weight to the fact that Provo Canyon had been state-funded and regulated, however extensively.<sup>122</sup> Under a similar set of facts in terms of the type of state involvement with the defendant program, the court held that there was no state action for the purposes of § 1983.<sup>123</sup> That being said, the conduct complained of in *Stetson* was also not found to be state action because it was an

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<sup>110</sup> See *Rendell-Baker v. Kohn*, 457 U.S.830, 838, 842 (1982).

<sup>111</sup> See generally *id.*; *Blum v. Yaretsky*, 457 U.S. 991 (1982).

<sup>112</sup> See *Rendell-Baker*, 457 U.S. at 842 (private alternative education is not a traditional state function for the purposes of § 1983); *Rockwell v. Cape Cod Hospital*, 26 F.3d 254, 258-259 (psychiatric hospital does not perform traditional exclusive state function).

<sup>113</sup> See *Rendell-Baker*, 457 U.S. at 839-842.

<sup>114</sup> 691 F.2d 931 (10th Cir. 1982).

<sup>115</sup> *Id.* at 939.

<sup>116</sup> *Id.* at 935 n. 4, 940.

<sup>117</sup> *Id.* at 935 n. 4, 936.

<sup>118</sup> *Id.* at 940.

<sup>119</sup> *Milonas*, 691 F.2d at 939.

<sup>120</sup> *Id.* at 940-943.

<sup>121</sup> 256 F.3d 159 (3rd Cir. 2001).

<sup>122</sup> *Id.* at 167-168.

<sup>123</sup> *Id.* at 165.

individual instance of malfeasance by staff in violation of program policy.<sup>124</sup> By contrast, the conduct at issue in *Milonas* was a known part of the program, to which a child's parents and, ostensibly, schools and courts placing children there knew of and consented to.<sup>125</sup> This distinction also was significant in other cases that led to court decisions that departed from the holding in *Milonas*.<sup>126</sup> It is unclear whether a program's systematic use of aversives similar to that at Provo Canyon would lead a court today to find liability under § 1983 if there was a significant amount of state involvement with the program. The outright refusal of a number of other courts to follow *Milonas* suggests that it would not, but it remains an open question while *Milonas* is still considered good law.

Part of the courts' reluctance to find liability under § 1983 is due to the belief that plaintiffs would do better to seek relief under common law tort doctrines.<sup>127</sup> Indeed, a number of children injured by the use of restraint and seclusion have sought relief by suing under theories such as false imprisonment, emotional distress and medical malpractice.<sup>128</sup> As might be expected, a number of these cases settle, thus rendering the actual legal status of aversives under these common law doctrines unclear to some extent.<sup>129</sup> However, there are a few decided cases on the issue. For instance, the New York Court of Appeals in the aforementioned case of *Peters v. Rome City School Dist.* upheld the jury verdict of liability for both false imprisonment and resulting negligent infliction of emotional distress against a school that had placed a child with disabilities in an unsanitary seclusion room 75 times in one school year.<sup>130</sup> In addition to concluding that the school had intentionally confined the student and that the student had been aware of this confinement, the court emphasized the fact that his parents had not consented to the

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<sup>124</sup> *Id.* at 163 (plaintiff was suing over a staff member's allegedly physically abusing him, which violated the program's policy against "horseplay").

<sup>125</sup> *Id.* at 936 (students at Provo Canyon placed there as a "last resort" to address their serious behavioral problems).

<sup>126</sup> See *Doe v. Senechal*, 845 N.E.2d 418, 428 (Mass. App. Ct. 2006) (no state action for purposes of § 1983 where member of staff at residential mental health program sexually assaulted minor resident); *Robertson v. Red Rock Canyon School, LLC*, No. 2:05-CV-758 TC, 2006 WL 3041469 at \* 5 (D. Utah Oct. 24, 2006) (private residential program not liable under § 1983 for molestation of plaintiff committed by another student at the program).

