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# Out of the institution, into the classroom: Legal challenges to the use of restraint and seclusion in school settings in the United States

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## ABSTRACT

The issue of restraint and seclusion of children with mental and developmental disabilities in schools has gained greater attention in the United States in recent years as more children with disabilities are attending mainstream schools. This article looks at how cases brought on behalf of children who have been subjected to such treatment fit or fail to fit within a well-developed jurisprudence that provides constitutional protections for the rights of people with mental disabilities to be free from discrimination and from cruel and unusual punishment. It examines this jurisprudence in light of Article 16's emphasis on the provision of age- and gender-appropriate services to protect people with disabilities from exploitation, violence, and abuse.<sup>1</sup>

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## 1. Introduction

Article 16 of the CRPD, in addition to emphasizing the gender- and age-specific aspects of violence and abuse against persons, also calls attention to where such abuse occurs: “both within and outside the home”<sup>2</sup> and to the need for States Parties to monitor “all facilities and programmes designed to serve persons with disabilities.”<sup>3</sup>

While institutions for people with disabilities remain the primary site for abuse, neglect, violence and exploitation, Article 16 recognizes that abuses against people with disabilities also take place in the home and in non-institutional facilities and programs that are designed to serve people with disabilities. The more the CRPD's vision of inclusion is realized, the more people with disabilities will be receiving services outside of institutional settings, in community-based programs, mainstream health care, and, for children with disabilities, mainstream schools. The challenge for States Parties implementing Article 16 is to develop legislative and monitoring frameworks to recognize and address violence and abuse in all settings where people with disabilities receive services.

In this article, I will examine a specific type of abuse against children with disabilities in a setting that does not traditionally fall within the category of programs and facilities designed to provide services to people with disabilities: the use of restraint and seclusion against children

with disabilities in mainstream schools. The article will first look at how the CRPD Committee has addressed this in Concluding Observations and its Draft General Comment 4 on Article 24 of the CRPD and the response from NGOs to the Committee's approach. The article will then focus on how the issue of restraint and seclusion of children with disabilities in mainstream schools in the United States has been addressed in policy and legislation to highlight the challenges of both monitoring such abuse and finding remedies for those subjected to it. Although the U.S. has not ratified the CRPD, it has a well-developed body of statutes and caselaw to which States Parties implementing the CRPD can look for guidance regarding what has and has not been effective in ensuring legal protection of the rights of people with disabilities. The U.S. history is complex due to the interaction of federal and state laws and the specific legislative framework and caselaw that has developed over many years. However, it does provide lessons about extending monitoring from institutional to mainstream settings and developing legislation to prevent abuses associated with institutions from occurring in such settings due to legal and regulatory gaps.

## 2. The Committee on the rights of persons with disabilities on restraint and seclusion in schools

In its Concluding Observations, the Committee has addressed restraint and seclusion under Article 15's prohibition of torture, inhuman and degrading treatment. In its Concluding Observations from its review of Australia, the Committee noted its concern that such practices were occurring in schools, among other settings:

The Committee is concerned that persons with disabilities, particularly those with intellectual impairment or psychosocial disability, are subjected to unregulated behaviour modification or restrictive practices such as chemical, mechanical and physical restraints and

<sup>1</sup> This paper forms part of a special edition of the International Journal of Law and Psychiatry entitled ‘Protecting people with disabilities from harm, exploitation and abuse: Unlocking the potential of Article 16 of the United Nations Convention on the Rights of Persons with Disabilities’. For a full view of the contents of this special edition, go to <http://www.journals.elsevier.com/international-journal-of-law-and-psychiatry>.

<sup>2</sup> Convention on the Rights of Persons with Disabilities (CRPD), Article 16(1).

<sup>3</sup> CRPD Article 16(3).

seclusion, in various environments, including schools, mental health facilities and hospitals.<sup>4</sup>

However, the Committee's recommendation to address this was that "the State party take immediate steps to end such practices, including by establishing an independent national preventive mechanism to monitor places of detention — such as mental health facilities, special schools, hospitals, disability justice centres and prisons —, in order to ensure that persons with disabilities, including psychosocial disabilities, are not subjected to intrusive medical interventions."<sup>5</sup>

In focusing on "intrusive medical interventions" and monitoring of "places of detention", the Committee limited its recommendation to a specific type of abuse occurring in a specific setting even though the violation it pointed out was much broader. The NGO Autistic Minority International called attention to this weakness in the Committee's response to restraint and seclusion in schools in its submission on Draft General Comment 4 on Article 24 of the CRPD:

Unfortunately, the Committee ... focused on the medical setting only, recommending to abolish "intrusive medical interventions", but failing to recommend the abolishment of restrictive practices that serve no pretended medical purpose – but rather aim to discipline students, manage their behaviour, and enforce compliance – in schools.<sup>6</sup>

Autistic Minority International called on the CRPD Committee to rectify this in General Comment 4 by adding a paragraph "rejecting the use of restrictive practices, restraints and seclusion in both special and regular schools."<sup>7</sup>

In Paragraph 50 of Draft General Comment 4 the CRPD Committee called attention to violence and abuse occurring in schools and by educational personnel and to the connection between Article 24 and Article 16:

