

# IMPROVING THE LEGAL AND REGULATORY FRAMEWORK OF RESTRAINT AND SECLUSION IN D.C. PUBLIC SCHOOLS

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## INTRODUCTION

Tiffany, a seventeen-year-old student with an intellectual disability at a Washington, D.C. public school, suffered a head injury and experienced loss of consciousness, nausea, and vomiting after two staff members pulled her hair, ripped her jacket, and punched her in the face while administering

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restraint.<sup>1</sup> Unfortunately, horrific stories like this have become more prevalent in the District of Columbia’s (D.C.’s) public school system.<sup>2</sup> Children attending public schools in D.C. are facing a severe epidemic—restraint and seclusion.<sup>3</sup> More disturbingly, the Office of the State Superintendent of Education (OSSE), the State Education Agency (SEA) which has the responsibility to “raise the quality of education for all D.C. residents,”<sup>4</sup> has not implemented overarching regulations regarding the use of restraint and seclusion on students or the tracking and reporting of restraint and seclusion.<sup>5</sup> When a school restrains or secludes a student, it does not have to write an incident report recording the event, nor does it need to inform the student’s parent or guardian about the restraint or seclusion.<sup>6</sup>

OSSE has the direct authority to regulate restraint and seclusion for students covered under the Individuals with Disabilities Education Act (IDEA).<sup>7</sup> It is unclear if OSSE has the direct authority to regulate restraint

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1. DISABILITY RIGHTS D.C. AT UNIV. LEGAL SERVS., *RESTRAINT, SECLUSION, AND ABUSE IN D.C. SCHOOLS AND THE NEED FOR ACCOUNTABILITY* 4 (2017), <http://www.uls-dc.org/S%20and%20R%20Report%203%203%2017%20-%20Final.pdf> [hereinafter DRDC 2017 Oversight Report].

2. The District of Columbia (D.C.) public school system refers to all public schools and public charter schools in D.C. operated by either the District of Columbia Public Schools (DCPS) or the District of Columbia Public Charter School Board (D.C. PCSB). *Our Schools*, D.C. PUB. SCHS., <https://dcps.dc.gov/page/our-schools> (last visited Sept. 11, 2021); *What is a Public Charter School?*, D.C. PUB. CHARTER SCH. BD. <https://dcpceb.org/families/what-public-charter-school/> (last visited Sept. 11, 2021); see Joshua Kaplan, *When D.C. Schools Use Restraint or Seclusion, No Laws Govern Them. Allegations of Abuse are Piling Up*, WASH. CITY PAPER (Dec. 13, 2019), <https://washingtoncitypaper.com/article/177217/when-dc-schools-use-restraint-or-seclusion-no-laws-govern-them-allegations-of-abuse-are-piling-up/> (describing the increasing number of restraint and seclusion incidents and how many of these incidents are causing actual physical and emotional harm to students).

3. Kaplan, *supra* note 2.

4. *About OSSE*, OFF. OF THE STATE SUPERINTENDENT OF EDUC., <https://osse.dc.gov/page/about-osse> (last visited Sept. 11, 2021). The Office of the State Superintendent of Education (OSSE) oversees all federal education programs within the District of Columbia and develops state-level education standards.

5. DISABILITY RIGHTS D.C. AT UNIV. LEGAL SERVS., *NEED FOR OVERSIGHT AND RESTRICTION OF SECLUSION AND RESTRAINT OF DISTRICT YOUTH ATTENDING D.C. PUBLIC SCHOOLS* 3 (2019), <http://www.uls-dc.org/media/1185/2019-seclusion-restraint-report.pdf> [hereinafter DRDC 2019 Oversight Report].

6. Amanda Michelle Gomez, *District Line Daily: Restraint, Seclusion, and Abuse at D.C. Schools*, WASH. CITY PAPER (Dec. 13, 2019), <https://washingtoncitypaper.com/article/323429/district-line-daily-restraint-seclusion-and-abuse-at-dc-schools/>.

7. OSSE can regulate restraint and seclusion practices for children served under the Individuals with Disabilities Education Act (IDEA) as OSSE has rulemaking authority acting

and seclusion practices for general education students in public schools.<sup>8</sup> OSSE lacks the authority to regulate restraint and seclusion for general education students in public charter schools.<sup>9</sup> OSSE has not fully used its regulatory authority to protect students with disabilities covered under the IDEA.<sup>10</sup> These regulatory gaps along with OSSE's inaction leave all students vulnerable to harm caused by improper restraint and seclusion. Moreover, Black students, students with disabilities, and the intersection of these groups<sup>11</sup> are left extremely vulnerable to harm as they are disproportionately subjected to restraint and seclusion.<sup>12</sup>

Restraint and seclusion is an emergency tool that school personnel should only use when a student is in a behavioral crisis endangering the student's

as the state education agency (SEA) for D.C. D.C. CODE § 38-2602 (b)(9)–(11), (15) (2020); 34 C.F.R. § 300.149–300.150 (2020).

8. D.C. CODE § 38-2602(b)(15) (2021) (allowing OSSE to possibly regulate restraint and seclusion for all public school students through its authority as the SEA).

9. See D.C. CODE § 38-2602 (2021) (granting OSSE certain regulatory authority over public charter schools, but not including authority over restraint and seclusion practices); D.C. CODE 38-1802.04(c)(3)(B) (2021) (excluding public charter schools from laws and regulations enacted specifically for DCPS); Jenny Abamu, *Debate Over Charter School Transparency Rooted in D.C.'s Struggle for Local Governance*, WAMU (Feb. 12, 2019) <https://wamu.org/story/19/02/12/debate-over-charter-school-transparency-rooted-in-d-c-s-struggle-for-local-governance/> (discussing the strong power and independence that D.C.'s public charter schools have).

10. OSSE has only promulgated one limited regulation regarding restraint and seclusion practices, applying only to students covered under the IDEA who attend non-public special education schools. D.C. Mun. Regs. tit. 5-A, §§ 2816–2820 (2010).

11. When referring to Black students and students with disabilities, this also includes the intersection of these groups. Additionally, while this Comment focuses specifically on D.C. where Black students are disproportionately harmed the most, nationwide, students of color, particularly Black students and students of Hispanic ethnicity, are disproportionately harmed by improper restraint and seclusion practices. Antonis Katsiyannis et al., *Exploring the Disproportionate Use of Restraint and Seclusion Among Students with Disabilities, Boys, and Students of Color*, 4 ADVANCES IN NEURODEVELOPMENTAL DISORDERS 271, 271, 275–76 (2020).

12. U.S. DEP'T OF EDUC., OFF. FOR CIV. RIGHTS, 2017–18 RESTRAINT AND SECLUSION ESTIMATION: PHYSICAL RESTRAINT IDEA/NON-IDEA (2018), <https://ocrdata.ed.gov/estimations/2017-2018> [hereinafter RESTRAINT AND SECLUSION ESTIMATION: PHYSICAL RESTRAINT TOTAL]; U.S. DEP'T OF EDUC., OFF. FOR CIV. RIGHTS, 2017–18 RESTRAINT AND SECLUSION ESTIMATION: MECHANICAL RESTRAINT IDEA/NON-IDEA (2018), <https://ocrdata.ed.gov/estimations/2017-2018> [hereinafter RESTRAINT AND SECLUSION ESTIMATION: MECHANICAL RESTRAINT TOTAL]; U.S. DEP'T OF EDUC., OFF. FOR CIV. RIGHTS, 2017–18 RESTRAINT AND SECLUSION ESTIMATION: SECLUSION IDEA/NON-IDEA (2018), <https://ocrdata.ed.gov/estimations/2017-2018> [hereinafter RESTRAINT AND SECLUSION ESTIMATION: SECLUSION TOTAL].

safety and the safety of others in the school.<sup>13</sup> The practice is necessary in these emergency circumstances to allow the student in crisis to calm down while keeping everyone else in the classroom safe.<sup>14</sup> The rise of restraint and seclusion in schools stems from the passage of the Education for all Handicapped Children Act, later becoming the IDEA,<sup>15</sup> which requires states to provide a free appropriate public education (FAPE) to students with disabilities as a condition to receive federal funds.<sup>16</sup> As public schools began serving students with various disabilities, in particular students with severe behavioral problems, this led to schools implementing restraint and seclusion practices.<sup>17</sup>

However, restraints and seclusions can lead to serious injury and even death if not conducted properly.<sup>18</sup> Within the D.C. public school system, the use of restraint and seclusion is not limited solely to emergency circumstances, as schools have used seclusion in particular as a form of discipline and punishment.<sup>19</sup> The lack of regulations allows for horrific abuse of restraint and seclusion practices in D.C. public schools.<sup>20</sup> Disability Rights D.C. at University Legal Services (DRDC), the protection and advocacy agency for D.C.,<sup>21</sup> reported multiple incidents regarding the abuse of

13. See U.S. DEP'T OF EDUC., RESTRAINT AND SECLUSION RESOURCE DOCUMENT 2 (2012), <https://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf> (stating the fifteen principles that guide when schools should utilize restraint and seclusion) [hereinafter DEP'T OF EDUC. FIFTEEN PRINCIPLES].

