PROACTIVE PROTECTION: HOW THE IDEA CAN BETTER ADDRESS THE BEHAVIORAL PROBLEMS OF CHILDREN WITH DISABILITIES IN SCHOOLS

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INTRODUCTION

The Individuals with Disabilities Education Act ("IDEA")[1] needs to be amended to proactively promote positive behavioral interventions and reduce unnecessary and highly dangerous uses of restraint and seclusion. The IDEA purports to advance these goals, but in reality the relevant provisions of the IDEA require behavioral plans only as a reactionary measure to violent or disruptive behavior.

Specifically, the IDEA does an inadequate job of proactively addressing behavioral issues in children with disabilities. First, the IDEA requires that an Individualized Education Program ("IEP")[2] team[3] only "consider" the use of positive behavioral interventions,[4] rather than actually require the IEP team to use positive behavioral interventions when it is recognized that a child has behavioral issues that impede his or her learning or the learning of others.[5] Second, a child's IEP is only required to address his or her disruptive or harmful behavior after it occurs, not before.[6] This reactionary approach to a child's behavioral issues fails to require schools to address and plan for these outbursts, which results in the school using dangerous and ineffective forms of restraint and seclusion that can be not only harmful, but in some cases fatal to the child.[7]

This Note proposes an amendment to the IDEA to address these problems proactively. The IDEA should be amended to require that an IEP for a child who has behavioral issues that suggest she may cause safety concerns or be disruptive to a class must include a completed functional behavioral assessment ("FBA")[8] along with a behavioral intervention plan

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1. 20 U.S.C. §§ 1400–50 (2012).

2. The term "individualized education program," or "IEP," means a written statement for each child with a disability that is developed, reviewed, and revised to address the child's educational goals. 20 U.S.C. § 1414(d)(1)(A).

3. *See* 20 U.S.C. § 1414(d)(1)(B).

4. *Id.* § 1414(d)(3)(B)(i).

5. *Id.*

6. *See id.* § 1415(k)(1)(D)(ii).

7. *See* Jeffrey P. Miller, Note, *Physical Education: Amending the Individuals with Disabilities Education Act to Restrict Restraint and Seclusion in Public and Private Schools*, 49 FAM. CT. REV. 400 (2011).

8. A "Functional Behavioral Assessment," or "FBA," is "a systematic process of identifying the purpose—and more specifically the function—of problem behaviors by investigating the preexisting environmental factors that have served the purpose of these behaviors." Perry A. Zirkel, *Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 SEATTLE U. L. REV. 175 (2011) [hereinafter Zirkel, *Case Law*] (citing Gregory P. Hanley et al., *Functional Analysis of Problem Behavior: A Review*, 36 J. APPLIED BEHAV. ANALYSIS 147 (Summer 2003) and Mark W. Steege & T. Steuart Watson, *Best Practices in Functional Behavior Assessment*, BEST PRACTICES IN SCHOOL PSYCHOLOGY 337 (Alex Thomas & Jeff Grimes eds., 2008)).

("BIP").[9] Additionally, either Congress or the Department of Education needs to promulgate requirements for states to follow regarding the standards for an appropriate BIP. These two proposed solutions will require schools to address behavioral issues before they escalate to potentially disruptive or harmful situations, promote safety for both students and staff, provide parents with a clear understanding of the methods used to teach their children, allow for greater parental participation in behavioral intervention planning, and provide a better opportunity for obtaining redress with a successful claim in court if the IEP is not followed.

Part I of this Note focuses on the restraint and seclusion techniques that are used instead of positive behavioral interventions in states and their school districts. Part II defines and discusses positive behavioral interventions and supports ("PBIS"), which are effective behavioral management techniques to be used when creating and implementing behavioral intervention plans. Part III looks at the main federal law addressing education of children with disabilities, the IDEA. Part IV discusses the failed attempts at addressing dangerous uses of behavioral techniques and interventions, looking specifically at the failed Congressional attempts to restrict the use of restraint and seclusion through the Keeping All Students Safe Acts of 2009 and 2011. Finally, Part V proposes a solution to the problem. It proposes that the IDEA is the best vehicle to enact substantive federal change regarding unsafe behavioral interventions, and proposes amendments to the IDEA that will require schools to better address behavioral problems before they actually occur in the classroom.

This Note takes the position that the most effective way to reduce the practice of restraint and seclusion is to require proactive behavioral management techniques such as an FBA and a BIP during the creation of a child's IEP and not resort to restraint and seclusion as reactionary tactics to address behavioral issues. In addition, Congress and the Department of Education should reiterate through the IDEA that restraint and seclusion should only be used in emergency situations, when other forms of behavior management have failed or cannot be effectively implemented. While utilization of an FBA and BIP for students with known behavioral issues may not eliminate all uses of restraint and seclusion on its own, it will at the very least proactively force schools to discuss with parents how the school will address the child's behavioral issues and hopefully reduce the use of unplanned, dangerous, and potentially fatal forms of restraint and seclusion.

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9. A "Behavioral Intervention Plan," or "BIP," is "a concrete plan of action for reducing problem behaviors, dictated by the particular needs of the student exhibiting the behaviors." Zirkel, *Case Law*, *supra* note 8, at 175 (citing H. Rutherford Turnbull III et al., *Public Policy Foundations for Positive Behavioral Interventions, Strategies, and Supports*, 2 J. POSITIVE BEHAV. INTERVENTIONS 218 (2000)).

I. RESTRAINT AND SECLUSION

States have long been afforded primary responsibility in making laws and regulations regarding the education of children.[10] Although states are the primary mechanism for establishing education standards, each state must at a minimum conform to the baseline requirements in the IDEA regarding educating children with disabilities.[11] But because there is nothing in the federal law that "directly prohibits or proscribes the school's use of aversive techniques to control or modify behavior,"[12] the use of restraint or seclusion as a method of addressing behavioral outbursts is a commonly used practice in schools.[13] Thus, one of the more contentious issues regarding educating children with disabilities involves the different tactics states are able to use in order to manage and correct behavioral problems.[14]

So what exactly are restraint and seclusion? There is currently no federal definition of restraint or seclusion as it is used in schools.[15] Most states have thus come up with their own definitions of the terms. Not only do the states define the terms, they also determine when to use or prohibit restraint and seclusion.[16] The lack of any federal guidance on restraint or seclusion in schools has resulted in states abusing the practice, with many cases of restraint or seclusion resulting in serious injuries and even student deaths.[17]

A. What Are Restraint and Seclusion?

There are two types of restraint most commonly used in school settings: mechanical restraint and physical restraint.[18] A third type of

10. NANCY LEE JONES, CONG. RESEARCH SERV., THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): STATUTORY PROVISIONS AND RECENT LEGAL ISSUES R40690, at 5 (2010) (citing 121 Cong. Rec. 19498 (1975) (statement of Sen. Dole)).

11. *Id.* at 1.

12. Craig Goodmark, *A Tragic Void: Georgia's Failure to Regulate Restraint & Seclusion in Schools,* 3 J. MARSHALL L.J. 249, 261 (2010).

13. *Id.*

14. Justin J. Farrell, Note, *Protecting the Legal Interests of Children When Shocking, Restraining, and Secluding Are the Means to an Educational End*, 83 ST. JOHN'S L. REV. 395, 399 (2009).

15. Sarah Marquez, Note, *Protecting Children with Disabilities: Amending the Individuals with Disabilities Education Act to Regulate the Use of Physical Restraints in Public Schools*, 60 SYRACUSE L. REV. 617, 620 (2010).

16. NAT'L DISABILITY RIGHTS NETWORK, SCHOOL IS NOT SUPPOSED TO HURT: THE U.S. DEPARTMENT OF EDUCATION MUST DO MORE TO PROTECT SCHOOL CHILDREN FROM RESTRAINT AND SECLUSION 19 (2012), *available at* http://www.ndrn.org/images/Documents/Resources/Publications/Reports/School_is_Not_Supposed_to_Hurt_3_v7.pdf [hereinafter NDRN REPORT].

17. *Id.* at 9.

18. Christine Florick Nishimura, Note, *Eliminating the Use of Restraint and Seclusion Against Students with Disabilities*, 16 TEX. J. C.L. & C.R. 189, 192 (2011).

restraint, chemical restraint, is normally not used in schools, but rather is most often used in hospitals to sedate patients.[19]

Various organizations have their own definitions of physical restraint. The Civil Rights Data Collection ("CRDC") definitions seem to closely mirror the Centers for Medicare and Medicaid Services definition. The CRDC defines physical restraint as "[a] personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely."[20] The term physical restraint does not include a physical escort. Physical escort means a temporary touching or holding of the hand, wrist, arm, shoulder, or back for the purpose of inducing a student who is acting out to walk to a safe location.[21] The Center for Medicaid Services defines restraint as it is used in hospitals.[22] Restraint in this context is defined as "any manual method, physical or mechanical device, material, or equipment that immobilizes or reduces the ability of an individual to move his or her arms, legs, body, or head freely."[23] In addition, the Council for Exceptional Children defines physical restraint as "any method of one or more persons restricting another person's freedom of movement, physical activity, or normal access to his or her body."[24]

States and school districts have also developed their own definitions of restraint.[25] For example, Tennessee defines "physical holding restraint" as "the use of body contact by school personnel with a student to restrict freedom of movement or normal access to the student's body."[26] The Texas statute defines physical restraint as "the use of physical force or a mechanical device to significantly restrict the free movement of all or a portion of the student's body."[27] Colorado regulations note that physical restraint is "the use of bodily, physical force to limit an individual's

19. Farrell, *supra* note 14, at 399–400.

20. U.S. DEPARTMENT OF EDUCATION, RESTRAINT AND SECLUSION: RESOURCE DOCUMENT 10 (2012), *available at* http://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf [hereinafter DOE RESOURCE DOCUMENT].