<sup>127</sup> See *Ingraham v. Wright*, 430 U.S. 651, 661 (1977) ("To the extent that the force [involved in the use of corporal punishment] is excessive or unreasonable, the educator in virtually all States is subject to possible civil and criminal liability.")

<sup>128</sup> See SZALAVITZ, *supra* note 11, at 189-246 (recounting a medical malpractice trial over the use of aversives including restraint and social humiliation in a troubled teen program); CBS Boston, Settlement Reached in Lawsuit Against School that Shocked Student (Apr. 24, 2012), <http://boston.cbslocal.com/2012/04/24/settlement-reached-in-lawsuit-against-school-that-shocked-student/> (last viewed May 9, 2012) (describing the aftermath of medical malpractice suit arising out of the use of contingent electric shock and restraint at a private residential program). See generally *Peters v. Rome City School Dist.*, 747 N.Y.S.2d 867 (2002) (lawsuit claiming false imprisonment and negligent infliction of emotional distress, among other claims, based on repeated instances of restraint and seclusion); *Fred Collins v. Straight Inc.*, 748 F.2d 916 (1984) (young adult held involuntarily at troubled teen program was held to have been falsely imprisoned). See also PHILLIP ELBERG, LEGAL ISSUES SURROUNDING PLACEMENT OF AN ADOLESCENT IN A RESIDENTIAL PROGRAM: A DISCUSSION OF CIVIL LITIGATION ON BEHALF OF ADOLESCENTS AND THEIR FAMILIES 2-4 (2009) (discussing the possibility of legal claims on the basis of consumer fraud or medical malpractice, especially as pertains to the misuse of educational and therapeutic language, at abusive residential programs for teens).

<sup>129</sup> See, e.g., SZALAVITZ, *supra* note 11, at 245-246 (medical malpractice claim for abuses in troubled teen program settled before jury verdict was reached); CBS Boston, *supra* note 166 (mother and guardian of individual with disabilities who was repeatedly shocked and restrained for hours settled with residential program responsible for it at the end of the trial).

<sup>130</sup> 747 N.Y.S.2d at 869-870.

use of seclusion in his IEP.<sup>131</sup> It further held that the jury could well have found that these interventions had endangered the student or caused him to fear for his safety, and that they were outrageous enough in frequency, duration and manner to support a finding of negligent infliction of emotional distress.<sup>132</sup>

There would be very little room for tort liability, however, in cases where a child's parents did in fact know and consent to the use of aversives as part of their child's program. In one case, *Nicholson v. Freeport Union School Dist.*,<sup>133</sup> a mother suing on behalf of her son argued that the residential program that her son had attended, the Judge Rotenberg Educational Center (JRC), had used contingent electric shock and other aversives as part of his treatment in a way that was improper and unlawful.<sup>134</sup> The court dismissed the lawsuit, finding that the plaintiff was estopped from raising this claim by virtue of his mother having earlier consented to the JRC's use of aversives.<sup>135</sup> This limitation becomes particularly relevant in cases involving private residential programs which market themselves as relying largely on punitive interventions.<sup>136</sup> However, especially in cases involving alleged medical malpractice in a program's use of aversives, a lack of informed consent may undermine this defense, and in fact constitute an entirely different cause of action by itself.<sup>137</sup>

Children harmed by the use of aversives have also, through their families, sought redress under the Individuals with Disabilities in Education Act (IDEA). IDEA is a federal law mandating that states provide children with a free and appropriate public education in the least restrictive environment possible.<sup>138</sup> However, courts have held that IDEA, absent any state laws supplementing it, does not require schools to provide the best possible education to children with disabilities in order to maximize their potential, but merely to afford them with some meaningful educational benefit.<sup>139</sup> With regards to the use of aversives, as it is written, IDEA does not limit let alone ban them, and only requires schools to consider the use of positive behavioral interventions in developing a student with a disability's IEP.<sup>140</sup> In keeping with their pattern of deference towards schools, the courts have been unwilling to prescribe what interventions a school must choose over others in providing children with a free and appropriate public education.<sup>141</sup> For this reason, for example, in *CJN v. Minneapolis Public Schools*, the Eighth Circuit Court of Appeals refused to find that a student's rights under IDEA were violated where staff restrained him frequently over the course of the year rather than implementing positive behavioral interventions.<sup>142</sup> Even though the court agreed that restraint was perhaps not the optimal means of addressing his problematic behaviors, it held that this fact alone did not make his education inappropriate.<sup>143</sup> In addressing the plaintiff's assertion that, in restraining the

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<sup>131</sup> *Id.* at 869.