Persons with disabilities, and particularly women and girls, can be disproportionately vulnerable to violence and abuse, including physical and humiliating punishments by educational personnel, and bullying by others in and on route to school. Article 16 requires that States parties take all appropriate measures to protect from and prevent all forms of violence and abuse towards persons with disabilities. Such measures must be age, gender and disability sensitive. The Committee strongly shares the recommendations of the Committee on the Rights of the Child, the Human Rights Committee and the Committee on Economic, Social and Cultural Rights that States parties must prohibit all forms of corporal punishment, and cruel, inhuman and degrading treatment in all settings, including schools, and ensure effective sanctions against perpetrators.<sup>8</sup>

Several organizations that submitted comments on Draft General Comment No. 4 called on the Committee to strengthen this paragraph to specifically include a prohibition on the use of restraint, seclusion and aversive interventions as part of States' inclusive education policies. Amnesty International, in its comments on Paragraph 50 of Draft General Comment 4, expressed concern that "even in States with inclusive education policies, the use of restraint, seclusion and aversive interventions undermines efforts to realize the protections enshrined in

Article 24" and recommended that States prohibit the use of such methods as part of their inclusive education policies.<sup>9</sup> Children with Disability Australia (CDA) and Disability Discrimination Legal Service Inc. (DDLS) also urged the CRPD Committee to include an explicit prohibition on the use of restraint and seclusion in schools.

CDA and DDLS recommend that restraint and seclusion of students with disability is explicitly mentioned as a form of violence and abuse. Restraint and seclusion is experienced by children and young people with disability in education settings, often as a "strategy" to "manage behaviour." It is frequently justified as acceptable or necessary to ensure the safety of the student concerned or others. It is critical that States Parties commit to eliminating the use of restraint and seclusion of students with disability.<sup>10</sup>

The final version of General Comment 4 does include a reference to restraint and seclusion, but does not specifically prohibit their use. The first sentence of paragraph 49 of the General Comment references "physical and humiliating punishments by educational personnel, for example, the use of restraints and seclusion" and goes on to state, as the Draft General Comment did, that Article 16 requires States Parties to protect from and prevent all forms of violence and abuse against people with disabilities.

As the issue of restraint and seclusion of children with disabilities in schools is emerging internationally, it has received significant attention in the United States over the past decade.

### 3. Legislative and policy framework for regulating the use of restraint and seclusion in U.S. schools

An investigative report published by the National Disability Rights Network (NDRN) in 2009, "School is Not Supposed to Hurt,"<sup>11</sup> showed the harm to children with disabilities from the use of restraint and seclusion in schools across the country. The NDRN reported numerous cases of physical harm and even death of children as young as seven years old.<sup>12</sup> In addition to the risk of serious physical injury, NDRN reported that restraint and seclusion led to re-traumatization, loss of dignity, and other psychological harm.

The NDRN report uses federal government definitions developed by the US Congress when it passed the Children's Health Act in 2000 to address the use of restraint and seclusion in health care facilities for children receiving federal funding. Restraint under the federal definitions includes both mechanical/physical restraint and chemical restraint.<sup>13</sup> Seclusion is defined as "the involuntary confinement [of an individual] alone in a room or area from which the individual is physically prevented from leaving."<sup>14</sup>

NDRN examined all state laws and policies as well as federal law and regulations regarding the use of restraint and seclusion in schools and found that 41% of states had no laws, policies or guidelines concerning restraint or seclusion use in schools.<sup>15</sup> The federal Office of Special Education Programs, which is responsible for implementation of the Individuals with Disabilities Education Act (IDEA), has interpreted that legislation as emphasizing the use of positive behavioral interventions but not flatly

<sup>9</sup> Amnesty International, Observations on the Draft General Comment 4 on Article 24 of the UN Convention on the Rights of Persons with Disabilities, 2016 at p. 9

<sup>10</sup> Children with Disability Australia Submission on the Draft General Comment on the Right to Inclusive Education - January 2016, available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GCRightEducation.aspx>.

<sup>11</sup> National Disability Rights Network, "Schools is Not Supposed to Hurt," 2009, available at <http://www.ndrn.org/images/Documents/Resources/Publications/Reports/SR-Report2009.pdf>.

<sup>12</sup> Studies cited in the NDRN report show that children as at especially high risk of death and serious injury from seclusion and restraint.

<sup>13</sup> Id.

<sup>14</sup> Id. Under the Children's Health Act, seclusion can only be used for "the management of violent or self-destructive behavior."

<sup>15</sup> Id. at p. 11.

<sup>4</sup> Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session (2–13 September 2013); CRPD/C/AUS/CO 21 October 2013, para. 35.

<sup>5</sup> *Id.*, para. 36.

<sup>6</sup> Autistic Minority International, Comments on Draft General Comment 4 of the Committee on the Rights of Persons with Disabilities on Article 24 of the Convention on the Rights of Persons with Disabilities (CRPD), pp. 1–2; available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GCRightEducation.aspx>.

<sup>7</sup> *Id.* at p. 2.

<sup>8</sup> Draft General Comment 4 of the Committee on the Rights of Persons with Disabilities Article 24, para. 50. Available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GCRightEducation.aspx>.

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