21. *Id.*

22. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-719T, SECLUSIONS AND RESTRAINTS: SELECTED CASES OF DEATH AND ABUSE AT PUBLIC AND PRIVATE SCHOOLS AND TREATMENT CENTERS 3 (2009), *available at* http://www.gao.gov/new.items/d09719t.pdf [hereinafter GAO REPORT]. This definition is relevant because while there is no federal legislation that provides a definition of restraint or seclusion as it is used in schools, restraint has been defined in federal legislation as it is used in hospitals; *see also* 42 C.F.R § 482.13(e)(1)(i)–(ii).

23. GAO REPORT, *supra* note 22, at 1.

24. COUNCIL FOR EXCEPTIONAL CHILDREN, CEC'S POLICY ON PHYSICAL RESTRAINT AND SECLUSION PROCEDURES IN SCHOOL SETTINGS 1 (2009), *available at* http://sped.org/~/media/Files/Policy/CEC%20Professional%20Policies%20and%20Positions/restraint%20and%20seclusion.pdf [hereinafter CEC POLICY].

25. Marquez, *supra* note 15, at 620.

26. TENN. CODE ANN. § 49-10-1303(8) (Lexis Advance through 2013 Reg. Sess.).

27. TEX. EDUC. CODE ANN. § 37.0021(b)(1) (West, WestlawNext through 2013 Third Called Sess.).

freedom of movement,"[28] but specifically excludes from that definition "the holding of an individual for less than five minutes by a staff person for protection of the individual or other persons."[29] Nevada defines physical restraint as "the use of physical contact to limit a person's movement or hold a person immobile."[30]

Seclusion is defined by the CRDC as "the involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving."[31] Seclusion does not include the use of time-outs.[32] The Council for Children with Behavioral Disorders[33] defines seclusion:

> [T]he involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving. This includes situations where a door is locked as well as where the door is blocked by other objects or held by staff. Any time a student is involuntarily alone in a room and prevented from leaving should be considered seclusion regardless of the intended purpose or the name applied to this procedure or the name of the place where the student is secluded.[34]

B. No Rules, No Supervision

The language used in the IDEA allows states to use aversive techniques such as restraint or seclusion instead of positive behavioral interventions whenever they wish, and only requires a school to directly address a child's behavioral issues through a behavioral intervention plan when his or her behavioral outbursts cause a change in the child's educational placement.[35] In addition, very few states have any laws requiring a school to obtain the consent of the parents before their child is restrained or secluded, or to notify the parents after their child is restrained

28. COL. REV. STAT. ANN. § 26-20-102(6) (Lexis Advance through 2013 Reg. Sess.).

29. *Id.* § 26-20-102(6)(c).

30. NEV. REV. STAT. ANN. § 388.5255 (West, WestlawNext through 2013 Reg. and Spec. Sess.).

31. DOE RESOURCE DOCUMENT, *supra* note 20, at 10.

32. *Id.*

33. The Council for Children with Behavioral Disorders is a division of the Council for Exceptional Children.

34. THE COUNCIL FOR CHILDREN WITH BEHAVIORAL DISORDERS, CCBD POSITION SUMMARY ON THE USE OF SECLUSION IN SCHOOL SETTINGS 1 (2009), *available at* http://www.ccbd.net/sites/default/files/CCBD%20Position%20on%20Use%20of%20Seclusion%207-8-09.pdf [hereinafter CCBD POSITION SUMMARY].

35. 20 U.S.C. § 1415(k)(1)(D)(ii) (2012).

or secluded.[36] A 2009 report published by the National Disability Rights Network "found that 41% of states have no laws, policies, or guidelines governing [the use of restraint or seclusion in schools,] and only 45% of states require or recommend that schools notify parents or guardians if these procedures are used."[37] Thus, a school has very little, if any, supervision regarding how they address behavioral issues of students with disabilities.

Leaving the states to determine when to use restraint or seclusion has resulted in hundreds of allegations of abuse and the unfortunate deaths of children with disabilities.[38] Not only is the practice inconsistently regulated, in some states there is *nothing* regulating when restraint and seclusion can be used.[39] In addition to the National Disability Rights Network Report, the statistics regarding state use of restraint and seclusion were also examined in the 2009 Government Accountability Office Report on Seclusion and Restraint.[40] The Report found that as of 2009, nineteen states had no laws or regulations regarding the use of seclusions or restraints in schools.[41] Of the states that had regulations, the permitted practices varied greatly.[42] For example, seven states had some restrictions on the use of restraints but did not regulate seclusions.[43] "Seventeen states required that selected staff receive training before being permitted to restrain children."[44] Schools are required to obtain consent before using foreseeable or non-emergency restraints in thirteen states.[45] Nineteen states required parents to be notified after restraints have been used.[46] Two states

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36. JESSICA BUTLER, THE COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC., UNSAFE IN THE SCHOOLHOUSE: ABUSE OF CHILDREN WITH DISABILITIES 4 (2009), *available at* http://www.copaa.org/wp-content/uploads/2010/10/UnsafeCOPAAMay_27_ 2009.pdf.

37. Janice LeBel et al., *Restraint and Seclusion Use in U.S. School Settings: Recommendations from Allied Treatment Disciplines*, 82 AM. J. OF ORTHOPSYCHIATRY 75, 76 (2012).

38. GAO REPORT, *supra* note 22, at 5.

39. *Id.*

40. *Id.*

41. Arizona, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, New Jersey, North Dakota, Oklahoma, South Carolina, South Dakota, Vermont, Wisconsin, and Wyoming. *Id.* at 4. As of 2012, there were only 29 states with laws protecting against restraint and seclusion, and six states (Arizona, Idaho, Mississippi, North Dakota, New Jersey and South Dakota) still had no laws regulating restraint or seclusion. NDRN REPORT, *supra* note 16, at 19–20.

42. *Id.*

43. *Id.* (Alaska, Colorado, Hawaii, Michigan, Ohio, Utah, and Virginia).

44. *Id.* (California, Colorado, Connecticut, Illinois, Iowa, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Texas, and Virginia).

45. *Id.* (Colorado, Delaware, Maryland, Massachusetts, Montana, New Hampshire, New York, North Carolina, Oregon, Pennsylvania, Tennessee, Virginia, and Washington).

46. *Id.* (California, Colorado, Connecticut, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, and Virginia).

required annual reporting on the use of restraints,[47] and eight states specifically prohibited the use of prone restraints, or restraints that impede a child's ability to breathe.[48]

The use of restraint or seclusion can be particularly problematic for children with disabilities who have difficulty communicating with teachers and parents.[49] For example, in North Carolina, a 14-year-old student who was deaf and had intellectual disabilities as well as a health condition was restrained by having her hands pinned against her chest.[50] The student used sign language as the primary form of communication.[51] The restraint prevented the child from being able to communicate with the staff members while restrained.[52] The force used by the staff during the restraint caused deep bruises on her arms, yet the school chose not to investigate or address the incident.[53] The communication difficulties result in such a child not understanding the purpose of the restraint or seclusion, thinking that he is being punished instead of being taught to correct the behavior.[54] Thus, the child will fail to understand how to appropriately modify his behavior in the future. The child's communication difficulties can also limit the ability of the child to inform his parents of what is being done to him at school.

Restraint and seclusion "do not further any legitimate or research-based behavior-management system, and has never been recognized as serving any pedagogical purpose."[55] Restraint and seclusion do not teach the child to whom the restraint or seclusion is being applied how to appropriately manage the behavior, and often can "turn a non-confrontational behavioral outburst into a violent and aggressive 'fight' response."[56] Indeed, studies of children who have been subjected to restraint or seclusion indicate that the children reported emotions during such events as "anger, fear and confusion."[57] Another study shows that the

47. *Id. (*California and Connecticut).

48. *Id.* (Colorado, Connecticut, Iowa, Massachusetts, Pennsylvania, Rhode Island, Tennessee, and Washington).

49. *Id.* at 14.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *See* Nishimura, *supra* note 18, at 198; Marquez, *supra* note 15, at 622; Farrell, *supra* note 14, at 402.