<sup>132</sup> *Id.* at 869-870.

<sup>133</sup> 74 A.D.3d 926 (2010).

<sup>134</sup> *Id.* at 927.

<sup>135</sup> *Id.*

<sup>136</sup> See Elberg, *supra* note 128, at 4-5 (parents have authority to place their children at programs that use aversives and consent to their treatment there).

<sup>137</sup> *Cf id.* at 3-4 (discussing theories of liability for private residential programs at the intersection of medical malpractice and consumer fraud).

<sup>138</sup> Individuals with Disabilities Education Act, Pub. L. No. 101-476, 104 Stat. 1142 (2004).

<sup>139</sup> See *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 191-192, 203-204 (1982).

<sup>140</sup> 20 U.S.C. §1414(d)(3)(B)(i).

<sup>141</sup> See *CJN v. Minneapolis Public Schools*, 323 F.3d 630, 640 (8th Cir. 2003) (quoting *Rowley*, 458 U.S. at 207).

<sup>142</sup> *Id.* at 639-640.

<sup>143</sup> *Id.*



student, the school had violated several state regulations pertaining to student rights under IDEA, the court went on to hold that what it considered to be minor infractions did not give rise to a claim under IDEA.<sup>144</sup> Overall, it refused to rule in such a way that would absolutely prohibit the use of restraint, as doing so would curtail the ability of schools to address problematic student behavior before it reached a level requiring the child's outright exclusion from school by means of suspension, which it considered to be a worse outcome than restraint.<sup>145</sup>

IDEA has even less applicability as a remedy for the use of aversives in private settings, as the court in *King v. Pioneer Regional Education Service Agency* established.<sup>146</sup> When a student's parents sued the state Department of Education (Department) under IDEA after the student had committed suicide in a seclusion room at a private residential program that the school had placed him at, the Georgia Court of Appeals ruled that the Department was not responsible.<sup>147</sup> This was because it had not been directly involved in the use of seclusion that had led to the suicide.<sup>148</sup> Thus, even if the use of aversives in a private setting could ever be considered to deny a child meaningful educational benefit for the purposes of a free and appropriate public education, there would be almost no situation in which a child could seek redress for this denial from the school or agency responsible for his or her placement, given that that entity would necessarily not be involved in making decisions over individual uses of aversives.<sup>149</sup> Furthermore, the court pointed out, based on prior case law, that IDEA did not exist for the purpose of being used as a tort statute against schools and state agencies in the way that the plaintiffs in this case intended to use it, namely for the purposes of obtaining monetary damages, further limiting its use in addressing the misuse of aversives.<sup>150</sup>

Finally, civil rights law prohibiting discrimination on the basis of disability may provide an avenue for children injured by the use of aversives to pursue in seeking protection or relief. There are two major such statutes, those being the Rehabilitation Act<sup>151</sup> and the Americans with Disabilities Act (ADA).<sup>152</sup> Both the Rehabilitation Act and the ADA prohibit discrimination on the basis of disability in providing access, services and funding, and require covered entities to provide reasonable accommodations to allow access to people with disabilities.<sup>153</sup> The main difference between the two laws is that, while the former applies only to entities that receive federal funding such as public schools, the latter applies to state and private entities as well, including private schools and programs.<sup>154</sup> Aside from that, however, the analysis used in

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<sup>144</sup> *Id.* at 639.

<sup>145</sup> *Id.*

<sup>146</sup> 301 Ga.App. 547, 556 (2009).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 557.