14. Barbara Trader et al., *Promoting Inclusion Through Evidence-Based Alternatives to Restraint and Seclusion*, 42 RSCH. & PRAC. FOR PERSONS WITH SEVERE DISABILITIES 75, 77 (2017); Jenny Abamu, *What Is Seclusion and Restraint? Explaining the Controversial School Discipline Practice*, WAMU (June 3, 2019), <https://wamu.org/story/19/06/03/what-is-seclusion-and-restraint-explaining-the-controversial-school-discipline-practice/>.

15. “The IDEA is a law that makes available a free appropriate public education to eligible children with disabilities throughout the nation and ensures special education and related services to those children.” U.S. DEP'T OF EDUC., *About IDEA*, IDEA <https://sites.ed.gov/idea/about-idea/> (last visited Sept. 11, 2021); 20 U.S.C. §§ 1400–1482.

16. Deanna Arivett, Comment, *The Need for Restraints in Public Schools? Keeping Students Safe in the Age of Inclusion*, 40 U. DAYTON L. REV. 155, 159–60 (2015).

17. *Id.* at 160 (citing Darcie Ahern Mulay, *Keeping All Students Safe: The Need for Federal Standards to Protect Children from Abusive Restraint and Seclusion in Schools*, 42 STETSON L. REV. 325, 328 (2012)).

18. See Kaplan, *supra* note 2 (illustrating that many states highly regulate restraint and seclusion practices because they “can cause serious psychological and physical harm, and . . . death”).

19. DRDC 2019 OVERSIGHT REPORT, *supra* note 5, at 7–8. DRDC has found that public schools and public charter schools in the District have used seclusion to discipline students for not listening to teachers, and for becoming irritable when hungry despite there being no concern of imminent harm or danger to the student or others. *Id.* at 8; accord Gomez, *supra* note 6.

20. DRDC 2017 Oversight Report, *supra* note 1, at 4–6 (2017).

21. *State Protection and Advocacy Systems*, ADMIN. FOR CMTY. LIVING

restraint and seclusion practices within D.C. public schools.<sup>22</sup> DRDC found that a public charter school<sup>23</sup> had a seclusion room that violated D.C. fire and building codes.<sup>24</sup> Upon investigation, DRDC found that the seclusion room door did not have any internal door handles or emergency releases.<sup>25</sup> This door prevented the student inside the seclusion room from exiting, even in an emergency, unless someone opened the door from the outside.<sup>26</sup> This is just one example found by DRDC, and local journalists have also covered the use of abusive restraint and seclusion practices within D.C.<sup>27</sup>

D.C.'s restraint and seclusion data shows that Black students and students with disabilities are unjustifiably subjected to restraint and seclusion practices without any regulations in place preventing their use as a last resort.<sup>28</sup> During the 2017–2018 school year, 133 out of the 236 reported physical restraint incidents—approximately 56.4%—involved students served under the IDEA.<sup>29</sup> Additionally, D.C. schools conducted 224 out of 236 reported physical restraints on Black students, approximately 94.9% of all restraints.<sup>30</sup>

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<https://acl.gov/programs/aging-and-disability-networks/state-protection-advocacy-systems> (last visited Sept. 11, 2021). “Protection and Advocacy Systems (P&As) work at the state level to protect individuals with disabilities by empowering them and advocating on their behalf.” *Id.*

22. DRDC 2017 OVERSIGHT REPORT, *supra* note 1, at 4–6; DRDC 2019 Oversight Report, *supra* note 5, at 7–8.

23. This Comment will refer to both D.C.'s public schools and public charter schools, which together form D.C.'s public school system. *Key Terms to Know – DC Public Education Enrollment*, STATE BD. OF EDUC., <https://sboe.dc.gov/page/key-terms-know-dc-public-education-enrollment> (last visited Sept. 11, 2021) (stating that DCPS is “[t]he traditional [public] school system in the District of Columbia” and operates as its own local education agency (LEA). Public charter schools are “independent, tuition-free schools under agreements approved by the DC Public Charter School Board.” *Id.* Each public charter school network is its own LEA. *Id.*

24. DRDC 2019 OVERSIGHT REPORT, *supra* note 5, at 6.

25. *Id.*

26. *Id.*

27. *See, e.g.*, DRDC 2019 OVERSIGHT REPORT, *supra* note 5; DRDC 2017 OVERSIGHT REPORT, *supra* note 1; Kaplan, *supra* note 2; Gomez, *supra* note 6; Jenny Abamu, *How Often Are D.C. Schools Isolating and Restraining Students? It's Hard to Tell*, WAMU (June 3, 2019), <https://wamu.org/story/19/06/03/how-often-are-d-c-schools-isolating-and-restraining-students-its-hard-to-tell/>.

28. *See* Kaplan, *supra* note 2 (discussing the lack of regulations regarding the use of restraint and seclusion on students and how schools perform them in non-emergency circumstances); RESTRAINT AND SECLUSION ESTIMATION: PHYSICAL RESTRAINT TOTAL, *supra* note 12 (showing how Black students and students with disabilities are restrained at significantly higher levels compared to white students and students without disabilities).

29. *Id.*

30. *Id.* Moreover, when looking at both race and IDEA status combined, 127 out of the 133 reported physical restraints that were performed on students covered by the IDEA were

For comparison, during the 2017–2018 school year, Black students made up 60% of all students in D.C. public schools and 75% of all students in public charter schools.<sup>31</sup> Most disturbingly, nearly all restraint and seclusion incidents reported within D.C. were performed on Black students, as there were only seven incidents of restraint or seclusion performed on white students, out of a total of 404 reported incidents.<sup>32</sup> These statistics show that Black students and students with disabilities in D.C. are at a much higher risk of being subjected to restraint and seclusion practices when compared to other demographics.<sup>33</sup>

Moreover, these statistics follow nationwide restraint and seclusion trends regarding restraint and seclusion when analyzed by race.<sup>34</sup> During the 2015–2016 school year, schools physically or mechanically restrained 87,000 students nationwide and secluded 37,500.<sup>35</sup> Schools disproportionately restrained Black students and students with disabilities relative to their proportion of the total student population.<sup>36</sup> While Black students accounted for only 15% of all students, they represented 27% of all students restrained and 23% of all students secluded.<sup>37</sup> Additionally, while students with disabilities accounted for 14% of total students, they represented 71% of students restrained and 66% of students secluded.<sup>38</sup> Similar to trends in D.C., nationwide trends illustrate that Black students

performed on Black students, approximately 95.5% of all restraints performed on IDEA covered students. U.S. DEP'T OF EDUC., OFF. FOR CIV. RIGHTS, 2017–18 RESTRAINT AND SECLUSION ESTIMATION: PHYSICAL RESTRAINT IDEA (2018) <https://ocrdata.ed.gov/estimations/2017-2018> [hereinafter RESTRAINT AND SECLUSION ESTIMATION: PHYSICAL RESTRAINT IDEA].

31. *DCPS at a Glance: Enrollment*, D.C. PUB. SCHS., <https://dcps.dc.gov/page/dcps-glance-enrollment> (last visited Sept. 11, 2021); D.C. PUB. CHARTER SCH. BD., *Student Enrollment*, <https://dcpsb.org/student-enrollment> (last visited Sept. 11, 2021).

32. RESTRAINT AND SECLUSION ESTIMATIONS: PHYSICAL RESTRAINT TOTAL, *supra* note 12 (indicating four out of 236 reported incidents of physical restraint were performed on white students); RESTRAINT AND SECLUSION ESTIMATION: MECHANICAL RESTRAINT TOTAL, *supra* note 12 (indicating none of the ten reported incidents of mechanical restraint were performed on white students); RESTRAINT AND SECLUSION ESTIMATION: SECLUSION TOTAL, *supra* note 12 (indicating three out of 158 reported incidents of seclusion were performed on white students).

33. RESTRAINT AND SECLUSION ESTIMATIONS: PHYSICAL RESTRAINT TOTAL, *supra* note 12; RESTRAINT AND SECLUSION ESTIMATION: MECHANICAL RESTRAINT TOTAL, *supra* note 12; RESTRAINT AND SECLUSION ESTIMATION: SECLUSION TOTAL, *supra* note 12.