55. Goodmark, *supra* note 12, at 257 (noting that "reports that physical restraints are effective in any manner are based on anecdotal evidence and subjective case reports" (citing Wanda K. Mohr & Jeffrey A. Anderson, *Faulty Assumptions Associated with the Use of Restraints with Children*, 14 J. CHILD & ADOLESCENT PSYCHIATRIC NURSING 141 (2001) and David M. Day, *Examining the Therapeutic Utility of Restraints and Seclusion with Children and Youth: The Role of Theory and Research in Practice*, 72 AM. J. ORTHOPSYCHIATRY 266 (2002))).

56. *Id.*

57. Marquez, *supra* note 15, at 622 (citing Wanda K. Mohr & Jeffrey A. Anderson, *Faulty Assumptions Associated with the Use of Restraints with Children*, 14 J. CHILD. & ADOLESCENT PSYCHIATRIC NURSING 141, 142 (2001)).

children believed the restraint or seclusion was used on them as punishment.[58] In regard to seclusion, "For some students, the feeling is so unbearable that they have become fearful of small spaces; others have threatened or committed suicide as a result."[59] Worst of all, restraint and seclusion is most commonly used against more vulnerable younger and smaller children with disabilities rather than older, stronger, and more physically aggressive children.[60] One study found that more than half of the incidents involving restraint and seclusion are against small children between six and ten years old.[61]

Federal legislation explicitly establishing permissible uses of restraint and seclusion is necessary to protect children in every state from dangerous and potentially lethal practices.[62] Many legal advocates consider restraint and seclusion to be corporal punishment,[63] which is defined as "any punishment in which physical force is used and intended to cause some degree of pain or discomfort."[64] While many states allow restraint and seclusion practices, the national and international communities view the practices as "unethical, abusive, and a violation of children's human rights."[65] But because there is no federal legislation or guidance regarding the use of restraint and seclusion, it is left up to the states to determine whether restraint and/or seclusion are acceptable practices. The disheartening reality is that while corporal punishment in the form of restraint and seclusion in schools is not addressed by the federal government, its use has been banned nationally in juvenile detention facilities.[66] While the federal government seems to recognize the danger in allowing corporal punishment to be used on children in detention facilities,

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58. *Id.*

59. Nishimura, *supra* note 18, at 198 (citing King v. Pioneer Reg'l Educ. Serv. Agency, 688 S.E.2d 7 (Ga. Ct. App. 2009)).

60. BUTLER, *supra* note 36, at 4.

61. *Id.*

62. Marquez, *supra* note 15, at 635 (citing Wanda K. Mohr & Jeffrey A. Anderson, *Faulty Assumptions Associated with the Use of Restraints with Children*, 14 J. CHILD. & ADOLESCENT PSYCHIATRIC NURSING 141, 142 (2001)).

63. Lebel et al., *supra* note 37, at 75.

64. *Id.*

65. *Id.*

66. *See* Morales v. Turman, 562 F.2d 993, 998 (5th Cir. 1977) (corporal punishment and physical abuse in juvenile detention facilities subject to prohibition as a violation of Eighth Amendment), *rev'd and remanded*, 430 U.S. 322 (1977); Nelson v. Heyne, 491 F.2d 352 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (listed as No. 73-1635) (paddling of children in juvenile detention was a violation of the Eighth Amendment's ban on cruel and unusual punishment); *see also* Santana v. Collazo, 533 F. Supp. 966, 992 (D.P.R. 1982) (corporal punishment against juveniles in industrial schools and juvenile camps violates Eighth Amendment and is barred "for any reason"), *aff'd in part and vacated and remanded in part*, 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984) (listed as No. 83-6024). The American Correctional Association has also issued standards banning use of corporal punishment in juvenile facilities. *See generally* Steve J. Martin, *Staff Use of Force in United States Confinement Settings*, 22 WASH. U. J.L. & POL'Y 145 (2006).

it does not view restraint and seclusion of children with disabilities in schools with the same trepidation.

II. POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS

The IDEA states that if a child's behavior impedes his or her learning or that of others, the IEP team should "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior."[67] Positive behavioral interventions and supports has been defined as "a multi-tiered school wide approach to establishing the social culture that is helpful for schools to achieve social and academic gains while minimizing problem behavior for all children."[68] The Council of Parent Advocates and Attorneys ("COPAA") released a report in 2009 regarding restraint and seclusion in schools. In the report, COPAA noted:

> Positive behavioral supports use research-based strategies that combine behavioral analysis with person-centered values to lessen problem behaviors while teaching replacement skills. These proactive practices teach children to build social relationships and skills they need to progress to adulthood. They also create an environment that values and teaches healthy relationships, conflict resolution skills, and each person. All members of a school community benefit from this, all children and adults.[69]

The Office of Special Education Programs ("OSEP") Technical Assistance Center on Positive Behavioral Interventions and Supports lays out recommended framework to properly implement positive behavioral interventions and supports in schools.[70] Four elements are emphasized: "(a) *data* for decision making; (b) measurable *outcomes* supported and evaluated by data; (c) *practices* with evidence that these outcomes are achievable; and, (d) *systems* that efficiently and effective[ly] support implementation of these practices."[71] According to the OSEP Technical Assistance Center, the goal is to utilize these four elements in order to:

> Develop a continuum of scientifically based behavior and academic interventions and supports[;] Use data to make decisions and solve problems[;] Arrange the environment to prevent the development and occurrence of problem

67. 20 U.S.C. § 1414(d)(3)(B)(i) (2012).
68. DOE RESOURCE DOCUMENT, *supra* note 20, at 3.
69. BUTLER, *supra* note 36, at 3.
70. OSEP CENTER ON PBIS, WHAT IS SCHOOL-WIDE POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS? (2009), *available at* http://www.pbis.org/common/cms/documents/WhatIsPBIS/WhatIsSWPBS.pdf.
71. *Id.*

> behavior[;] Teach and encourage prosocial [sic] skills and behaviors[;] Implement evidence-based behavioral practices with fidelity and accountability[; and] Screen universally and monitor student performance & progress continuously.[72]

The intended results of using positive behavioral interventions and supports include creating teaching and learning environments that are "less reactive, aversive, dangerous, and exclusionary . . . , [are more] support[ive] for students whose behaviors require more specialized assistance . . . , and maximize academic engagement and achievement for all students."[73]

The U.S. Department of Education estimates that more than 17,000 schools implement positive behavioral interventions and supports[74] and that the use of PBIS instead of aversive techniques to deal with problem behaviors in students has resulted in "significant reductions in the behaviors that lead to office disciplinary referrals, suspensions and expulsions."[75] However, other studies indicate that schools are far too often failing to implement PBIS. For example, COPAA collected 185 incident reports from families of children with disabilities. In 71% of these incidents, the schools had not provided the student with a behavioral intervention plan that included PBIS.[76] In an additional 13% of the incidents, the parents did not know whether the school provided any PBIS.[77] As the report noted, "These numbers are striking because they appear to indicate that rather than proactively providing positive behavioral plans to lessen problem behaviors, the school personnel apparently relied on reactive, aversive interventions."[78]

The failure to proactively address the use of restraint and seclusion in the IDEA is a huge hole in promoting safe and beneficial behavioral management strategies for children with disabilities in public schools in every state. The federal government has the ability, through the IDEA, to place more of an emphasis on the use of positive behavioral supports and interventions by requiring schools to proactively include functional behavioral assessments and behavioral intervention plans in IEPs for children that are known to have behavioral outbursts that disrupt or threaten the safety of the class. This type of federal legislation change can be coupled with a policy statement that restraint and seclusion should only be used in emergency situations where there is an immediate threat to health

72. *Id.*
73. *Id.*
74. DOE RESOURCE DOCUMENT, *supra* note 20, at 3.
75. *Id.*
76. BUTLER, *supra* note 36, at 3.
77. *Id.*
78. *Id.*

and safety. Indeed, Congress,[79] the Secretary of Education,[80] and the National Disability Rights Network[81] have already echoed this type of statement regarding emergency use of restraint and seclusion. There seems to be a clear consensus that positive behavioral interventions and supports implemented through a functional behavioral assessment and behavioral intervention plan are encouraged, and restraint and seclusion should only be used in emergencies.

Despite all the information available regarding the benefits of using positive behavioral interventions and supports, many states neglect to implement any PBIS, electing instead to resort to reactionary measures such as restraining or secluding a child who is having a behavioral outburst. As explained below, the current statutory language in the IDEA only requires "consideration" of these positive behavioral interventions and supports.[82] The time has come to make the use of PBIS a requirement on states and school districts, not merely a consideration.

III. THE IDEA AND STUDENTS WITH DISABILITIES

The major federal statute addressing the educational requirements of children with disabilities is the Individuals with Disabilities Education Act.[83] The IDEA authorizes federal funding for special education, and for each state that accepts this funding, sets out principles for the special education and related services that are to be provided.[84] To receive federal funding under the IDEA, a state must ensure that every student receiving services be provided with a Free Appropriate Public Education ("FAPE")[85] and an Individualized Education Plan.[86] Children with disabilities and their parents who are unsatisfied with the services provided by the school district for the student can file a due process claim for an alleged violation of the IDEA.[87]

Although the services required under the IDEA are meant to provide an education for children with disabilities that confer "some educational benefit" to the child,[88] restraint and seclusion techniques are

79. *See* Keeping All Students Safe Act of 2011, H.R. 1381, 112th Cong. (2011); Keeping All Students Safe Act of 2011, 112th Cong. S. 2020 (2011).