<sup>151</sup> Rehabilitation Act of 1973 § 504, Pub. L. No. 93-112, 87 Stat. 355 (1973).

<sup>152</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (2008).

<sup>153</sup> See 29 U.S.C. § 794 (“No otherwise qualified individual with a disability in the United States... shall solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”); 42 U.S.C. § 12182 (“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”).

<sup>154</sup> See *id.*

assessing claims under both statutes is much the same, as they contain similar language in terms of what they prohibit and require.<sup>155</sup>

Perhaps counter-intuitively given the intent of these statutes, the *Youngberg*-style deferential analysis carries over into interpretations of the Rehabilitation Act and, by extension, the ADA.<sup>156</sup> The courts have attempted to balance the rights of persons with disabilities against the responsibilities involved in running an educational program by holding that only actions in bad faith or out of gross misjudgment can constitute a Rehabilitation Act violation.<sup>157</sup> What this means in effect is essentially the same as what it means for claims under the constitution or the IDEA, that aversives will almost always be permissible under the law so far as the educational and treatment professionals involved in their development and implementation approve of their use for a recognized purpose such as safety or treatment. For example, the Eighth Circuit Court of Appeals in *Heidemann v. Rother* not only held that professional judgment rendered the use of the restraint blanket constitutional, but also that it defeated liability for the purposes of the Rehabilitation Act, in that it would serve to undermine an assertion of either bad faith or gross misjudgment.<sup>158</sup> In taking such a hands-off approach, the Eighth Circuit and other courts have relinquished a considerable amount of their own power to enforce the protections of these laws to some of the very people who they may at some point need to be enforced against.

However, in 2009, a coalition of disability advocates and organizations filed a complaint with the United States Department of Justice, among other federal agencies, alleging that the use of contingent electric shock and other aversives at a particular private facility, the aforementioned JRC, amounted to a violation of the civil and human rights of people with disabilities.<sup>159</sup> As a result of this, Department of Justice agreed to open an investigation under Title III of the ADA, which prohibits private entities, including private schools and programs, from discriminating on the basis of disability when it comes to goods, services, facilities and accommodations.<sup>160</sup> This investigation, which is still ongoing, could lead to litigation that, if the government and the beliefs of the advocates prevailed, would result in a prohibition on at least this particular facility's use of aversives.<sup>161</sup> Such action by the federal government itself may also provide grounds for holding other educational programs accountable for their misuse of aversives and, as part of that, by shifting the way in which the law currently addresses this and related issues.

## V. *International human rights law and aversives*

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<sup>155</sup> *See id.*

<sup>156</sup> *See* *Heidemann v. Rother*, 84 F.3d 1022, 1032 (8th Cir. 1996).

<sup>157</sup> *See id.* (citing *Monahan v. State of Nebraska*, 687 F.2d 1164, 1171 (8th Cir. 1984).

<sup>158</sup> *Id.*

<sup>159</sup> *See* Letter to Government Agencies, *supra* note 31.

<sup>160</sup> *See* Letter from Renee Wohlenhaus, Deputy Chief, Disability Rights Section, U.S. Department of Justice Civil Rights Division, to Nancy Weiss, Professor, University of Delaware (February 18, 2010), *available at* <http://leftbrainrightbrain.co.uk/wp-content/uploads/2010/02/US-Dept.-of-Justice-JRC-Investigation-Feb.10.pdf> (Department of Justice decides to open up a routine investigation into whether JRC has violated Title III of the ADA); 42 U.S.C. § 12182 (prohibiting discrimination on the basis of disability in public accommodations).

<sup>161</sup> *See, e.g.* Settlement Agreement, *United States v. Georgia*, No. 1:10-CV-249-CAP (N.D.Ga. October 19, 2010) (lawsuit filed by the Department of Justice against the state of Georgia under Title II over the ADA for Georgia's failure to integrate people with disabilities into the community results in settlement agreement requiring the state to stop institutionalizing people with disabilities in state hospitals and instead make substantial improvements to community-based public programs).