34. U.S. COMM'N ON CIVIL RIGHTS, BEYOND SUSPENSIONS: EXAMINING SCHOOL DISCIPLINE POLICIES AND CONNECTIONS TO THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS OF COLOR WITH DISABILITIES 80 (2019), <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf> [hereinafter *Beyond Suspensions*]; Katsiyannis et al., *supra* note 11 at 271.

35. Katsiyannis et al., *supra* note 11 at 271.

36. *Id.*

37. *Id.*

38. *Id.*

and students with disabilities are continuously restrained and secluded at much higher rates, putting them at increased risk for harm.<sup>39</sup>

Currently, D.C. is failing to meet its responsibility to “rais[e] the quality of education for all DC residents,”<sup>40</sup> by allowing the overuse of restraint and seclusion on all students—with the practices being potentially dangerous if not implemented correctly. Part I of this Comment examines the legal and regulatory framework surrounding restraint and seclusion. Part II analyzes these regulations and their failure to address the overuse of restraint and seclusion on children in D.C.’s public schools. Part III recommends a three-pronged approach to address the overuse of restraint and seclusion among all children within D.C. public schools and public charter schools. First, the D.C. Council must expand and clarify OSSE’s authority to regulate restraint and seclusion in all public schools and public charter schools. Second, OSSE needs to promulgate a comprehensive rule limiting the use of restraint and seclusion among all students, and to create regulations that are race-conscious to limit the disproportionate use of restraint and seclusion on Black students. Third, the D.C. Council should expand due process protections for students with disabilities by allowing disputes regarding restraint and seclusion to operate under an expedited due process timeline if the parties request.

## I. CURRENT RESTRAINT AND SECLUSION REGULATORY FRAMEWORK

Currently, the framework of federal and local laws and regulations fails to limit the use of restraint and seclusion on D.C. students to emergency instances justifying them.<sup>41</sup> The Department of Education (DOE) leaves restraint and seclusion regulation to the states; however, the DOE has published guidance identifying fifteen principles that should be followed regarding state restraint and seclusion practices.<sup>42</sup> Within D.C., OSSE has

39. *See id.* at 271–72 (stating that these statistics are “troublesome” given that the U.S. Government Accountability Office “has found hundreds of allegations of injury associated with restraint or seclusion”).

40. OFF. OF THE STATE SUPERINTENDENT OF EDUC., *supra* note 4.

41. *See* DRDC 2019 OVERSIGHT REPORT, *supra* note 5, at 3–4 (discussing the negative impact that the lack of restraint and seclusion regulations has had on the DRDC’s ability to fully investigate restraint and seclusion practices within D.C.); *see also* Jenny Abamu, *How Some Schools Restrain or Seclude Students: A Look at a Controversial Practice*, NAT’L PUB. RADIO (June 15, 2019), <https://www.npr.org/2019/06/15/729955321/how-some-schools-restrain-or-seclude-students-a-look-at-a-controversial-practice> (describing how the lack of federal regulations on restraint and seclusion has led to a wide variation of regulation between states).

42. *Infra* Overview of Current Restraint and Seclusion Regulation; DEP’T OF EDUC. FIFTEEN PRINCIPLES, *supra* note 13 at 11.

some authority to regulate restraint and seclusion within public schools and promulgated one regulation that applies specifically to students with disabilities who attend non-public special education schools.<sup>43</sup> OSSE's current regulatory framework does not allow OSSE to have full oversight authority over all public school students.<sup>44</sup> As a result, OSSE is unable to meet the restraint and seclusion guidelines published by the DOE's Office for Civil Rights (OCR) because OSSE only has the authority to regulate restraint and seclusion in non-public special education schools.<sup>45</sup>

#### A. Overview of Current Restraint and Seclusion Regulation

The DOE's OCR enforces several laws that protect the rights of students; however, none of them expressly address the use of restraint and seclusion.<sup>46</sup> Rather, it is left to D.C. to implement its own restraint and seclusion regulations.<sup>47</sup> However, the DOE does provide policy guidelines that states can look to when drafting these regulations.<sup>48</sup> The DOE's OCR 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."<sup>49</sup> Mechanical restraint is "the use of any device or equipment to restrict a student's freedom of movement."<sup>50</sup> Seclusion is "the involuntary confinement of a student alone in a

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43. D.C. Mun. Regs. tit. 5-A, §§ 2816–2820 (2010).

44. *See id.* (stating that regulatory authority only applies to students in non-public special education schools).

45. *See* DEP'T OF EDUC. FIFTEEN PRINCIPLES, *supra* note 13, at 5–6, 11–13, 15 (requiring protections in all schools to meet the Department of Education (DOE) guidance).

46. Abamu, *supra* note 41. The DOE enforces Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin; § 504 of the Rehabilitation Act of 1973, which bars discrimination on the basis of disability; Title IX of the Education Amendments of 1972, which bars discrimination on the basis of sex in all education programs; the Age Discrimination Act of 1975, which disallows discrimination on the basis of age; and Title II of the Americans with Disabilities Act, which bans discrimination because of disability by public entities. *Regulations Enforced by the Office of Civil Rights*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/policy/rights/reg/ocr/index.html> (last visited Sept. 11, 2021).

47. *See* DEP'T OF EDUC. FIFTEEN PRINCIPLES, *supra* note 13, at 12–13 (stating the fifteen principles that states can use when formulating their own restraint and seclusion regulations).

48. *Id.*

49. U.S. DEP'T OF EDUC., OFF. FOR CIV. RIGHTS, 2017–2018 CIVIL RIGHTS DATA COLLECTION: THE USE OF RESTRAINT AND SECLUSION ON CHILDREN WITH DISABILITIES IN K–12 SCHOOLS, 4 (2020), <https://www2.ed.gov/about/offices/list/ocr/docs/restraint-and-seclusion.pdf>.

50. *Id.*



room or area from which the student is physically prevented from leaving.”<sup>51</sup>

The DOE’s OCR guidelines assert that schools should never use restraint and seclusion as a form of discipline and should only use them as a measure of last resort when other behavioral interventions and supports have failed.<sup>52</sup> The DOE, along with the Department of Health and Human Services (HHS), urges states to adopt restraint and seclusion regulations and policies that conform to fifteen guiding principles that aim to ensure students and educators will be safe in all schools.<sup>53</sup> The DOE proffers guidance documents that describe the agency’s positions on different issues; however, these guidelines do not create any binding requirements for D.C. public schools.<sup>54</sup>

Instead of following the guidelines set forth by the DOE, OSSE has only promulgated one regulation regarding restraint and seclusion in D.C.<sup>55</sup> This regulation solely applies to students placed in non-public special education schools funded by D.C.<sup>56</sup> OSSE has authority to implement restraint and seclusion regulations for non-public special education schools funded by D.C. through the Placement of Students with Disabilities in Nonpublic Schools Amendment Act of 2006.<sup>57</sup> The Act’s purpose was to “promote quality and control costs in the provision of special education services by nonpublic schools and programs that receive District of Columbia government funding.”<sup>58</sup> The Committee on Education, Libraries, and Recreation reasoned in part that this Act was necessary because non-public special education schools often serve students with severe disabilities who require a very high level of care and

51. *Id.* There are two other types of restraints that this Comment will briefly mention. A prone restraint is a restraint where the person is positioned lying face down. DEP’T OF EDUC. FIFTEEN PRINCIPLES, *supra* note 13, at 16. A chemical restraint is a medication used to restrict a student’s movement. Trader et al., *supra* note 14, at 76.

52. DEP’T OF EDUC. FIFTEEN PRINCIPLES, *supra* note 13, at 2.

53. *Id.* at 6.

54. Guidance documents are proffered by the DOE and describe the agency’s “current thinking on a topic.” *United States Department of Education’s Guidance Homepage*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/policy/gen/guid/types-of-guidance-documents.html> (last visited Sept. 11, 2021). However, they do not create any legal requirements beyond what is currently required by law and regulations. *Id.*

55. D.C. Mun. Regs. tit. 5-A, §§ 2816–2820 (2010); see DRDC 2019 OVERSIGHT REPORT, *supra* note 5, at 3 (noting how it is unclear if D.C. public schools are following the DOE’s restraint and seclusion guidance).

56. DRDC 2019 OVERSIGHT REPORT, *supra* note 5, at 9–10.

57. 57 D.C. Reg. 009444 (Oct. 8, 2010).

