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RESTRAINT AND SECLUSION IN CALIFORNIA: A LEGAL UPDATE

PENT CONFERENCE
Elizabeth Estes, Esq.
November 9, 2010

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What To Expect

- Summary of laws and cases regarding restraint and seclusion in the schools
- Best practices and legal tips based on expertise in the field and review of current legal authorities
- To have some fun

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Who Am I Anyway

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Who Are You

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Where Are We Now

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Issue in Forefront of Awareness Now

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US Government Accountability Office Study on Seclusion and Restraints

May 2009

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GAO Study

- Studied cases of death and abuse at public and private schools and treatment centers across the U.S.
- Testified for House Committee on Education and Labor.

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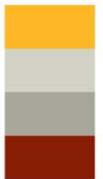
GAO Study

- Asked to provide overview of seclusions and restraint laws applicable to children in all schools;
- To verify whether allegations of student death and abuse from such methods are widespread;
- To examine facts/circumstances surrounding cases where student died or suffered abuse.

GAO Study

Examined 10 restraint/seclusion cases where there was criminal conviction, finding of civil or administrative liability or large financial settlement.

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GAO Study

- Restraint defined as any means that immobilizes or reduces the ability of an individual to move his or her arms, legs, body or head freely.
- Seclusion defined as involuntary confinement alone in a room or area from which they are prevented from leaving.

GAO Study

- Overall, found no federal laws restricting use of restraint/seclusion in public or private schools.
- State laws and regulations vary widely:
 - 19 states no laws related to use of seclusion or restraints in schools;
 - 7 place restrictions on restraints, but don't regulate seclusions;

GAO Study

- 17 states require training before restraint;
- 13 require parent consent prior to foreseeable physical restraints;



GAO Study

- 19 require consent after restraint;
- 2 require annual reporting on use of restraint;
- 8 prohibit prone restraint or restraint that impedes ability to breathe.

GAO Study

- Could not determine whether allegations of abuse or death were widespread.
- However, did discover hundreds of allegations across the nation – almost all involving children with disabilities.
- Also discovered thousands of students are restrained or secluded each year.

GAO Study

Case:

- 14 year old student in Penn. residential facility.
- 2 trained staff pinned student facedown for 20 minutes after he tried to attack counselor. Died from brain injury due to lack of oxygen.
- Settlement for over 1 million. Penn. thereafter banned prone restraint in 2008.

GAO Study

Case:

- 13 year old autistic student in New York residential facility.
- Student died by suffocation after aide sat on top of him because he was being disruptive in van.
- Aide and driver stopped at game store while student was unconscious in backseat.
- Aide convicted of manslaughter.

GAO Study

Case:

- 15 year old autistic male in Mich. suffered seizure and lost control of extremities and later became uncooperative.
- Staff did not provide medical attention, but placed student in prone restraint for 1 hour, resulting in death.
- Death ruled an accident. No criminal charges.
- Civil suit with District settled for 1.3 million.

GAO Study

Case:

- 4 year old autistic girl in West Virginia with cerebral palsy restrained in chair using multiple leather straps when uncooperative at school.
- Suffered bruising and later diagnosed with PTSD.
- Teacher not liable, but school board liable for negligent supervision and training.
- Family awarded \$460,000.

GAO Study

Case:

- 8 year old Illinois student with ADHD restrained in chair with masking tape on arms and mouth because would not remain seated.
- Found guilty of unlawful restraint and aggravated battery.

GAO Study

Case:

- 7 year old California girl with Asperger's syndrome. Student weighed 43 pounds.
- Student was secluded in a walled off area because refused to do work sat on and repeatedly restrained when non-compliant.
- Teacher smeared burrito on student's face and hair after she refused to eat.

GAO Study

Case:

- Student reported to parents that teacher “hurt her all day.”
- Teacher reported she restrained student because she was a danger.
- Principal reported teacher was trained once annually in restraint.

GAO Study

Case:

- Teacher and principal found liable for negligence and civil rights violations and family awarded \$700,000 in damages.
- However, to avoid protracted appeal, parties settled for \$260,000.

GAO Study

GAO found cases illustrate the following themes:

- Children with disabilities restrained and secluded at times when they did not appear to be physically aggressive;
- Facedown or other restraints that block air to lungs can be deadly;

GAO Study

GAO found cases illustrate the following themes:

- Teachers and staff were often not trained;
- Teachers and staff involved continue to be employed at schools.



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Current California Law

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Ed. Code 56341.1

- For a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, strategies, including positive behavioral interventions and supports, to address that behavior.

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5 C.C.R. 3001

- Behavioral interventions are defined as systemic implementation of procedures that result in lasting positive changes in student's behavior, including instructional and environmental modifications designed to provide greater access and ensure LRE.





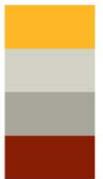
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FAPE

- An IEP that does not appropriately address behavior that impedes a child's learning, denies a student a FAPE.