80. DOE RESOURCE DOCUMENT, *supra* note 20, at iii.

81. NDRN REPORT, *supra* note 16, at 30.

82. 20 U.S.C. § 1414(d)(3)(B)(i) (2012).

83. *Id.* §§ 1400–50.

84. JONES, *supra* note 10, at 1.

85. 20 U.S.C. § 1412(a)(1).

86. *Id.* § 1412(a)(4).

87. *Id.* § 1415; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 535 (2007) (holding that because parents enjoy rights under the IDEA, they are entitled to prosecute IDEA claims on their own behalf); *see* JONES, *supra* note 10, at 9–12.

88. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 200 (1982).

permitted under the IDEA to be used during a child's behavioral outburst.[89] These types of aversive techniques do not provide any educational benefit for a child.[90] In contrast, positive behavioral interventions and supports used during a child's behavioral outbursts have been shown to educate that child on how to effectively manage his or her behavior.[91] Yet the IDEA only requires those positive behavioral interventions and supports on a reactionary basis.[92] Requiring a functional behavioral assessment and implementing a behavioral intervention plan utilizing positive behavioral interventions and supports when it is first recognized that a child has behavioral issues that may impede his or her learning or the learning of others will provide the best opportunity for a child to receive an educational benefit regarding his or her behavioral problems.

A. Background of the IDEA

Before the 1970s, children with disabilities had experienced a history of discrimination in public education.[93] Many states prohibited children who suffered from physical disabilities such as deafness or blindness, as well as children with mental disabilities, from attending public schools.[94] Because of this, schools generally did not address the behavioral problems associated with physical or intellectual disabilities for much of the twentieth century.[95]

But in the 1970s, two major judicial decisions resulted in Congress enacting several federal statutes regarding discrimination of children with disabilities.[96] In *PARC v. State of Pennsylvania*, suit was brought in 1972 on behalf of children with disabilities, claiming a number of Pennsylvania statutes were unconstitutional by excluding children with disabilities from being provided access to a free education.[97] The court in *PARC* enjoined Pennsylvania from denying "to any mentally retarded child access to a free

89. Indeed, the Department of Education has stated that, "While the IDEA emphasizes the consideration of positive behavioral interventions and supports to address behavior that impedes learning, IDEA does not flatly prohibit the use of mechanical restraints or other aversive behavioral techniques for children with disabilities." Letter to Anonymous, 50 IDELR 228 (OSEP March 17, 2008). *See* JONES, *supra* note 10, at 13.

90. *See* Nishimura, *supra* note 18, at 195.

91. *Id.*

92. By reactionary basis, the author is referring to the fact that a "functional behavioral assessment, behavioral intervention services and modifications" are only required after a change in the student's placement. 20 U.S.C. § 1415(k)(1) (2012).

93. Laura C. Hoffman, *A Federal Solution That Falls Short: Why the Keeping All Students Safe Act Fails Children with Disabilities*, 37 J. LEGIS. 39, 52 (2011).

94. *Id.*

95. *Id.*

96. *See* PARC v. State, 343 F. Supp. 279 (E.D. Pa. 1972); Mills v. Bd. of Educ. of D.C., 348 F. Supp. 866 (D.D.C. 1972).

97. *PARC*, 343 F. Supp. at 281–82.

public program of education and training."[98] In the same year, *Mills v. Board of Education of District of Columbia*, which also dealt with children with disabilities who had been excluded from education in public schools, was decided.[99] In *Mills*, the District Court for the District of Columbia, citing *Brown v. Board of Education* and *Bolling v. Sharpe*, stated that "denying plaintiffs and their class not just an equal publicly supported education but all publicly supported education while providing such education to other children, is violative of the Due Process Clause."[100] The court thus held that children with disabilities must be given access to an adequate, publicly supported education.[101]

In response to these judicial decisions, Congress, in 1973, passed Section 504 of the Rehabilitation Act,[102] which states that no "otherwise qualified individual . . . shall, solely by reason of his or her handicap, 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."[103] Then, in 1975, Congress passed the Education for All Handicapped Children Act, which, in 1990, was renamed the Individuals with Disabilities Education Act ("IDEA").[104] One of the primary purposes of the IDEA was to provide children with disabilities the right to receive a FAPE.[105] Although states have the "primary responsibility for developing and executing education programs for children with disabilities, the IDEA 'imposes significant requirements to be followed in the discharge of that responsibility.'"[106] The IDEA is currently the major federal statute regarding the education of children with disabilities.[107]

98. *Id.* at 302.

99. *Mill*s, 348 F. Supp. at 866.

100. *Id.* at 875 (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954), and Bolling v. Sharpe, 347 U.S. 497 (1954)).

101. *Id.* at 878.

102. 29 U.S.C. § 794(a) (2012).

103. *Id.*

104. 20 U.S.C. §§ 1400–1450 (2012); *see* Miller, *supra* note 7, at 401. The IDEA has also been the subject of numerous reauthorizations; the most recent reauthorization was Pub. L. No. 108-446 in 2004. Pub. L. No. 108-446 included specific authorizations for appropriations through 2011. The American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, includes supplemental appropriations for the IDEA.

105. 20 U.S.C. § 1412(a)(1).

106. Schaffer v. Weast, 546 U.S. 49, 52 (2005) (quoting Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 183 (1982)). The IDEA imposes these requirements by authorizing federal IDEA funding to be allotted to states on the condition that the state complies with the requirements set forth in the Act. JONES, *supra* note 10, at 1. Currently, all states receive IDEA funding. *Id.* at 1 n.5.

107. JONES, *supra* note 10, at 1. Other federal statutes that affect the education of children with disabilities are Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2012), and the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101–213 (2011).

B. Main Requirements of the IDEA

As stated above, the primary purpose of the IDEA is that students will be provided with a free, appropriate public education.[108] In *Board of Education v. Rowley*, the Supreme Court was asked for the first time to interpret a provision of the IDEA.[109] At issue was the interpretation of "the IDEA's requirement of a 'free appropriate public education.'"[110] The Court stated that a FAPE "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction."[111] The court interpreted this to be an education made in accordance with the IDEA's procedures and one that is "sufficient to confer some educational benefit."[112] It is accepted that the "IDEA does not specifically define an educational benefit, but most courts require that the student make educational progress."[113] However, the requirement of a FAPE, according to the Supreme Court, is a limited one.[114] It does not require a school to provide the maximum possible benefit to students with disabilities.[115]

In order to fulfill the FAPE requirements of the IDEA, the Act assigns to each Local Education Agency ("LEA")[116] the responsibility of providing the requisite services to children with disabilities.[117] The Supreme Court in *Rowley* noted that a FAPE must be provided at the public expense, must meet the standards of the state educational agency, and must also be in conformity with the student's IEP "as required under section 1414(a)(5)" of the IDEA.[118] An IEP is a statement that spells out the specific special education and related services[119] to be provided to meet each individual child's needs.[120] The IEP must include, among other things, a statement of the child's present levels of academic achievement and functional performance, a statement of measurable annual goals, a

108. JONES, *supra* note 10, at 1.

109. *Rowley*, 458 U.S. at 186.

110. *Id.*

111. *Id.* at 188–89.

112. *Id.* at 189.

113. Miller, *supra* note 7, at 402 (citations omitted).

114. *Rowley*, 458 U.S. at 197.

115. *Id.* at n.21.

116. 20 U.S.C. § 1401(19) (2012)*; see also* Zirkel, *Case Law*, *supra* note 8, at 185 n.68 ("The IDEA uses this term generically to refer to school districts and other local governmental entities that provide education to students with disabilities. LEAs have the primary responsibility of implementing the various requirements of the IDEA, subject to SEA oversight.").

117. 20 U.S.C. § 1414.

118. *Rowley*, 458 U.S. at 188 (citing 20 U.S.C. § 1401(18)).

119. Related services are defined as "transportation, *and such developmental, corrective, and other supportive services* as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children." 20 U.S.C. § 1401(26) (emphasis added).

120. *Id.* § 1414(d); *see also* JONES, *supra* note 10, at 1.

description of how these goals are to be met, a statement of the special education and related services to be provided, and an explanation of the extent to which the child is to be educated with children without disabilities.[121] The IEP is written by a team that includes special education teachers, representatives of the LEA who can provide specially designed instruction, the student's parents, and when practicable, the student.[122]

The IDEA conveys rights to both children with disabilities as well as their parents.[123] If a parent is unsatisfied with a child's IEP, the IDEA allows the parent to seek administrative and judicial review.[124] If a parent wishes to complain about the action of a school, he or she can file a due process complaint with the state education agency.[125] If the situation remains unresolved, a parent may file an administrative appeal, where the case will be heard in front of an impartial hearing officer ("IHO").[126] If still unsatisfied, a parent may appeal the decision of the IHO to a State-Level Review Officer ("SLRO"), and then if necessary, appeal the decision of the SLRO to an appropriate state or federal court.[127]

An additional requirement of the IDEA is that a FAPE must be provided in the least restrictive environment ("LRE").[128] This is defined in the IDEA to mean that a student must be educated with their non-disabled peers to "the maximum extent appropriate."[129] Separate schooling should only occur if a student's disability is severe enough that "education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."[130] When reviewing a claim regarding whether a student was placed in the LRE, several courts of appeals follow a two-pronged approach first utilized by the 5th Circuit Court of Appeals in *Daniel R.R. v. State Board of Education*.[131] The first inquiry is "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child."[132] If not, the second inquiry the court must address is "whether the student has been mainstreamed to the maximum extent appropriate."[133]

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121. 20 U.S.C. § 1414(d).