58. KATHY PATTERSON, BILL 16-668, THE PLACEMENT OF STUDENTS WITH DISABILITIES IN NONPUBLIC SCHOOLS AMENDMENT ACT OF 2006 at 1 (2006), [https://lms.dccouncil.us/downloads/LIMS/15993/Committee\\_Report/B16-0668-COMMITTEEREPORT.pdf](https://lms.dccouncil.us/downloads/LIMS/15993/Committee_Report/B16-0668-COMMITTEEREPORT.pdf).

services.<sup>59</sup> Therefore, the Act created additional protections for this extremely vulnerable population by implementing a Certificate of Approval<sup>60</sup> process for non-public special education schools, requiring them to meet certain academic and health standards.<sup>61</sup>

Non-public special education schools are banned from using both mechanical and prone restraints, and schools can lose their Certificate of Approval if this regulation is violated.<sup>62</sup> Additionally, only trained personnel can perform both physical restraints and seclusions, and they can only be performed in an emergency.<sup>63</sup> For example, chemical restraints are only allowed if ordered by a physician, deemed medically necessary, and implemented in conformance with the student's medical treatment plan.<sup>64</sup> Moreover, if any form of restraint or seclusion is used on a student, the school personnel must write an incident report, place it in the student's file, and send it to both the student's parents or guardians as well as to the sending local education agency (LEA).<sup>65</sup> While OSSE's regulations prohibit the abuse of restraint and seclusion in this vulnerable population, the regulations are ultimately limited because they do nothing to protect against the abuse of restraint and seclusion across the D.C. public school system at large.<sup>66</sup> It is these types of regulations that need to be applicable to all students to reduce the use of restraint and seclusion, limiting their usage solely to emergencies, and therefore protecting vulnerable populations, especially Black students and students with disabilities.<sup>67</sup>

There is arguably a second regulation on restraint, as there is a rule that prohibits the use of corporal punishment in District of Columbia Public School (DCPS).<sup>68</sup> As part of the prohibition on corporal punishment, this rule prohibits the use of unreasonable restraint as a form of discipline.<sup>69</sup> However, this rule only applies to DCPS and prohibits restraint only as a

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59. *Id.* at 7.

60. *Specialized Educ. Nonpublic School or Program Monitoring*, OFF. OF THE STATE SUPERINTENDENT OF EDUC., <https://osse.dc.gov/service/specialized-education-nonpublic-school-or-program-monitoring> (last visited Sept. 11, 2021) ("Certificates of Approval (COAs) are issued to nonpublic schools and programs meeting federal and state standards . . .").

61. *Id.*

62. D.C. Mun. Regs. tit. 5-A §§ 2817–18 (2010).

63. *Id.* §§ 2816, 2819.

64. *Id.* § 2816.

65. *Id.* § 2830.

66. *See id.* § 2816 (applying solely to students in non-public special education schools).

67. *See supra* INTRODUCTION (describing how these populations are subject to almost all of the reported restraint and seclusion incidents in the District of Columbia).

68. D.C. Mun. Regs. tit. 5-E, § 2403 (2002).

69. *Id.* § 2403.5(g).

form of discipline.<sup>70</sup> The rule does not create any additional requirements for when to use restraint, such as who is allowed to implement a restraint, the training required for personnel implementing a restraint, etc.<sup>71</sup> Additionally, this rule does not provide a reporting requirement when a restraint or seclusion incident occurs, thus schools do not have to notify parents, and there is no paper trail if a complaint were to arise later.<sup>72</sup>

### B. OSSE's Authority as the State Education Agency

D.C. Code § 38-2601 establishes OSSE as the SEA for D.C.<sup>73</sup> It is OSSE's duty to, among other things, develop and adopt "policies that come within the functions of state educational agencies under federal law."<sup>74</sup> OSSE is responsible for supervising public elementary and secondary schools.<sup>75</sup> As the SEA, OSSE must be in compliance with federal anti-discrimination laws protecting students based on race, gender, and disability, among other characteristics.<sup>76</sup> Additionally, the D.C. public school system that OSSE oversees includes two main types of schools: traditional public schools, which comprise DCPS;<sup>77</sup> and public charter schools, which the D.C. Public Charter School Board (D.C. PCSB) oversees.<sup>78</sup>

OSSE has the authority to pass its own regulations through the D.C. Administrative Procedure Act (D.C. APA).<sup>79</sup> Through this authority, OSSE

70. *Id.*; see D.C. Mun. Regs. tit 5-E, § 2400 (1977) (implementing regulations in this chapter specifically for DCPS).

71. D.C. Mun. Regs. tit. 5-E, § 2403.5.

72. See *id.* (lacking requirements for schools to write incident reports after a restraint as well as no requirement for schools to notify parents).

73. D.C. CODE § 38-2601 (2014); OFF. OF THE STATE SUPERINTENDENT OF EDUC., *supra* note 4.

74. D.C. CODE § 38-2602(b)(12) (2020).

75. 34 C.F.R. § 300.41 (2020).

76. See *Protecting Students Overview*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/protectingstudents.html> (last visited Sept. 11, 2021) (stating that the civil rights laws that are enforced by the Office for Civil Rights (OCR) extend to all SEAs).

77. *Key Terms to Know – DC Public Education Enrollment*, STATE BD. OF EDUC., <https://sb.oe.dc.gov/page/key-terms-know-dc-public-education-enrollment> (last visited Sept. 11, 2021).

78. *Id.*; *Who We Are*, D.C. PUB. CHARTER SCH. BD. (D.C. PCSB), <https://dcpsb.org/about-us/who-we-are?type=181> (last visited Sept. 11, 2021).

79. D.C. CODE § 38-2601 (2021); D.C. CODE §§ 2-501–510 (1977) (defining OSSE as a subordinate agency under the D.C. Administrative Procedure Act (D.C. APA), meaning that it is an office "required by law or by the Mayor or the Council to administer any law or any rule adopted under the authority of a law," and OSSE has been granted the authority to promulgate rules pursuant to the rulemaking process set forth in the D.C. APA); see *id.* § 2-502 (1977) (defining subordinate agency); D.C. CODE § 38-2602(b)(11) (2020) (granting OSSE the authority to promulgate regulations pursuant to the procedures set forth in the D.C. APA).

potentially has the authority to implement restraint and seclusion regulations for all DCPS students as it may “fulfill any other responsibilities consistent with the performance of the state-level education functions of the District of Columbia.”<sup>80</sup> DCPS is an LEA, which the D.C. Code defines as “an educational institution at the local level that exists primarily to operate a publicly funded school or schools in the District of Columbia.”<sup>81</sup> Since it is left to the states to create restraint and seclusion regulations, creating these regulations may fall under OSSE’s state-level education function to oversee its LEAs.<sup>82</sup> However, DCPS is not the only LEA in D.C. as each public charter school network is an LEA.<sup>83</sup>

Almost half of D.C.’s public school students attend public charter schools.<sup>84</sup> Public charter schools in D.C. are similar to traditional public schools in that they are free and open to students residing in D.C.<sup>85</sup> Unlike traditional public schools in D.C., which fall under the control of DCPS, a non-profit organization with an agreement (charter) approved by the D.C. PCSB oversees each individual public charter network.<sup>86</sup> OSSE maintains some oversight over public charter schools, such as verifying enrollment counts, promulgating rules for verification of D.C. residency for charter school students, and issuing rules regarding amounts of instruction time.<sup>87</sup> However, OSSE has not been granted the authority to regulate restraint and seclusion within public charter schools.<sup>88</sup>

## II. DEFICIENT REGULATIONS AND LAW

OSSE has not passed any rules or regulations regarding restraint and seclusion that apply to all D.C. public school students.<sup>89</sup> The current lack of

80. D.C. CODE § 38-2602(b)(15) (2020).

81. D.C. CODE § 38-2601.02(3) (2019).

82. D.C. CODE § 38-2602(b)(15) (2020).

83. D.C. CODE § 38-2601.02(3) (2019).

84. See DC PCSB, *supra* note 78.

85. *What Is a Public Charter School*, D.C. PUB. CHARTER SCH. BD., <https://dcp.csb.org/families/what-public-charter-school> (last visited Sept. 11, 2021). D.C. residents can attend traditional DCPS schools within their boundary. *Find Your In-Boundary School*, D.C. PUB. SCHS., <https://enrolldcp.dc.gov/node/41> (last visited Sept. 11, 2021). Public charter schools are open to all D.C. residents, regardless of where they live within the city. *Key Terms, My Sch. DC*, <https://www.myschooldc.org/faq/key-terms#pcs> (last visited Sept. 11, 2021).

86. *Id.*; *Key Terms to Know—DC Public Education Enrollment*, STATE BD. OF EDUC. (SBOE), <https://sboe.dc.gov/page/key-terms-know-dc-public-education-enrollment> (last visited Sept. 11, 2021).