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Hughes Bill

- In 1990, CA passed Ed Code section 56520, et seq. which is commonly referred to as the Hughes Bill.
- Addresses behavioral intervention for pupils with serious behavioral problems.
- Interestingly enough, does not exist in numerous other states according to recent GOA study.



Hughes Bill

- 5 C.C.R. 3052 implements the Hughes Bill.
- Requires an FAA, resulting in a BIP, when student develops a “serious behavior problem” and the instructional/behavioral approaches in IEP have been ineffective.



Hughes Bill

- “Serious Behavior Problem” means behaviors are self-injurious, assaultive, or cause serious property damage; or
- Other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches in the IEP are ineffective.

Hughes Bill

- BIP requirements:
 - Must be developed by IEP team and in IEP;
 - Must be implemented by, or under the supervision of, staff with appropriate training;
 - Must be based on an FAA and used in systemic manner;



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Hughes Bill

- BIP requirements:
 - Must identify targeted behavior and replacement positive behaviors;
 - Must identify goals specific to BIP;

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Hughes Bill

- BIP requirements:
 - Include detailed description of behavioral interventions and circumstances for their use;
 - Specific schedules for recording use of interventions and targeted and replacement behaviors, including criteria for discontinuing use of the intervention or replacing it;



Hughes Bill

- BIP requirements:
 - Include criteria for fading or phasing-out intervention;
 - Include interventions which will be used in the home, residential facility, worksite or other non-educational settings; and
 - Specific dates for review by IEP team.

Hughes Bill

- BIP requirements:
 - Positive response options shall include, but are not limited to ignoring behavior, verbally or verbally and physically redirecting the student, providing feedback, acknowledging the behavior, or providing a brief, physical prompt to interrupt or prevent aggression, self-abuse, or property destruction.



Hughes Bill

- Emergency Interventions SHALL not be a substitute for a BIP;
- Behavioral Interventions CANNOT cause pain or trauma.

Hughes Bill

- Behavioral Emergency is a serious behavior problem that has not been seen before and for which BIP has not been developed, or for which BIP is not effective.



Hughes Bill

- Emergency Intervention may only be used to control unpredictable, spontaneous behavior which poses danger of serious physical harm and cannot be prevented by a less restrictive response.





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Hughes Bill

- No emergency intervention shall be used for longer than is necessary to contain the behavior;
- Any situation requiring prolonged use shall require staff to seek assistance of an administrative or law enforcement as applicable;

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Hughes Bill

To PREVENT emergency interventions, parent and residential care provider, if appropriate, shall be notified within 1 school day whenever emergency intervention is used or serious property damage occurs.

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Hughes Bill

Behavior Emergency Report (BER) must be completed, including:

- Name and setting;
- Name of those involved;
- Description of incident;
- Whether Student has BIP;
- Details of injuries.



Hughes Bill

Anytime a BER is written for a student who does not have a BIP, an administrator shall, within 2 days, schedule an IEP meeting to review the BER and determine the necessity for a FAA and Interim BIP.



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Hughes Bill

Anytime a BER is written for a student who has a BIP, any incident involving an unseen serious behavior or where previous designed interventions is not effective should be referred to the IEP team to determine if BIP needs modification.

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Hughes Bill

- School Districts and NPAs cannot use aversive interventions to modify a student's behavior.

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Hughes Bill

- Aversive interventions include:
 - Intervention likely to cause physical pain;
 - Releasing unpleasant odors or substances in proximity to face;
 - Denying adequate sleep, food, water, shelter, bedding, physical comfort or access to bathrooms;

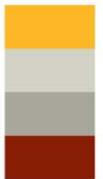
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Hughes Bill

- Aversive interventions include:
 - Restrictive interventions which use device or object that immobilized all four extremities, including prone containment, except prone containment may be used by trained personnel as a limited emergency intervention;





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Hughes Bill

- Aversive interventions include:
 - Intervention designed to, likely to, or which does subject individual to verbal abuse, ridicule or humiliation, or which is expected to cause excessive emotional trauma;

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- Aversive interventions include:
 - Locked seclusion;
 - Any intervention precluding adequate supervision;
 - Any intervention which deprives the individual of one or more of his or her senses.

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Hughes Bill

- SELPA Plan must include procedures governing the use of behavioral interventions and emergency interventions.
- These procedures shall be available to all staff and parents whenever a BIP is proposed.



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Office of Administrative Hearings Cases

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Student v Patterson Unified, **(ALJ Castillo, May 2010)**

- Due to change in medication, special education eligible Student identified as potentially having behavioral outbursts requiring intervention.
- District appropriately drafted a BSP.

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Student v Patterson Unified, **(ALJ Castillo, May 2010)**

- In December 2008 and January 2009 Student's behaviors increased and he was physically restrained on multiple occasions as BSP procedures did not deescalate Student.
- Staff testified they did not complete a BER or hold an IEP team meeting because Student had a BSP.