The rights of both children and people with disabilities to be free of cruel and degrading treatment are addressed in numerous instruments of international human rights law, including both more general conventions on human rights and specific ones on issues pertaining to those groups. For instance, the International Covenant on Civil and Political Rights, which addresses the rights of all human beings, guarantees that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>162</sup> The prohibition against such treatment is bolstered and further elaborated upon in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), where torture is defined as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as... punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>163</sup>

Like the ICCPR, the Convention Against Torture protects all people in countries which have ratified it.<sup>164</sup> Both of these instruments call upon the individual states that sign on to them to establish and enforce legal means of protecting the rights mentioned within them and to punish violations thereof.<sup>165</sup>

In addition to their being implicated in these general instruments, both people with disabilities and childrens’ rights are specifically mentioned in their own treaties established by the United Nations. The Convention on the Rights of Persons with Disabilities (CRPD) guarantees the people it covers the right to be free of torture and cruel, inhuman or degrading treatment, as well as from more general violence, exploitation and abuse.<sup>166</sup> It goes on to establish that “[e]very person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.”<sup>167</sup> Meanwhile, the Convention on the Rights of the Child (CRC) has its own provision banning torture and cruel, inhuman or degrading treatment.<sup>168</sup> In fact, it requires state parties to the convention to take measures to promote the recovery and integration of child victims of such treatment, as well as abuse, neglect and exploitation.<sup>169</sup> It further provides that children, to the extent possible given their age and maturity, should have the right to express their views on any matter affecting them and have those views taken into consideration in decisions.<sup>170</sup> Additionally, both treaties explicitly mention the right of children with disabilities to enjoy full and equal participation in society.<sup>171</sup>

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<sup>162</sup> Int’l Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171, art. 7 [hereinafter “ICCPR”]

<sup>163</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85, art. 1.1 [hereinafter “Convention Against Torture”].

<sup>164</sup> *Id.* at art. 2.; ICCPR, *supra* note 162, at art. 2.

<sup>165</sup> *See id.*

<sup>166</sup> Convention on the Rights of Persons with Disabilities, January 24, 2007, A/RES/61/106, art. 15-16 [hereinafter “CRPD”].

<sup>167</sup> *Id.* at art. 17.

<sup>168</sup> Convention on the Rights of the Child, November 20, 1989, 1577 U.N.T.S. 3, art. 37(a).

<sup>169</sup> *Id.* at art. 39.

<sup>170</sup> *Id.* at art. 12(1).

<sup>171</sup> *Id.* at art. 23; CRPD, *supra* note 166, at art. 7.

However, the United States has not joined in ratifying either convention, and has not even signed the CRPD, making it one of only two countries along with Somalia not to ratify the CRC.<sup>172</sup>

The most significant involvement of the international community on the issue of the use of aversives in a U.S. educational setting occurred in 2010, when the U.N. Special Rapporteur on Torture declared the use of contingent electric shock, long-term restraint and other aversives practiced at the Judge Rotenberg Center in Massachusetts to be torture under international law.<sup>173</sup> This declaration was based upon an urgent appeal to the Special Rapporteur by an international disability rights organization, which alleged that these techniques as used at this program violated the Convention Against Torture based on the abovementioned definition.<sup>174</sup> Unlike the CRC or CRPD, the U.S. has actually signed onto the Convention against Torture, and is thus bound to uphold the convention's terms within its own borders.<sup>175</sup> While the federal government has not taken direct or open steps towards ending the use of aversives at that program or in similar settings as of yet, discussions between the U.N. and the Obama Administration led to the latter putting pressure on Massachusetts' government to take action on this issue.<sup>176</sup> This may have in part led to the Massachusetts Department of Developmental Services' nearly banning the use of aversives by amending the regulations in 2011.<sup>177</sup> Currently, a report to the U.N. on the issue of abuses at residential programs for troubled youth in the U.S. is in progress, and will, similar to the 2010 report, be based on such programs' alleged violations of the Convention Against Torture.<sup>178</sup>