87. D.C. CODE § 38-2602 (2020).

88. See *id.* The powers that the D.C. Council granted OSSE regarding public charter school oversight do not state anything about restraint and seclusion. *Id.*

89. See *supra* CURRENT RESTRAINT AND SECLUSION REGULATORY FRAMEWORK (discussing the lack of overarching restraint and seclusion regulations and laws).

regulations negatively impacts Black students and students with disabilities because they are more likely to be subjected to restraint and seclusion for improper purposes.<sup>90</sup> Additionally, OSSE’s proposal to regulate restraint and seclusion for all students with disabilities is insufficient as the regulation would still leave students without disabilities subject to no regulations.<sup>91</sup> Finally, current due process protections for students with disabilities are insufficient. Addressing these deficiencies will allow OSSE to better fulfill its purpose of “raising the quality of education for all DC residents.”<sup>92</sup>

#### *A. Current Lack of Regulations Harms Students*

OSSE’s current regulations only protect students covered under the IDEA who attend non-public special education schools.<sup>93</sup> This leaves both general education students, and all other students covered under the IDEA at risk of harm from restraint and seclusion.<sup>94</sup> The lack of comprehensive regulations for all public school students has resulted in no repercussions for LEAs that overutilize restraint and seclusion on students.<sup>95</sup> Moreover, LEAs use restraint and seclusion methods not only for emergency behavioral purposes but also as a form of discipline, particularly on Black students.<sup>96</sup>

This lack of regulation is concerning for several reasons. First, the IDEA guarantees students who qualify for special education services the provision of a free appropriate public education (FAPE).<sup>97</sup> The improper use of

90. See *RESTRAINT AND SECLUSION ESTIMATION: PHYSICAL RESTRAINT TOTAL*, *supra* note 12 (demonstrating that Black students and students with disabilities are more likely to be subjected to restraint and seclusion than other student groups); Kaplan, *supra* note 2 (describing horrific incidents of children with disabilities being restrained or secluded for minor reasons); see also Jennifer Smith Richards et al., *The Quiet Rooms: Schools Aren’t Supposed to Forcibly Restrain Children as Punishment. In Illinois, It Happened Repeatedly*, PROPUBLICA (Dec. 20, 2019), <https://www.propublica.org/article/illinois-school-restraints> (describing incidents where students were subjected to restraint and seclusion for minor reasons as opposed to genuine safety concerns).

91. 66 D.C. Reg. 014963 (2019).

92. OFF. OF THE SUPERINTENDENT OF EDUC., *supra* note 4.

93. D.C. Mun. Regs. tit. 5-A, §§ 2816–2820 (2010).

94. See *supra* I (describing the harms caused by restraint and seclusion); D.C. Mun. Regs. tit. 5-A, §§ 2816–2820 (2010) (protecting only students with disabilities who attend non-public special education schools).

95. See DRDC 2019 OVERSIGHT REPORT, *supra* note 5, at 3 (describing how the District has no rules or regulations “that direct how schools should address, report, or investigate allegations . . . of inappropriate or improper conduct . . . during instances of seclusion and restraint”).

96. See, e.g., *id.* at 7; DRDC 2017 OVERSIGHT REPORT, *supra* note 1; Gomez, *supra* note 6; Kaplan, *supra* note 2.

97. See generally 34 C.F.R. § 300.101 (2020) (mandating a free appropriate public

restraint and seclusion can be a FAPE violation if the restraint or seclusion has had a substantial impact on the child's education.<sup>98</sup> Additionally, the improper use of disciplinary tactics—such as the use of restraint and seclusion for discipline—in a discriminatory manner on Black students can be a violation of Title VI of the Civil Rights Act of 1964.<sup>99</sup> Title VI prohibits schools from “using ‘criteria or methods of administration’ that have an illegal racially discriminatory effect.”<sup>100</sup> Due to the lack of regulations within the D.C. public school system for both traditional and public charter schools, and the practice of restraint and seclusion as a form of discipline on Black students and students with disabilities, these schools may be in violation of both the IDEA and Title VI.<sup>101</sup> This is especially true given that nearly all reported restraint and seclusion incidents within the D.C. public school system have occurred on Black students.<sup>102</sup>

The unregulated practice of restraint and seclusion on Black students and students with disabilities can also contribute to the school-to-prison pipeline.<sup>103</sup> In particular, students who experience harsh disciplinary practices, such as restraint and seclusion, are more likely to ultimately fall into the juvenile or criminal justice system.<sup>104</sup> As D.C.'s usage of restraint and seclusion mirrors national trends of most heavily subjecting Black

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education (FAPE) be available to all children between the ages of three and twenty-one, including children with disabilities).

98. See *Beckwith v. District of Columbia*, 208 F. Supp. 3d 34, 45, 47 (D.D.C. 2016) (holding that restraint could be a FAPE violation if the restraint had a substantial impact on the child's education).

99. See BEYOND SUSPENSIONS, *supra* note 34, at 83. See generally *Race and National Origin Discrimination: Frequently Asked Questions*, U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS., <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html> (last visited Sept. 11, 2021).

100. BEYOND SUSPENSIONS, *supra* note 34, at 83.

101. *Beckwith*, 208 F. Supp. 3d at 45, 47 (violating FAPE if the overuse of restraint and seclusion is having a substantial impact on their education); BEYOND SUSPENSIONS, *supra* note 34, at 83 (for Black students, the practice of restraint and seclusion may be a Title VI violation if the practice has a discriminatory effect on these populations). See generally *Regulations Enforced by the Office for Civil Rights*, U.S. DEP'T OF EDUC. OFF FOR CIV. RTS., <https://www2.ed.gov/policy/rights/reg/ocr/index.html> (last visited Sept. 11, 2021).

102. See RESTRAINT AND SECLUSION ESTIMATIONS: PHYSICAL RESTRAINT TOTAL, *supra* note 12; RESTRAINT AND SECLUSION ESTIMATIONS: SECLUSION TOTAL, *supra* note 12.

103. See *School-to-Prison Pipeline*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline> (last visited Sept. 11, 2021) (describing the school-to-prison pipeline as a trend where schools subject students, particularly Black students and students with disabilities, to extremely harsh disciplinary policies that eventually funnel the students out of the school system and into the criminal justice system).

104. See Benjamin Olneck-Brown, *Legislatures Address the “School to Prison Pipeline”*, Educ. Pol'y Snapshot, Sept. 2020, at 1.

students and students with disabilities to restraint and seclusion,<sup>105</sup> these populations are the ones most likely to end up in the school-to-prison pipeline.<sup>106</sup> The result is that instead of these students receiving proper counseling or education services, the use of restraint and seclusion pushes them out of the education system and into the criminal justice system.<sup>107</sup>

### *B. OSSE's Proposed Rule Does Not Go Far Enough*

OSSE issued a Notice of Proposed Rulemaking to update the current special education regulations for all students served under the IDEA within D.C.<sup>108</sup> This revised chapter includes new regulations for restraint and seclusion for students who are covered under the IDEA and attend public schools in D.C.<sup>109</sup> Sections 3045.1–3045.4 of the proposed revision ban all mechanical, prone, and chemical restraints and stipulate that LEAs can only use physical restraints in emergency circumstances or where it is included in the child's individualized education program (IEP)<sup>110</sup> to address specific behaviors under specific circumstances.<sup>111</sup> Additionally, it establishes that only LEA personnel who are trained and certified in the appropriate use of evidence-based techniques can conduct physical restraints, and it makes explicit that LEA personnel cannot use physical restraint as a manner of discipline or punishment.<sup>112</sup> The proposed Section 3046 would implement

105. See RESTRAINT AND SECLUSION ESTIMATIONS: PHYSICAL RESTRAINT TOTAL, *supra* note 12; RESTRAINT AND SECLUSION ESTIMATIONS: SECLUSION TOTAL, *supra* note 12.

106. AM. CIV. LIBERTIES UNION, *supra* note 103.

107. See *id.*; Lanette Suarez, Comment, *Restraints, Seclusion, and the Disabled Student: The Blurred Lines Between Safety and Physical Punishment*, 71 U. MIAMI L. REV. 859, 878–80 (2017).

108. 66 D.C. Reg. 014963 (proposed Nov. 8, 2019). Immediately prior to publication, OSSE issued a second Notice of Proposed Rulemaking regarding restraint and seclusion practices on students with disabilities in the D.C. public school system. 68 D.C. Reg. 009091 (proposed September 3, 2021). In this second NPRM, OSSE eliminated language that would have allowed school personnel to use physical restraint as a permissible intervention when written into a child's IEP. *Id.* at 009127, 009228.

109. 66 D.C. Reg. 014963, 015057–60 (proposed Nov. 8, 2019).