122. *Id.* §§ 1414(d)(1)(B)(i)–(vii).

123. *See supra* note 87 and accompanying text.

124. *See, e.g.*, C.N. *ex rel*. J.N. v. Willmar Pub. Sch. Indep. Sch. Dist. No. 347, 591 F.3d 624, 630 (8th Cir. 2010).

125. JONES, *supra* note 10, at 10; Alyssa Kaplan, *Harm Without Recourse: The Need for a Private Right of Action in Federal Restraint and Seclusion Legislation*, 32 CARDOZO L. REV. 581, 588 (2010).

126. *Id.*

127. *See* JONES, *supra* note 10, at 11; Kaplan, *supra* note 125, at 588.

128. 20 U.S.C. §1412(a)(5) (2012).

129. *Id.*

130. 20 U.S.C. § 1412(a)(5); *see* JONES, *supra* note 10, at 7.

131. 874 F.2d 1036 (5th Cir. 1989) (addressing a claim brought under the Education of the Handicapped Act, which was renamed the IDEA in 1990).

132. *Id.* at 1048.

133. *Id.*

Material failures by a school to implement an IEP violate the IDEA because they constitute a failure to provide a FAPE that provides an educational benefit to the child.[134] A material failure to implement an IEP occurs when there is a major discrepancy "between the services a school provides to a disabled child and the services required by the child's IEP,"[135] such as not providing services listed in an IEP.[136]

C. Behavioral Issues and the IDEA

Though the IDEA is meant to provide requirements for the education of children with disabilities, its breadth and purpose is not limited to just academic goals. Congress intended the IDEA to not only improve educational results for children with disabilities,[137] but also to "address the learning and behavioral needs of such children."[138] Two provisions in the IDEA[139] refer to Functional Behavioral Assessments, Behavioral Intervention Plans, and Positive Behavioral Interventions and Supports as ways to address the behavioral needs of a child with disabilities. Consideration of FBAs and BIPs has been a relatively new trend, as they were not mentioned in the IDEA until the 1997 and 2004 amendments.[140]

The statutory provision in the IDEA regarding creation of an IEP, although not explicitly mentioning FBA or BIP, alludes to them by stating that if a child's behavior impedes his or her learning or that of others, the IEP should "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior."[141] While this provision purports to address a child's behavioral issues, it does not require "development" or "implementation," but only requires "consideration" of strategies to address that behavior.[142] Because the IDEA only requires

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134. *See, e.g.*, Miller, *supra* note 7, at 402; Van Duyn *ex rel*. Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 819 (9th Cir. 2007); Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 (8th Cir. 2003) (holding that the IDEA is violated when a school fails to implement an "essential" element of an IEP); Hous. Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000) (stating *de minimis* failures to implement an IEP do not violate the IDEA, but failures to implement "substantial" or "significant" IEP provisions do).

135. *Van Duyn*, 502 F.3d at 815.

136. *E.g.*, Shaun M. *ex rel.* Kookie W. v. Hamamoto, CV. NO. 09-00075 DAE-BMK, 2009 WL 5218032, at *1 (D.Haw. Dec. 31, 2009) (stating that defendants materially failed to implement student's IEP by failing to provide transition services for adult life); *see* Miller, *supra* note 7, at 402.

137. 20 U.S.C. § 1400(c)(3) (2012).

138. *Id.* § 1400(c)(5)(F).

139. *See id.* §§ 1414(d)(3)(B)(i), 1415(k)(1)(D)(ii).

140. *See* Perry A. Zirkel, *State Special Education Laws for Functional Behavioral Assessment and Behavior Intervention Plans*, 36 J. BEHAV. DISORDER 262, 264 (August 2011) [hereinafter Zirkel, *State Special Education Laws*].

141. 20 U.S.C. § 1414(d)(3)(B)(i).

142. *Id.*; *see also* IDEA Regulations Commentary, 71 Fed. Reg. 46,629 (Aug. 14, 2006); Zirkel, *Case Law*, *supra* note 8, at 188 (noting that in the OSEP commentary, "in

consideration of positive behavioral supports in these situations, no FBA or BIP is required. Instead, schools can resort to unplanned restraint and seclusion practices in response to a child's behavioral issues.[143] In some states, schools can even use frightening or harmful restraint or seclusion techniques on a child without having to disclose the use to the child's parents.[144]

The only mention in the IDEA of when a school is actually *required* to address behavioral issues occurs if there is a disciplinary change in the child's placement[145] that would occur for more than ten days and the behavior that resulted in the change in placement was a manifestation of the child's disability.[146] Only upon this manifestation determination and the placement change for greater than ten days is an IEP team expressly required to conduct an FBA and implement a BIP to address ways to reduce the recurrence of the disruptive behavior.[147]

The consequences of these reactionary provisions in the IDEA are readily apparent from case studies of how schools handle behavioral outbursts of students with disabilities by using restraint and seclusion instead of BIPs that utilize positive behavioral interventions and supports. The U.S. Government Accountability Office released a report in 2009 regarding the use of restraint and seclusion in schools.[148] Although the report "stopped short of calling the incidence of abuse and death widespread,"[149] it indicated that thousands of public and private school children were restrained and secluded during the previous school year.[150] The report also noted, "children with disabilities were sometimes restrained and secluded even when they did not appear to be physically aggressive and their parents did not give consent."[151] In one case, school personnel restrained a four-year old girl with cerebral palsy and autism by placing her in a chair with leather straps around her arms, chest, lap and legs.[152] The mother said that the child, due to her disability, would act out when she

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regard to a behavior-impeding situation, FBAs and BIPs are not required components of an IEP unless state law provides otherwise.").

143. Hoffman, *supra* note 93, at 53*; see also* Letter to Trader, 48 IDELR ¶ 47 (OSEP 2006) (policy letter in which OSEP wrote that state special education regulations that allow aversive interventions are not in conflict with the IDEA).

144. Hoffman, *supra* note 93, at 59.

145. The language in the IDEA states that a change in placement can occur if the child "violates a code of student conduct." School personnel are given the authority to determine on a case-by-case basis if a change in the child's placement is necessary. 20 U.S.C. § 1415(k)(1)(A).

146. 20 U.S.C. § 1415(k)(1)(F)(i)–(iii).

147. *Id.*; *see* Zirkel, *Case Law*, *supra* note 8, at 186–87.

148. *See generally* GAO REPORT, *supra* note 22.

149. Goodmark, *supra* note 12, at 260.

150. GAO REPORT, *supra* note 22, at 7.

151. *Id.*

152. *Id.* at 22.

needed to use the restroom.[153] The school said she was placed in the chair for being "uncooperative."[154] The child, in addition to suffering bruises on her arms and legs, was diagnosed by the family doctor as suffering from post-traumatic stress disorder resulting from the restraint.[155]

In March 2012, the National Disabilities Rights Network documented incidents of restraint or seclusion from all fifty states.[156] These incidents showed that students with disabilities were being duct taped to wheelchairs, tied to lunch tables, and locked in closet-sized rooms for hours at a time, all as methods of behavior management.[157] In one incident in Kentucky, the school district placed a nine-year-old child with autism in a duffel bag for "misbehaving."[158] The child's mother stated that she witnessed her child wiggling around in the bag as a teacher's aide stood by.[159]

Reports such as these illustrate the alarming reality that schools use restraint and/or seclusion to deal with a child's behavioral outbursts rather than attempting to proactively address the behavioral problems before they arise.[160] This egregious use of restraint and seclusion on small children displays the practical failure by school districts and states to "provid[e] . . . positive behavioral interventions and supports, and early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children."[161] Children are being injured and traumatized in school districts because the IDEA does not limit the use of restraint and seclusion,[162] and only requires a behavioral intervention plan when the child commits a student conduct violation that results in a change in placement for more than ten days.[163]

D. Case Law Concerning Restraint, Seclusion, and Behavioral Intervention Plans

Given the current case law, it appears to be difficult to have a successful claim against a school district under the IDEA. For example, if a child with disabilities or a parent claims that the school district did not provide sufficient services for the child as required in the IDEA, they must first exhaust the administrative review process before suit can be brought in