Beyond the political impact that international condemnation of human rights violations can have, however, there is little opportunity for enforcement, even of rights in treaties that the U.S. is actually a party to. The U.S. has not signed onto the Rome Statute, which would make it subject to the jurisdiction of the International Criminal Court in trials over crimes against humanity and similar atrocities, and has in fact been markedly hostile to the idea, leaving our own courts to decide on what constitutes such abuses and what is to be done about them.<sup>179</sup> The result of this has been to largely close the door on enforcing international human rights standards on a domestic basis. Specifically, in *Sosa v. Alvarez-Machain*,<sup>180</sup> the Supreme Court set a very

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<sup>172</sup> Human Rights Watch, United States Ratification of International Human Rights Treaties (July 24, 2009), [http://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties#\\_Convention\\_on\\_the\\_1](http://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties#_Convention_on_the_1) (last visited on May 9, 2012) (U.S. has signed but not ratified the CRC, and has not signed or ratified the CRPD); *Roper v. Simmons*, 543 U.S. 551, 576 (2005) (the U.S. and Somalia are the only two countries that are not a party to the CRC).

<sup>173</sup> See Office of Senator Brian A. Joyce, U.N. finds shock treatments at Judge Rotenberg Center in Canton to be torture (June 30, 2010), <http://brianajoyce.com/pressreleases/un-finds-shock-treatments-judge-rotenberg-center-canton-be-torture> (last visited on May 9, 2012).

<sup>174</sup> See generally MDRI, *supra* note 31 (using findings of prior investigation findings and interviews with former program staff and students, among other sources, to establish that JRC's practices are in violation of the Convention Against Torture).

<sup>175</sup> ; Convention Against Torture, *supra* note 163, at art. 2.

<sup>176</sup> Interview with Laurie Ahern, President, Disability Rights International [formerly Mental Disability Rights International], in Washington, D.C. (Mar. 27, 2012).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> See Human Rights Watch, The United States and the International Criminal Court, <http://www.hrw.org/legacy/campaigns/icc/us.htm> (last visited on May 9, 2012) (the U.S. is one of seven countries that has not signed onto the Rome Statute establishing the International Criminal Court, and has in fact "unsigned" it and outright refused to cooperate with the ICC, going so far as to pass measures protecting U.S. citizens from the court's reach).

<sup>180</sup> 542 U.S. 692 (2004).

high standard for plaintiffs to meet in attempting to do so. In order to prevail, one must show that the international law in question is widely recognized and accepted by “civilized nations,” and that is at least comparable to the types of international principles that were recognized at the time that the U.S. first allowed such claims to be heard in its court in the late eighteenth century.<sup>181</sup> The Court has repeatedly considered the prohibition on torture to be a norm that is so widely accepted by the international community so as to be enforceable through the U.S. justice system.<sup>182</sup> That being said, given the deference that courts have shown to schools and institutions in administering discipline and treatment, and given the U.S.’s own refusal to sign on to such conventions as the CRC or the CRPD, it seems unlikely that a court would consider the use of aversives to be torture for the purposes of this type of litigation.<sup>183</sup> Furthermore, in most but not all cases of alleged violations of human rights, including those involving torture, the defendant must have been acting the color of state law, raising similar difficulties to those found in § 1983 actions when it comes to the conduct of private entities.<sup>184</sup>

Additionally, the statute that allows for such lawsuits in the first place is the Alien Tort Claims Act,<sup>185</sup> which allows for federal district courts to have jurisdiction over claims brought by non-U.S. citizens over torts in violation of U.S. or international law.<sup>186</sup> Non-U.S. citizens do not have a comparable statute under which to sue on the basis of international law. This allows abuses such as those in schools and residential programs involving the use of aversives to fall through the cracks, where individuals whose rights have been violated can neither seek relief under the Constitution nor under the much broader provisions of international human rights law.<sup>187</sup> As far as direct enforcement goes, at best, international human rights law provisions relating to, and the international community’s condemnation of, the use of aversives may serve as persuasive authority in future court decisions addressing their permissibility under domestic law.<sup>188</sup>

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<sup>181</sup> *Id.* at 732. The Court also held that courts, in deciding whether an alleged violation of international law rises to this level, should consider the practical effects of allowing such a case to go forward. *Id.* at 732-733.