110. *Id.* at 015057. See generally 20 U.S.C. § 1414(d) (outlining that an individualized education program (IEP) is a written statement that includes the child's present academic and functional performance including how the child's disability affects their education, a statement of "measurable annual goals" that allow the child to make meaningful educational progress, a description of how the child's progress will be evaluated, and a statement of the special education, related services, and supplementary aids and services the child will receive).

111. 66 D.C. Reg. 014963, 015057. See 68 D.C. Reg. 009091. 009127, 009228.

112. *Id.* at 015057–58.

similar restrictions regarding seclusion.<sup>113</sup>

Additionally, the proposed Section 3047 applies reporting requirements to the LEAs.<sup>114</sup> Section 3047.2 requires the LEA to prepare a report any time a restraint or seclusion incident occurs, and it sets forth requirements for the report.<sup>115</sup> Sections 3047.3 and 3047.4 require the LEA to add a copy of the incident report to the child's record and give it to the child's parent or guardian within one business day.<sup>116</sup> If the incident causes physical injury to the child or if the child causes physical injury to someone else, the proposal requires the LEA to report the incident to the parent and the D.C. agency involved in the child's education placement within one business day.<sup>117</sup> Finally, it requires the IEP team<sup>118</sup> to meet within ten days of the restraint or seclusion event to discuss either the need for a functional behavioral assessment (FBA) and behavior intervention plan (BIP), or, if the student already has these in place, to discuss whether the current FBA and BIP are appropriate.<sup>119</sup>

These regulations would be a major step in the right direction, and they would increase the level of protections for students with disabilities in D.C. public schools to the level for students attending non-public special education schools.<sup>120</sup> However, these regulations do not go far enough. While a majority of the restraint and seclusion incidents in D.C. involve children covered under the IDEA, public schools may subject all students to restraint and seclusion practices.<sup>121</sup> Therefore, students who do not receive special education services under the IDEA would not have protection: no emergency or last resort

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113. *See id.* at 015058–59 (limiting seclusion to be used only in emergency circumstances and implemented by personnel who are trained and certified in the use of appropriate techniques).

114. *Id.* at 015059–60.

115. *See id.* (requiring the child's name, date of incident, personnel involved, start and end times, technique(s) used, among other requirements to be included in the report).

116. *Id.* at 015060.

117. *Id.*

118. *See* 34 C.F.R. § 300.321(a) (2020) (consisting of the parents of the child, at least one regular education teacher if the child participates in the regular education environment, at least one special education teacher, a qualified representative of the public agency (school), other individuals with knowledge or expertise of the child, and the child whenever appropriate).

119. 66 D.C. Reg. 014963, 015060.

120. *Compare id.* at 014963–015060 (outlining proposed regulations which would restrict D.C. public schools from utilizing various methods of restraint and seclusion), *with* D.C. Mun. Regs. tit. 5-A, §§ 2816–2820 (2010) (highlighting current regulations which restrict non-public special education schools that receive D.C. funds from employing physical and chemical restraints, mechanical and prone restraints, and seclusion).

121. *See* RESTRAINT AND SECLUSION ESTIMATION: PHYSICAL RESTRAINT TOTAL, *supra* note 12 (stating that out of the 236 physical restraints reported, 103 occurred with non-covered students and not students with disabilities).



requirement, no guarantee that LEA personnel are properly trained, and no tracking and reporting requirement.<sup>122</sup> Parents of non-covered students have no way of knowing that their child is being subjected to this harsh and potentially dangerous emergency practice unless their child informs them.<sup>123</sup>

The proposed regulation fails to incorporate proactive means for reducing discriminatory uses of restraint and seclusion. It also fails to address the concern that Black students are disproportionately impacted by restraint and seclusion, potentially in a discriminatory manner.<sup>124</sup> OSSE's proposed regulation does not include any requirement of positive behavior interventions and supports (PBIS). PBIS is a "set of strategies and techniques that work to create a standard of behavioral expectations for all students and these desired behaviors are explicitly taught and continuously encouraged by teachers and school administrators."<sup>125</sup> Proper implementation of PBIS decreases the amount of restraint and seclusion incidents in schools.<sup>126</sup> Moreover, the implementation of school-wide PBIS decreases disciplinary referrals and school suspensions and improves school climate for all students.<sup>127</sup> To further improve outcomes among Black students, schools must implement PBIS in a "racially and culturally competent manner" and pay specific attention to race, ethnicity, and culture.<sup>128</sup> PBIS alone might not address disparities between students of different races and ethnicities.<sup>129</sup> Therefore, requiring training in race-conscious PBIS systems for all teachers and school personnel who have the authority to implement restraint and seclusion procedures will help reduce the ultimate incidence of restraint and seclusion.

122. See Kaplan, *supra* note 2.

123. See *id.* (providing the story of LaShelle Jones-Herrion's six-year-old son whom the school isolated on a daily basis without any notice from the school). Jones-Herrion only learned of the occurrences from her son's protests. *Id.* The article goes to explain that Jones-Herrion's son is not unique at his school or within the D.C. public school system. *Id.*

124. See BEYOND SUSPENSIONS, *supra* note 34. See generally DEP'T OF EDUC. FIFTEEN PRINCIPLES, *supra* note 13.

125. BEYOND SUSPENSIONS, *supra* note 34, at 83–84.

126. See *id.*; Katsiyannis et al., *supra* note 11, at 277.

127. See NAT'L COUNCIL ON DISABILITY, *Breaking the School-to-Prison Pipeline for Students with Disabilities* 51 (2015), [https://www.ncd.gov/sites/default/files/Documents/NCD\\_School-to-PrisonReport\\_508-PDF.pdf](https://www.ncd.gov/sites/default/files/Documents/NCD_School-to-PrisonReport_508-PDF.pdf); see also Suarez, *supra* note 107 at 893–94 (illustrating the positive benefits of positive behavior intervention and supports (PBIS) and how it helps reduce the school-to-prison pipeline).

128. See Nat'l Council on Disability, *supra* note 127, at 50–51 (discussing the impact of implementing race conscious PBIS systems in reducing the racial and ethnic disparities of students in office disciplinary referrals and school suspensions).

129. *Id.*

The proposed regulation allows for restraint to be used as an approved intervention for students with disabilities if it is included in a child's IEP.<sup>130</sup> However, an IEP should not include restraint nor seclusion as an approved intervention, but rather should only allow either as a last resort during a severe emergency where all other de-escalation methods have failed.<sup>131</sup> Lastly, there remains no accountability for either traditional public schools or public charter schools<sup>132</sup> when they improperly utilize restraint and seclusion techniques on students.<sup>133</sup>

### C. *More Due Process Protections are Needed for Students with Disabilities*

As part of OSSE's authority to oversee special education within D.C., OSSE promulgates rules regarding disputes between parents of students with disabilities under the IDEA and LEAs.<sup>134</sup> When there are disputes, parents<sup>135</sup> have the right to file due process complaints on behalf of their children under the IDEA.<sup>136</sup> Parents can file due process complaints when they disagree with a proposal to change or not change the identification, evaluation, or placement of their child, or regarding the provision of FAPE to their child.<sup>137</sup> Once filed, within fifteen days of receiving a notice, the LEA must convene a resolution meeting with the parent and the relevant members of the IEP team to discuss the due process complaint and attempt to resolve it without going to a due process hearing.<sup>138</sup>

The LEA and the parent have a thirty-day resolution period to attempt to resolve the complaint.<sup>139</sup> If the LEA and the parent are unable to resolve the

130. See 66 D.C. Reg. 014963, 015057 (Nov. 8, 2019). See 68 D.C. Reg 009091.009127, 009228.

131. See COUNCIL OF PARENT ATT'YS & ADVOCATES, COPAA DECLARATION OF PRINCIPLES OPPOSING THE USE OF RESTRAINTS, SECLUSION, AND OTHER AVERSIVE INTERVENTIONS UPON CHILDREN WITH DISABILITIES, (2011), [https://cdn.ymaws.com/copaa.site-ym.com/resource/resmgr/copaa\\_declaration\\_of\\_princip.pdf](https://cdn.ymaws.com/copaa.site-ym.com/resource/resmgr/copaa_declaration_of_princip.pdf).

132. See *supra* note 2 (discussing the difference between public schools and public charter schools).

133. See DRDC 2019 OVERSIGHT REPORT, *supra* note 5, at 3.

134. See 34 C.F.R. § 300.500 (2020); 38 D.C. CODE § 2602(12) (2021).

135. Under the IDEA, the term "parent" also includes legal guardian. 34 C.F.R. § 300.30.

136. See 34 C.F.R. § 300.507.

137. See *id.* (establishing when a due process complaint can be filed by citing to § 300.503(a)(1) and (2)). Schools also have the right to file due process complaints based on these causes of action. *Id.*

138. 34 C.F.R. § 300.510(a).