153. *Id.*
154. *Id.*
155. *Id.* at 22–23.
156. NDRN REPORT, *supra* note 16.
157. *Id.* at 9–16.
158. *Id.* at 12.
159. *Id.*
160. BUTLER, *supra* note 36, at 3; *see also* Miller, *supra* note 7, at 403.
161. 20 U.S.C. § 1400(c)(5)(F) (2012).
162. *See* JONES, *supra* note 10, at 13.
163. 20 U.S.C. § 1415(k)(1)(D)(ii). For an explanation of the requirements in the event a child's removal for more than ten days is determined not to be a manifestation of the child's disability, see 20 U.S.C. § 1415(k)(1)(C).

a district or state court.[164] Second, the party must prove that the child was denied a FAPE.[165] The court engages in a two-part inquiry, first expounded in the seminal *Board of Education v. Rowley* decision: (1) Has the school complied with the procedures set forth in the IDEA? and (2) Was the child's IEP reasonably calculated to enable the child to receive educational benefits?[166] Under the *Rowley* standard, claims that restraint or seclusion interventions violated the FAPE requirement often have little legal merit.[167]

In *Thompson R2-J School District v. Luke P. ex rel. Jeff P.*,[168] the parents of a student with autism argued that their child's IEP "failed to address adequately his inability to generalize functional behavior learned at school to the home and other environments."[169] In rejecting this argument, the reasoning given by the court is of particular importance. Citing cases from the First and Eleventh Circuit Courts as well as other district courts, the *Thompson* court reasoned that this generalization is not required by the IDEA so long as the child is making some progress in school.[170] Although improving communication skills and behavioral responses can promote "self-sufficiency for individuals with disabilities,"[171] "under the *Thompson* court reasoning, these are not guaranteed or even considered vital; instead, the school need only draft appropriate individualized education programs."[172]

If a parent or child brings a disabilities claim based on the use of aversive techniques to control or manage the child's behavior, circuit courts often have held that the school's use of restraint or seclusion was not a violation of a FAPE. For example, in *Melissa S. v. School District of Pittsburgh*, the Third Circuit stated that the use of restraint or seclusion techniques is permissible if no placement change occurs, and the restraint or seclusion constituted a "normal discipline procedure for all students in the school district."[173]

Some courts have entertained claims that an inadequate FBA or BIP violates the IDEA. When a child does have a BIP included in his or her IEP, some case law suggests that inclusion of the BIP can create additional legal protections under the IDEA. For example, in *B.H. v. West Clermont*

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164. *Id.* § 1415(i)(2)(A). *See also* Nishimura, *supra* note 18, at 210 (explaining that in order to bring a claim against a school district, the child must still be enrolled in the school district that is being sued; the aggrieved party must also exhaust all available administrative remedies, or show that the exhaustion would be futile) (citations omitted).

165. 20 U.S.C. § 1415(f)(3)(E)(ii)(I)–(II).

166. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 200–06 (1982).

167. Kaplan, *supra* note 125, at 592.

168. 540 F.3d 1143 (10th Cir. 2008).

169. *Id.* at 1150; *see also* Kaplan, *supra* note 125, at 592.

170. *Thompson*, 540 F.3d at 1153.

171. 20 U.S.C. § 1400(c)(1) (2012); *see* Kaplan, *supra* note 125, at 593 (citation omitted).

172. Kaplan, *supra* note 125, at 593 (citation omitted).

173. 183 F. App'x 184, 188 (3d Cir. 2006).

Board of Education,[174] the court reviewed whether a school appropriately considered the use of positive behavioral interventions when it failed to address the student's behaviors except through restraint and seclusion.[175] The court found that the school district concluded that the child's behavior was an essential part of her IEP since the school included behavior goals in each of the child's IEPs.[176] Once the goals were included in the IEP, the district was required to provide "specially designed instruction to address the unique needs of the child."[177] Thus, the court held that, because the school district neglected to implement positive behavioral interventions, set increasingly low behavioral standards, and employed physical restraint even though it was shown to be ineffective, the school district's failure to properly address the child's behavior constituted a denial of FAPE.[178]

The court's decision in *B.H.* shows why implementation of a BIP in a child's IEP is so essential: When a child's IEP team mandates the inclusion of a BIP to address problem behaviors, and when the behavior goals demonstrate that the methods being used to address the behavior are ineffective, a failure to properly address the behavior can result in denial of a FAPE.[179]

Despite the encouraging decision by the Ohio District Court in *B.H.*, one scholar noted that when parents challenge their child's entitlement to, or the appropriateness of, an FBA or BIP, "the odds of a favorable outcome in most jurisdictions are slim if the determination is based strictly on the requirements in the IDEA and state law."[180] This is because the IDEA does not provide any substantive requirements for an FBA or BIP. In a policy statement regarding manifestation determinations made after regulations concerning the IDEA were promulgated in 2006, the OSEP refused to specify the standards for a valid or current FBA, stating instead that "such decisions are best left to the LEA, the parent, and [other] relevant members of the IEP Team."[181] Thus, while the IDEA requires an FBA to be implemented when a child has a change in placement due to a violation of the school's code of conduct, there is no federal standard specified for what would be considered a valid FBA.

The effect of this lack of standard for an FBA has influenced various court decisions. For example, in 2004, the Seventh Circuit rejected a parent's challenge that the BIP developed for her child was inadequate.[182] In *Alex R. ex rel. Beth R. v. Forrestville Valley Community Unit School*

174. 788 F. Supp. 2d 682 (S.D. Ohio 2011).
175. *Id.* at 697.
176. *Id.* at 699.
177. *Id.*
178. *Id.*
179. *Id.*
180. Zirkel, *State Special Education Laws supra* note 140, at 269.
181. IDEA Regulations Commentary, 71 Fed. Reg. 46,721 (Aug. 14, 2006).
182. Alex R. *ex rel.* Beth R. v. Forrestville Valley Cmty. Unit Sch. Dist. No. 221, 375 F.3d 603 (7th Cir. 2004).

District No. 221, the court reviewed whether the child's BIP was "substantively 'insufficient.'"[183] The court, in rejecting the challenge, noted that:

> Although we may interpret a statute and its implementing regulations, we may not create out of whole cloth substantive provisions for the behavioral intervention plan contemplated by § 1415(k)(1) or § 1414(d)(3)(B)(i). In short, the District's behavioral intervention plan could not have fallen short of substantive criteria that do not exist, and so we conclude as a matter of law that it was not substantively invalid under the IDEA.[184]

The Seventh Circuit thus determined that because the IDEA does not identify the specific components of an FBA or BIP, as long as the school produced an FBA or BIP, it does not amount to a violation of the IDEA.[185] However, because the court noted that "neither Congress nor the agency charged with devising the implementing regulations for the IDEA, the Department of Education, had created any specific substantive requirements for the behavioral intervention plan,"[186] the court indicated that if either Congress or the Department of Education were to implement requirements for a BIP and FBA, those standards, if not followed by the school district, could then constitute a violation of the IDEA.[187]

An additional problem regarding substantive requirements of an FBA or BIP is that even if a state has issued guidance as to what should be included in an FBA or BIP, the guidelines, even if they have official SEA status, are often "couched in terms of recommendations rather than requirements."[188] Courts thus reject claims brought under these recommendations, viewing the state guidelines as nonbinding "in light of their failure to follow the formal processes of legislation or regulations."[189]

This problem regarding substantive standards for an FBA and BIP illustrate the importance of amending the IDEA to require implementation of an FBA and BIP when a child's learning or the learning of others is impeded, as well as establishing requirements for what is considered an "appropriate" FBA and BIP. If courts are unwilling to find violations of a BIP because state guidelines are only recommendations, it is necessary, for the protection of children with disabilities, that either Congress or the

183. *Id.* at 615.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. Zirkel, *State Special Education Laws*, *supra* note 140, at 270.
189. *Id.*; *see* D.K. v. Abington Sch. Dist., No. 08-cv-4914, 54 IDELR ¶ 119 (E.D. Pa. Mar. 25, 2010); Bethlehem Area Sch. Dist. v. Zhou, 976 A.2d 1284 (Pa. Commw. Ct. 2009).

Department of Education promulgates requirements for an appropriate behavior intervention plan.

As the holding in *B.H.* illustrates, by requiring a BIP proactively rather than reactively, the chances of a court finding in favor of a parent or child with disabilities will undoubtedly increase. Not only that, the participation of parents in including a BIP in the child's IEP before any behavioral outbursts occur should also provide parents with appropriate information regarding how the child's behavior will be managed, before the school resorts to methods to which the parent did not consent. This should have the additional effect of reducing the amount of claims that are brought in court concerning restraint and seclusion. If the parent participation occurs earlier in the behavior intervention process, fewer parents may feel like the techniques or methods used to address the child's behavior are inappropriate.

IV. FAILED ATTEMPTS TO ADDRESS BEHAVIORAL INTERVENTION VIOLATIONS IN SCHOOLS: THE KEEPING ALL STUDENTS SAFE ACT

Congress has attempted on more than one occasion to tackle the problem regarding the pervasive use of restraint and seclusion in schools.[190] Neither attempt at passing new legislation has succeeded,[191] however, leaving the issue of restraint and seclusion still untouched by the federal government.