<sup>182</sup> *See id.* at 732 (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980)) (“[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him— *hostis humani generis*, an enemy of all mankind”).

<sup>183</sup> *See supra* note 214 and accompanying text (U.S. has not ratified the CRC or CRPD); discussion *supra* Part III (courts give educational and treatment professionals substantial leeway when it comes to questions of whether a given use of aversives was within the range of acceptability).

<sup>184</sup> *See Sosa*, 542 U.S. 733 n. 20 (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-795 (D.C. Cir. 1995)).

<sup>185</sup> 28 U.S.C. 1350 (2012).

<sup>186</sup> *Id.*

<sup>187</sup> *See* discussion *supra* Part IV (courts narrowly construing constitutional provisions and setting a high bar for establishing state action makes it difficult for plaintiffs to establish that their rights under the Constitution were violated).

<sup>188</sup> *See, e.g., Roper v. Simmons*, 543 U.S. 551, 575-576 (2005) (Supreme Court bans the death penalty for juvenile offenders, in part based on the fact that the U.S. was, at that time, the only country in the world that allowed or practiced the juvenile death penalty). Interestingly enough, the Court relied upon provisions under the Convention on the Rights of the Child, rather than a treaty that the U.S. has actually signed onto such as the International Covenant on Civil and Political Rights, in discussing the international human rights issues and laws bearing upon this decision. *Id.* at 576. This may be because the U.S. had specifically passed a reservation in signing onto the ICCPR on the issue of the juvenile death penalty. *See id.* at 567. That being said, the Court specifically rejected the government’s argument that this reservation should bear on its decision on whether the juvenile death penalty was unconstitutional under the Eighth Amendment. *Id.*

## VI. Conclusion

Children with disabilities are not systematically excluded from educational environments or permanently warehoused in institutions in the way that they once were.<sup>189</sup> That being said, they continue to be at risk for abuse and neglect in educational settings in ways that nondisabled people are not through the use of aversive behavioral and (supposedly) emergency interventions.<sup>190</sup> The physical and psychological consequences that these techniques can have are, and have repeatedly proven to be, severe.<sup>191</sup> Yet the law as it currently stands provides students with inconsistent and insufficient protection with regards to when and how they are used.<sup>192</sup> Courts have traditionally afforded schools and treatment professionals with a large amount of deference in civil cases, and criminal offenses related to the use of aversives go largely under-prosecuted.<sup>193</sup> Statutory and regulatory protections are scattered and as a result incomplete at this point.<sup>194</sup> International human rights conventions are at best persuasive authority in American courts, even where the United States has signed on to them.<sup>195</sup>

However, increased awareness of the ways in which aversives can be misused may change that. Not only have new laws and regulations been proposed and enacted recently, but advocates have also been exploring the possibility of using existing antidiscrimination, tort and even international law to address the harm that can be and has been caused by aversives.<sup>196</sup> Between the enforcement of existing laws and the passage of stronger and more consistent ones and regulations on a national level, possibly bolstered by international standards for the treatment of children and people with disabilities, the law may in the near future be able to effectively prevent and respond to abuse that disguises itself as treatment, education or discipline.

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<sup>189</sup> See sources cited *supra* note 1.

<sup>190</sup> See discussion *supra* note II.

<sup>191</sup> See *supra* notes 25-26 and accompanying text.

<sup>192</sup> See discussion *supra* Parts III-V.

<sup>193</sup> See discussion *supra* Part IV.

<sup>194</sup> See discussion *supra* Part III.

<sup>195</sup> See discussion *supra* Part V.

<sup>196</sup> See discussion *supra* pp 15-19, 23-25, 28-33.