139. 34 C.F.R. § 300.510(b).

complaint within thirty days, the due process hearing can move forward.<sup>140</sup> After the thirty-day resolution process expires, the SEA must convene a due process hearing in front of an impartial hearing officer, and the hearing officer must mail a decision to both parties within forty-five days.<sup>141</sup> This lengthy process can last up to seventy-five days in total.<sup>142</sup> If school personnel are restraining or secluding the child in question multiple times, this timeline is simply inadequate to resolve a dispute when the child's safety is potentially at risk.<sup>143</sup>

However, there is an expedited timeline for due process hearings.<sup>144</sup> The IDEA allows for expedited due process when the parent disagrees with an LEA's disciplinary decision regarding changes in their child's education placement and the outcome of a manifestation determination meeting.<sup>145</sup> Under the expedited timeline, the LEA must hold a resolution meeting within seven days of the filing of the due process complaint.<sup>146</sup> If the parties do not resolve their dispute at the resolution meeting, the due process hearing must occur within twenty days of the filing of the complaint and the hearing officer must mail a decision to both parties within ten days of the hearing.<sup>147</sup> This expedited timeline bars parents who file due process complaints due to FAPE violations caused by restraint or seclusion incidents at school, as currently, the expedited timeline only applies to disagreements stemming from disciplinary incidents at school.<sup>148</sup>

While the IDEA currently has the expedited due process timeline limited to matters regarding discipline decisions or manifestation determination

140. *Id.* The parent or guardian and the LEA have the option to jointly waive the resolution meeting, or if they have the resolution meeting, can waive the remainder of the thirty-day period if they know that an agreement will not be reached. *Id.* §§ 300.510(c)(1)–(2).

141. 34 C.F.R. §§ 300.511, 300.515(a).

142. 34 C.F.R. § 300.515(a).

143. For example, a public charter school secluded six-year-old M.H. in the seclusion room multiple times, failed to document the seclusion on at least one occasion, and M.H. suffered traumatic nightmares because of these seclusion incidents. DRDC 2019 OVERSIGHT REPORT, *supra* note 5, at 4–6. If M.H.'s parents were to file a due process complaint to address concerns about the seclusion incidents, they would have to potentially wait seventy-five days for a resolution. 34 C.F.R. § 300.515. During this time of attempting to resolve the issue with the school, this could result in additional seclusion events causing more harm to M.H.

144. 34 C.F.R. § 300.532.

145. *Id.*

146. *Id.*; D.C. Mun. Regs. tit. 5-E § 3030 (2010).

147. *Id.*

148. *Id.* Expedited due process is available for parents when they disagree with their child's special education placement due to a disciplinary issue. *Id.* Additionally, expedited due process is available for parents when they disagree with the outcome of a manifestation determination meeting following a disciplinary issue. *Id.*

decisions,<sup>149</sup> states<sup>150</sup> are still free to implement protections that go beyond federal law.<sup>151</sup> The Supreme Court held in *Rowley* that the IDEA provides a “basic floor of opportunity” for students with disabilities to receive equal access to education relative to students without disabilities.<sup>152</sup> While the law does not mandate that states provide more protections than what the IDEA provides,<sup>153</sup> courts have held that states are allowed to implement statutory protections that go beyond the federal law, so long as these additional protections “are not inconsistent” with the IDEA.<sup>154</sup> Moreover, parties may file suit under the IDEA over violations of state laws that do provide protections beyond the IDEA to enforce the more expansive state statutes.<sup>155</sup> The IDEA provides the foundation of protections for students with disabilities; however, states may expand those protections, and parents have the right to file suit for violations of both the basic federal law and any state expansion.<sup>156</sup>

D.C. can provide additional due process protections for students with disabilities. D.C. has provided additional protections for students with disabilities through the Special Education Student Rights Act of 2014.<sup>157</sup> In *Middleton v. District of Columbia*, the U.S. District Court for the District of Columbia held that a FAPE violation occurred because the school violated the state statute by not providing the parent an opportunity to participate in her child’s education decisionmaking process.<sup>158</sup> Since restraint and seclusion are emergency tools that can potentially be very dangerous if not implemented properly, having a parent wait up to seventy-five days to resolve issues regarding these practices is simply unacceptable.<sup>159</sup> OSSE must

149. *Id.*

150. 34 C.F.R. § 300.40 (2020) (defining “state” under the IDEA as including D.C.).

151. *Middleton v. District of Columbia*, 312 F. Supp. 3d 113, 122, 147 (D.D.C. 2018).

152. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 200 (1982).

153. *Id.*

154. *Middleton*, 312 F. Supp. 3d at 122 (citing *G. ex rel. RG v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 303 (4th Cir. 2003)).

155. *See id.* (citing *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1035 (8th Cir. 2000)). If a state implements protections that exceed the IDEA, the state must meet those additional protections to be found in compliance with the IDEA and receive its federal education funds. *Gill*, 217 F.3d at 1035.

156. *Middleton*, 312 F. Supp. 3d at 122.

157. 38 D.C. CODE § 2571 (2015).

158. *Middleton*, 312 F. Supp. 3d at 128 (citing 34 C.F.R. § 300.513(a)(2) (2020)) (defining procedural violations as being violations of FAPE if they “impeded the child’s right to a FAPE,” “significantly impeded the parent’s opportunity to participate in the decisionmaking process” of their child’s education or deprived the child of an educational benefit).

159. 34 C.F.R. § 300.515(a).

address the fact that neither the current nor proposed regulations go far enough to protect D.C. students. Additionally, OSSE must improve due process protections for students with disabilities if OSSE is to fully address issues regarding restraint and seclusion within D.C.

### III. RECOMMENDATIONS

D.C.'s inadequate regulation of restraint and seclusion endangers students and is unacceptable. If not conducted properly, restraint and seclusion can be extremely dangerous, hence the need for regulations that are applicable to all students—especially those who are most vulnerable.<sup>160</sup> Additionally, for students who are covered under the IDEA, further due process protections must be passed to protect their rights. The D.C. Council and OSSE must undertake a three-pronged approach to improve restraint and seclusion regulations in D.C. schools. First, the D.C. Council needs to expand OSSE's authority to regulate restraint and seclusion in all public schools, for both DCPS and Public Charter Schools. Second, OSSE must issue a new Notice of Proposed Rulemaking implementing regulations that are applicable to all D.C. students and that are created and implemented in a “racially and culturally competent manner” to prevent further disproportionate use of restraint and seclusion on Black students.<sup>161</sup> Third, the D.C. Council should expand expedited due process hearing protections to cover disagreements regarding the use of restraint and seclusion.

#### A. *Expand OSSE's Regulatory Authority*

At this time, OSSE does not have the regulatory authority to regulate restraint and seclusion among all public school students. Currently, OSSE might not have the authority to regulate restraint and seclusion in public charter schools for general education students because this is not explicitly stated as one of OSSE's responsibilities for overseeing public charter schools.<sup>162</sup> Even if this was not an issue, it is unclear if OSSE has the authority to regulate restraint and seclusion in general because that authority hinges on whether it falls under OSSE's established authority to develop and adopt “policies that come within the functions of state educational agencies under federal law.”<sup>163</sup> If OSSE attempted to promulgate a rule regulating

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160. *See supra* INTRODUCTION (describing the potential harms of restraint and seclusion).

161. Nat'l Council on Disability, *supra* note 127, at 50–51.

162. D.C. CODE § 38–2602 (2021); *see* Abamu, *supra* note 9.

163. D.C. CODE § 38–2602(b)(12); *see also supra* OSSE's Authority as the State Education Agency (discussing OSSE's oversight authority of DCPS).

restraint and seclusion, there is potential that the rule would be invalid if regulating these policies went beyond the functions of SEAs. D.C. stands in contrast to a state like Virginia that has regulations regarding the use of restraint and seclusion in public schools,<sup>164</sup> which the Virginia Board of Education promulgated under the authority granted to it as the SEA by statute.<sup>165</sup> Therefore, to avoid any potential pushback over the legitimacy of OSSE's authority, the D.C. Council should expand OSSE's authority to regulate restraint and seclusion for DCPS and public charter schools.

The D.C. Council should pass new legislation that regulates restraint and seclusion within the D.C. public school system. The D.C. Council can craft this legislation similarly to the Student Fair Access to School Amendment of 2018 (SFASA),<sup>166</sup> which reformed disciplinary procedures used in both DCPS and public charter schools.<sup>167</sup> In this new legislation, the D.C. Council must address the harms that unregulated restraint and seclusion can cause to students. Particularly, this legislation must require that school personnel only perform restraint and seclusion during emergencies as a method of last resort, and schools must be required to document every incident of restraint and seclusion. Moreover, this legislation should require schools to report these incidents to parents, so they know right away if their child is having problems at school, as well as to OSSE, so OSSE can track the number of students being restrained and secluded.