In the past two decades, restraint and seclusion in schools became a much more widely used behavioral management technique in schools.[192] In response to the growing concern regarding their use, Representatives George Miller (D-CA) and Cathy Rogers (R-WA) introduced in the House of Representatives the Keeping All Students Safe Act of 2009 ("KSSA")[193] as a federal solution to eliminate the harm caused by restraint and seclusion of schoolchildren.[194] Senator Chris Dodd proposed similar legislation in the Senate.[195]

The primary purpose of the bill is to reduce and prevent the use of restraint or seclusion.[196] The bill states, "all children have the right to be free from physical or mental abuse, aversive behavioral interventions that compromise health and safety, and any physical restraint or seclusion

190. *E.g.,* Keeping All Students Safe Act of 2009, H.R. 4247, 111th Cong. (2009); Preventing Harmful Restraint and Seclusion in Schools Act, S. 2860, 111th Cong. (2009); Keeping All Students Safe Act of 2011, H.R. 1381 112th Cong. (2011).

191. Recently, H.R. 1381 was reintroduced on May 8, 2013 as H.R. 1893 by Rep. George Miller. Keeping All Students Safe Act of 2013, H.R. 1381, 113th Cong. (2013).

192. Nishimura, *supra* note 18, at 190.

193. H.R. 4247.

194. *See* Hoffman, *supra* note 93, at 40.

195. S. 2860. While both the House and Senate bills passed an initial vote, both versions of the bill failed to make it out of committee.

196. Nishimura, *supra* note 18, at 223; Hoffman, *supra* note 93, at 61.

imposed solely for purposes of discipline or convenience."[197] The bill notes that the use of restraint and seclusion practices does more harm than good to a child with behavioral issues.[198] Finally, the KSSA emphasizes "the multiple benefits of implementing positive behavioral reinforcements in the classroom: The effective implementation of school-wide positive behavior supports is linked to greater academic achievement, significantly fewer disciplinary problems, increased instruction time, and staff perception of a safer teaching environment."[199]

There are a number of requirements delineated in the KSSA. The bill, if enacted, would require the Secretary of Education to issue regulations and guidelines for all schools receiving federal funding.[200] It would also ensure that restraint and seclusion were only used in emergency situations, and not as a disciplinary measure.[201] Restraint or seclusion, under the KSSA, cannot be written into a student's IEP.[202]

Two important requirements of the KSSA are the staff training and notification to parents. The KSSA would require all staff to be trained in aversive behavioral interventions,[203] and would also require parents to be notified every time an aversive behavioral intervention was used on the child.[204] These provisions would greatly enhance the protection afforded to students, since it would both require teachers to be trained on the safe and proper techniques to restrain a child[205] and require a school to report the use of restraint or seclusion to the parent.[206]

While the KSSA was championed as essential legislation necessary to protect children with disabilities,[207] the bills have ultimately failed to pass as legislation.[208] The main concerns about the KSSA seemed to center on states' rights and laws that would be affected by the legislation.[209]

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197. H.R. 4247 § 2(2).

198. *Id.* § 2(8).

199. *Id.* § 2(9).

200. *Id.* § 5(a).

201. *Id.* § 5(a)(2).

202. *Id.* § 5(a)(4).

203. *Id.* § 5(a)(2)(D)(i). "Aversive behavioral interventions," as the term is used in the Act, includes restraint and seclusion.

204. *Id.* §§ 5(a)(5)(A)(i), (ii).

205. *Id.* § 5(a)(2)(D)(i).

206. *Id.* §§ 5(a)(5)(A)(i), (ii).

207. Press Release, Autistic Self Advocacy Network, ASAN Calls for Swift Passage of Keeping All Students Safe Act (July 13, 2012), http://autisticadvocacy.org/2012/07/asan-calls-for-swift-passage-of-keeping-all-students-safe-act/; Valerie Strauss, *Keeping Students Safe: A Bill Even This Congress Should Be Able to Pass*, WASH. POST BLOG (June 28, 2012, 6:00 AM), http://www.washingtonpost.com/blogs/answer-sheet/post/keeping-students-safe-a-bill-even-this-congress-should-be-able-to-pass/2012/06/28/gJQAuRkQ8V_blog.html.

208. *See generally supra* notes 190–191.

209. James Ridgeway & Jean Casella, *House Republicans Explain Why They Oppose Ban on Child Abuse in Schools*, SOLIDARITY WATCH (March 7, 2010), http://solitarywatch.com/2010/03/07/house-republicans-explain-why-they-oppose-ban-on-child-abuse-in-schools/.

Congressman Steve King of Iowa elaborated on some of these concerns, stating, "It's one thing after another after another after another . . . and pretty soon it's a national curriculum with federal mandates, and imposing cultural impositions [sic] at the school level in every accredited district in the country."[210] Congressman Louie Gohmert of Texas said the bill sent the message that states and local school boards are "a bunch of morons" because they "can't figure out that sitting on a precious little child and killing 'em is inappropriate."[211]

While educational policy has traditionally been a matter regulated by the states, federal legislation has provided a baseline of regulation that states must follow and should be allowed to continue to do so.[212] Nevertheless, the Keeping Students Safe Act, while a good attempt at addressing behavioral management of students with disabilities, seems unlikely to become law.

V. PROPOSED SOLUTION: AMEND THE IDEA TO REQUIRE AN FBA AND BIP PROACTIVELY, NOT JUST REACTIVELY

"An interrelated pair of procedures that have come into favor in the field of special education for proactively addressing the behavior problems of students with disabilities . . . are functional behavior assessments (FBAs) and behavior intervention plans (BIPs)."[213] The IDEA should be amended to require that during the creation of a child's IEP, if the IEP team indicates on the IEP that the child is suffering from behavioral issues that impede his or her learning or the learning of others, the IEP team must conduct an FBA to determine if the child would benefit from implementing a BIP as part of the child's education.

This proactive approach to addressing behavioral problems will require the schools to plan for behavioral outbursts, and will provide clear guidance on each child's IEP as to the appropriate and acceptable methods to attempt to eliminate the behavioral problems. This requirement should also improve the chance of a child or parent succeeding in court on an IDEA violation. It will also increase the safety of staff and students, and hopefully will reduce the occurrence of dangerous aversive techniques, such as restraint and seclusion.

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210. *Id.*

211. *Id.*

212. Miller, *supra* note 7, at 408 (stating that "Congress has repeatedly and successfully passed laws regulating health and safety matters when they involve civil rights, such as the IDEA, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act. . . . The reason for all of these permissible intrusions is that the United States has a national interest in protecting children with disabilities.").

213. Zirkel, *Case Law*, *supra* note 8, at 175.

A. Proactive Policies Comport with the Intent of the IDEA

Congress mandated that students with disabilities have the right to a FAPE with well-designed behavior intervention strategies.[214] The reasoning was that if an IEP team addressed the behavioral problems proactively, there would be less of a need for disciplinary measures, and students would be learning the adaptive skills they would need to successfully function in society.[215]

Unfortunately, the statutory language in the IDEA does not provide such a clear intent.[216] By using "consider" rather than more binding language,[217] the IDEA allows schools to bypass positive behavioral supports if they so desire. As one pair of authors noted, "A student's teacher may report that occasionally a student engages in serious misbehavior. In this case, the FBA may be the best proactive approach to problem behavior, but it is not required by law."[218] The proposed amendment to the IDEA would change this.

This proposed amendment to the IDEA would replace this open-ended language of 20 U.S.C. § 1414(d)(3)(B) with "The IEP Team shall – (i) in the case of a child whose behavior impedes the child's learning or that of others, *conduct a functional behavioral assessment to ascertain the likely cause of the problem behavior, and, if necessary, implement a behavioral intervention plan using positive behavioral interventions and supports to address the problem behavior.*" This change in statutory language would place a requirement on schools to be proactive in addressing problem behavior. It would still allow schools to hold off on implementing a BIP if, after conducting the FBA, it is deemed unnecessary. However, nothing in this amendment would alter the requirement of conducting a BIP if a child's conduct falls under 20 U.S.C. § 1415(k)(1)(D)(ii). This amendment would merely bring the IDEA's statutory requirements in line with its intended purpose of proactively addressing behavioral problems.

The Council for Exceptional Children, one of the largest international professional organizations dedicated to improving the educational success of individuals with disabilities, has issued policy statements that fall exactly in line with this need to proactively address problem behavior.[219] In a statement titled "CEC's Policy on Physical Restraint and Seclusion Procedures in School Settings" issued in September 2009, the Council noted, among other things:

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214. Erik Drasgow & Mitchell L. Yell, *Functional Behavioral Assessments: Legal Requirements and Challenges*, 30 SCH. PSYCHOL. REV. 239 (2001).

215. *Id.*

216. *See* 20 U.S.C. § 1414(d)(3)(B)(i) (2012).