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Student v Patterson Unified, **(ALJ Castillo, May 2010)**

- ALJ held District did not use physical restraint as form of aversive punishment, but only as last resort when Student presented serious threat.
- However, District failed to complete required BERs, regardless of whether Student had an existing BSP.

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Student v Patterson Unified, **(ALJ Castillo, May 2010)**

- Because Student did not have a BIP, District failed to schedule the necessary emergency IEP meeting within 2 days of incident.
- This prevented Parents from meaningful participation and denied Student a FAPE.
- District required to provide compensatory education and develop a policy to implement the Hughes Bill.

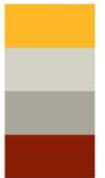


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Student v Bellflower Unified, **(ALJ Castillo, January 2010)**

- 5 year old autistic student enrolled in SDC program.
- Continually lied down in and out of class and minimally participated in group activities.
- Required hand-over-hand prompting to complete fine motor tasks.

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Student v Bellflower Unified, **(ALJ Castillo, January 2010)**

- Required repeated instruction and physical prompting to follow requests.
- Substitute teacher restrained Student in chair with soft ties due to aggressive behaviors on the playground during recess. Then returned to playground.
- Mother came and released Student and refused to return her to school.

Student v Bellflower Unified, **(ALJ Castillo, January 2010)**

- District contended restraint was only brief and did not harm Student.
- Chair was used for postural support, but District did not train staff in use of chair. Aide did not know she could not use chair to discipline Student.
- ALJ held because Student had been removed from playground, there was no need to restrain.

Student v Bellflower Unified, **(ALJ Castillo, January 2010)**

- District failure to offer BSP to address Student conduct and failure to train staff was a denial of FAPE, including using an aversive intervention.
- Harm was minimal as Student was only restrained for 5 minutes and then left. Also, there was no evidence Student was negatively impacted upon return to school.



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Student v Los Altos Elementary, **(ALJ Castillo, December 2006)**

- 12 year old Student with autism received partial in-home program.
- During in-home program mother would give child a cold bath after toileting accident. Also, put hot sauce on Student's hand to stop thumb sucking.
- NPA providing in-home services informed mother these were aversive and they could not implement them.

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Student v Los Altos Elementary, **(ALJ Castillo, December 2006)**

- However, when Student had a toileting accident, NPA staff would bring child to mother to give Student a cold bath. Staff also recorded cold baths and use of hot sauce in data collection binder.
- NPA did not inform District of aversive interventions being used.



Student v Los Altos Elementary, **(ALJ Castillo, December 2006)**

- ALJ held that even if NPA did not approve of mother giving Student cold baths, mother's actions became part of the ABA program through acquiescence.
- Also, District failed to appropriately monitor home program by failing to seek written status reports or reviewing Student's data binder.



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Potential Federal and State Claims

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Potential Federal and State Claims

- As a result of alleged inappropriate restraint or seclusion, numerous state and federal court claims may also be pursued.
- The merits of each case depends upon the specific facts of the case and claims pursued.
- In most cases in California, the cases have settled due to costs of litigation.



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Potential Federal and State Claims

- Common claims are:
 - Assault;
 - Battery;
 - Intentional or Negligent Infliction of Emotional Distress;
 - Negligent Supervision;
 - False Imprisonment;

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Potential Federal and State Claims

- Common claims are:
 - Violation of Section 504 of the Rehabilitation Act of 1973;
 - 4th Amendment Unlawful Seizure;
 - 14th Amendment Deprivation of Life, Liberty or Property.

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Proposed Federal Legislation

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Proposed Federal Legislation

- SB 3895 (Sen. Chris Dodd):
 - Keeping All Students Safe Act
 - Rewritten from SB 2860, original version proposed in Dec 2008.
 - Permits restraint and seclusion to be included in IEP for students with history of dangerous behavior and if FBA has been conducted and BIP is in place.

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Proposed Federal Legislation

- SB 3895 (Sen. Chris Dodd):
 - Prohibition on mechanical, chemical, physical restricting breathing, and any other “aversive intervention that compromises health and safety.”
 - US Dept. of Education would have 1 year to issue regulations. States would then have 2 years to implement.
 - Would cover private schools receiving funds to serve students under the IDEA.

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Lessons Learned

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Lessons Learned

- Train staff on Section 504 and IDEA mandate to address the behavioral needs of eligible students.
- Train staff regarding how to address student behavior, including:
 - when to conduct functional behavioral assessments and develop behavior support plans,
 - when to conduct functional analysis assessments and develop behavior intervention plans.

Lessons Learned

- Make sure staff restraining students are properly trained in restraint techniques.
- Make sure staff placing students in seclusion are properly trained.
- Closely monitor cases for students who are being restrained or secluded.
- Listen to staff and parents.



Additional Questions



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