217. *Id.*

218. Drasgow & Yell, *supra* note 214, at 241.

219. CEC POLICY, *supra* note 24, at 1–2.

> All children and youth whose pattern of behavior impedes their learning or the learning of others should receive appropriate educational assessment, including Functional Behavioral Assessments. These should be followed by Behavioral Intervention Plans that incorporate appropriate positive behavioral interventions, including instruction in appropriate behavior and strategies to de-escalate their own behavior.[220]

This principle underscores the importance of changing the language in the IDEA to require the use of an FBA and BIP before the child's behavior reaches the level required to force a school to conduct an FBA and BIP under 20 U.S.C. § 1415(k)(1)(D)(ii).

B. The IDEA Should Provide a Standard for an Appropriate FBA and BIP

The Department of Education refrained from including a specific definition of an FBA in the IDEA.[221] The belief was that IEP teams needed to be able to address each child's circumstances individually, thus, the specific components for an FBA would be left to the states.[222] Scholars have defined an FBA as "a systematic process of identifying the purpose, and more specifically, the function, of problem behaviors by investigating the preexisting environmental factors that have served the purpose of these behaviors.[223] A BIP is defined as "a concrete plan of action for reducing the problem behaviors as dictated by the particular needs of the student who exhibits the behavior."[224]

While the IDEA does not address the specific components of an FBA, various scholars have proposed model FBAs that can be followed by a school district in formulating their specific policies. For example, one scholar noted that the factors of an effective FBA "consist of (a) setting events (i.e., events that do not by themselves trigger the problem behavior, but instead influence the likelihood that other events will trigger problem behavior), (b) antecedents (i.e., events or actions that immediately precede and trigger problem behavior), and (c) consequences (i.e., events or actions that occur as a result of the problem behavior)."[225] The functional assessment and analysis literature also supports the use of interviews, observations, and functional analysis in creating the FBA.[226]

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220. *Id.* at 1.

221. Drasgow & Yell, *supra* note 214, at 241.

222. *Id.*

223. Zirkel, *State Special Education Laws*, *supra* note 140, at 262.

224. *Id.*

225. Drasgow & Yell, *supra* note 214, at 241*; see also id.* at 242 (table describing key components of an FBA).

226. *Id.*

As noted above, the IDEA does not give any details about a BIP other than indicating that the plan needs to be individualized to meet the needs of a particular student.[227] While the exact construction of a BIP will undoubtedly be different for each student, and the creation of the BIP will still be left up to each school district or state, the IDEA can still promulgate guidelines for essential components of every BIP. For example, policy guidelines can be issued indicating that a key component of any BIP should be the use of multiple positive behavioral interventions that teach appropriate behaviors that will increase the likelihood of a student's success in school, and does not rely on coercion and punishment for behavioral change. Guidance such as this would provide schools with a framework for addressing behavioral problems, while still allowing the school the autonomy to tailor a BIP to best fit the schools' ability and the child's needs. Further, the inclusion of the phrase "does not rely on coercion and punishment for behavioral change" would signal to the states that restraint and seclusion are not appropriate methods for implementing behavioral change. This would further comport with the intended purpose of the IDEA to use positive behavioral supports to address problem behavior, but would do so in more binding language than what is currently in the statute.

C. Requiring an FBA/BIP Proactively Should Reduce the Occurrence of Restraint or Seclusion

Schools tend to use restraint and seclusion techniques as reactionary devices to handle a child's behavioral outburst as it occurs.[228] The COPAA study released in 2009 collected 185 cases of schools using physical restraint or seclusion.[229] Of these 185 cases, the school did not provide a BIP in 71% of them, using restraint and seclusion instead of a proactive behavioral intervention plan.[230] This case study illustrates how schools tend to use restraint and seclusion techniques as a "first line of defense," rather than attempting to reduce the problem behavior through positive behavioral reinforcements or plans.

Further, numerous articles and agencies have championed for the use of restraint or seclusion only in emergency situations, where the safety of a student or staff member is in immediate danger.[231] Requiring an FBA/BIP when a child's behavioral problems are initially identified could have the effect of reducing restraint and seclusion practices to those emergency situations. If positive behavioral reinforcements were

227. *See* 20 U.S.C. § 1415(k)(1)(D)(ii) (2012).

228. Miller, *supra* note 7, at 403.

229. *Id.*; BUTLER, *supra* note 36, at 3.

230. Miller, *supra* note 7, at 403; BUTLER, *supra* note 36, at 3.

231. *See, e.g.*, CCBD POSITION SUMMARY, *supra* note 34, at 2; DOE RESOURCE DOCUMENT, *supra* note 20, at 2; CEC POLICY, *supra* note 24, at 2; NDRN REPORT, *supra* note 16, at 7.

implemented as a preferred method of addressing behavioral problems, there would likely be a correlative decrease in episodes of seclusion (and presumably restraint).[232] Thus, the focus on positive reinforcements would hopefully reduce the use of restraint or seclusion to instances where they are absolutely necessary.

D. Including an FBA/BIP Increases Chances of Succeeding in Court

Another potential effect of amending the IDEA is the possibility of more successful claims brought in court against school districts for not complying with or creating insufficient Behavioral Intervention Plans. The current language of the pertinent provision of the IDEA is broad enough that courts tended to interpret "consider"[233] and, when raised, "positive"[234] as not being per se requirements of access to an FBA or a BIP."[235]

If the IDEA is amended to require an FBA/BIP when problem behavior is first identified, students and/or parents have a better argument for claiming that the deviation or non-compliance with the amendment violates the student's FAPE. The first prong of a FAPE, as stated by the Supreme Court in *Rowley*, asks, "Has the state complied with the procedures set forth in the IDEA?"[236] As noted above, some courts have indicated that when a BIP has been required and included in a child's IEP, deviation or non-compliance with that BIP could result in denial of a FAPE, and thus a violation of the IDEA.[237] The holdings in these cases seem to indicate that when a BIP has been required through the IDEA, it becomes part of the procedures that must be followed in order to satisfy the first prong of the FAPE analysis.

E. Leaving This Matter to the States Is Ineffective

The statutory language in the IDEA gives states and school districts the discretion as to when an FBA or BIP should be implemented. However, states have either refused to include provisions specifying when an FBA or BIP should be utilized, or have included requirements that fail to provide any meaningful guidance as to when they should be used, and what they should contain.

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232. Miller, *supra* note 7, at 405.

233. 20 U.S.C. § 1414(d)(3)(B)(i) (2012).

234. *Id.*

235. Zirkel, *Case Law*, *supra* note 8, at 202.

236. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206 (1982).

237. *See* B.H. v. W. Clermont Bd. of Educ., 788 F. Supp. 2d 682 (S.D. Ohio 2011); Pohorecki v. Anthony Wayne Local Sch. Dist., 637 F. Supp. 2d 547, 556 (N.D. Ohio 2009) (holding that the school district provided a FAPE by fulfilling its obligations with respect to the student's creation and implementation of a BIP).

An article published in 2011 assessed the pertinent provision of state laws that provide requirements pertaining to an FBA and/or BIP that exceeds what is currently required in the IDEA.[238] This article noted that there are four common categories in the state laws to be considered when creating an FBA or a BIP: First, when is an FBA or BIP legally required? Second, who is responsible for creating the FBA or BIP? Third, what is required to be included in the FBA or BIP? And fourth, how should the FBA or BIP be implemented?[239]

After reviewing the pertinent laws in all fifty states, the author found that nineteen states have no additional provision for an FBA or BIP other than what is expressed in the IDEA.[240] Of the thirty-one states that do have some additional state provisions, most of them are "notably limited in terms of scope and specificity."[241] As a result, "the limited scope of the FBA/BIP requirements in the IDEA, their complete absence in nineteen states, and the limited additions in the remaining thirty-one states leave ample room for local latitude."[242] Amending the IDEA to clearly indicate that an FBA and BIP should be implemented when a child has behavior that impedes the child's learning or the learning of others is the most effective way to proactively address problem behaviors in every state.

CONCLUSION

The current statutory language of the IDEA provides states and school districts with the ability to avoid implementing positive behavioral interventions and supports through a behavioral intervention plan, and instead use dangerous and sometimes lethal forms of restraint and seclusion to "manage" the behavioral outbursts of children with disabilities. Children are being injured, traumatized, and killed by these dangerous practices. There has been no evidence that restraint or seclusion teach the child how to effectively manage their behavior. On the other hand, PBIS has been shown to be an effective and safe way to not only manage a child's behavioral outbursts, but also teach that child how to appropriately manage their own behavior.

If Congress is willing to state that one of the primary purposes of the IDEA is to "provid[e] . . . positive behavioral interventions and supports, and early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children,"[243] then Congress needs to amend the IDEA to support that assertion. The language of the IDEA must require an FBA and a BIP to be

238. Zirkel, *State Special Education Laws*, *supra* note 140, at 262.
239. *Id.* at 267.
240. *Id.*
241. *Id.* at 268.
242. *Id.* at 270.
243. 20 U.S.C. § 1400(c)(5)(F) (2012).

implemented when it is first noted on the child's IEP that he or she has behavior that may impede his or her learning or the learning of others. Congress or the Department of Education must also promulgate requirements as to the appropriate standard for a BIP. Implementing these two proposals will put real force behind the words of the IDEA to "provid[e] . . . positive behavioral interventions and supports"[244] for children with disabilities.

244. *Id.*