The D.C. Council must also expand OSSE's regulatory authority so it can promulgate regulations regarding restraint and seclusion that apply to both DCPS and public charter schools. In this new legislation, the D.C. Council should amend the State Education Office Establishment Act of 2000<sup>168</sup> to directly provide OSSE this rulemaking authority. In particular, this legislation would create a new subsection under 38 D.C. Code § 2602, the

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164. 8 VA. ADMIN. CODE § 20-750-40 (2021).

165. VA. CODE ANN. § 22.1-279.1:1 (2019). This statute explicitly grants the Virginia Board of Education the authority to pass regulations regarding restraint and seclusion in public schools. *Id.* The statute also requires that the regulations passed must be consistent with the fifteen principles issued by the DOE. *Id.*

166. Student Fair Access to School Amendment Act of 2018, 65 D.C. Reg. 7499 (July 20, 2018).

167. *Id.* (limiting the number of days that schools can suspend students for both a single incident, as well as during a school year). Prior to the passage of the Student Fair Access to School Amendment of 2018 (SFASA), it was unclear if OSSE had the regulatory authority to regulate discipline in public charter schools. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-186, DISTRICT OF COLUMBIA CHARTER SCHOOLS: MULTI-AGENCY PLAN NEEDED TO CONTINUE PROGRESS ADDRESSING HIGH AND DISPROPORTIONATE DISCIPLINE RATES 35 (2017). Thus, to ensure that OSSE has the direct regulatory authority to regulate restraint and seclusion in charter schools, additional legislation clarifying OSSE's regulatory authority is needed.

168. State Education Office Establishment Act of 2000, 47 D.C. Reg. 6835 (Aug. 25, 2000).

section describing OSSE's responsibilities.<sup>169</sup> The new section would grant OSSE the authority to promulgate rules regarding the use of restraint and seclusion in both DCPS and D.C. public charter schools, pursuant to this new legislation and in accordance with the fifteen principles guidance by the DOE. This would explicitly grant OSSE the authority to regulate restraint and seclusion for all students in both DCPS and public charter schools, eliminating any potential pushback that OSSE does not have the proper authority to regulate restraint and seclusion for all students who attend either DCPS or public charter schools.<sup>170</sup>

Since D.C. is not a state, the process of enacting this proposed law differs from typical state legislations.<sup>171</sup> The D.C. Council must first approve a bill by majority vote and then approve it again at another Council legislative meeting at least fourteen days after the initial vote.<sup>172</sup> The mayor then reviews the bill with the option to do one of three things: sign the legislation, let the legislation be enacted without her signature, or veto the legislation.<sup>173</sup> If the mayor approves a bill, or if the D.C. Council overrides the mayor's veto, the bill is sent to Congress for a thirty-day congressional review period, during which Congress may enact a joint resolution disapproving the legislation.<sup>174</sup> If the President then approves this joint resolution that disapproves the legislation, the legislation cannot become law.<sup>175</sup> However, if there is no joint resolution disapproving the legislation within thirty days, the legislation becomes law for D.C.<sup>176</sup>

This proposal to increase OSSE's authority could generate some political backlash from the public charter schools in D.C. The local media in D.C. have reported on D.C. public charter schools pushing back on rules that would increase transparency among public charter schools.<sup>177</sup> D.C. public charter schools' substantial power to prevent additional oversight is not a recent development.<sup>178</sup> The School Reform Act of 1996, which allowed for

169. 38 D.C. CODE § 2602 (2020).

170. See Kaplan, *supra* note 2 (stating that it is unclear how OSSE would effectively provide oversight).

171. *How a Bill Becomes a Law*, COUNCIL OF THE D.C., <https://dccouncil.us/how-a-bill-becomes-a-law/> (last visited Sept. 11, 2021).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. See Abamu, *supra* note 9.

178. See generally Rachel M. Cohen, *How Charter Schools Won D.C. Politics*, WASH. CITY PAPER (Sept. 5, 2019), <https://washingtoncitypaper.com/article/178670/how-charter->

the creation of charter schools in D.C. as well as other factors, including a traditional public school system that has lost support from parents, enabled public charter schools to increase their political power systematically.<sup>179</sup> However, given the significant reporting and growing concern from DRDC, this could provide enough momentum for the D.C. Council to pass this increased power in oversight of the public charter schools to OSSE.<sup>180</sup> While this solution requires political capital to pass, it would ensure that OSSE has the express authority to implement these protections for all students, particularly Black students and students with disabilities.

### *B. Propose New Restraint & Seclusion Regulations*

OSSE's proposed restraint and seclusion rule does not go far enough to protect students from abusive restraint and seclusion practices.<sup>181</sup> The proposed rule is simply not strong enough to address the current issues surrounding the overuse of restraint and seclusion because it only serves students who receive special education, thus leaving students without disabilities, particularly Black students, vulnerable to the harms associated with unregulated restraint and seclusion.<sup>182</sup> Additionally, because OSSE has not implemented the rule since the passage of the minimum thirty-day public comment period,<sup>183</sup> it appears that OSSE is not acting on this rule. Even if OSSE were to finalize the rule and it took effect, OSSE must promulgate a new rule that addresses typical learners in DCPS and public charter schools.

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schools-won-dc-politics/ (discussing the background for how charter schools have risen in power through taxpayer funded lobbying, the struggle of DCPS, a weak teachers' union, and the usage of the School Reform Act to prevent local lawmakers from oversight of public charter schools).

179. *Id.*

180. *See* DRDC 2019 OVERSIGHT REPORT, *supra* note 5 (discussing how little has changed since the DRDC's 2017 investigation and report regarding restraint and seclusion); Kaplan *supra* note 2 (reporting on how the District of Columbia ignores DOE restraint and seclusion guidance that restraints and seclusions should be used solely when the child is in imminent danger to himself or others).

181. 66 D.C. Reg. 014963 (Nov. 8, 2019) (proposing a rule that only covers students with disabilities).

182. *See supra* INTRODUCTION (describing the overuse of restraint and seclusion on public school students, particularly Black students regardless of disability). *But see* 66 D.C. Reg. 014963, 015060 (preventing restraint and seclusion from being used as a method of discipline and creating a reporting requirement to the parent or guardian within one business day for students with disabilities).

183. *See* 66 D.C. Reg. 014963; D.C. CODE § 2-505(a) (2001) (publishing the Notice of Proposed Rulemaking on November 8, 2019 and providing a thirty-day notice-and-comment period per D.C. statute).



Otherwise, the rule as it is currently written will only serve students who receive special education under the IDEA.<sup>184</sup>

When the D.C. Council grants OSSE expanded authority to regulate restraint and seclusion among all public school students,<sup>185</sup> it can and must promulgate a new rule through the D.C. APA notice-and-comment process<sup>186</sup> that applies to all public school students. Any new proposed rule must require that restraints or seclusions are only implemented during an emergency where the student is in imminent physical harm. The rule should also explicitly state that restraint and seclusion practices should not be used by school personnel as a form of discipline or punishment.<sup>187</sup> The rule must also strike the language from OSSE's previous proposed rule that would allow physical restraint to be written into students' IEPs as an intervention.<sup>188</sup> Moreover, due to the extremely dangerous nature of mechanical and prone restraints, OSSE must completely ban their use.<sup>189</sup> These requirements will not only be the baseline that limits restraint and seclusion to only emergency uses, but they will also help bring D.C. in line with the guidance proffered by the DOE which protects the health and safety of all students.<sup>190</sup>

A new proposed rule must include the requirement that school personnel who administer restraints and seclusions on students receive training in specific, evidence-based techniques. This training requirement protects students and given the potentially dangerous nature of restraints and seclusions, only qualified personnel should be allowed to administer the practices. Moreover, a new proposed rule must include a requirement that all schools implement race-conscious PBIS. This will help not only ensure that the number of restraint and seclusion incidents decreases but also provide other school-wide benefits, including decreased disciplinary referrals, decreased school suspensions, and an

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184. 66 D.C. Reg. 014963 (Nov. 8, 2019).

185. *See supra* Expand OSSE's Regulatory Authority (discussing the expansion of OSSE's regulatory authority).

186. *See* D.C. CODE § 2-505 (requiring D.C. government agencies to have a notice-and-comment period for at least thirty days prior to finalizing any new rule).

187. D.C. Mun. Regs. tit. 5-E § 2403 (2002).

188. 66 D.C. Reg. 014963, 015057 (Nov. 8, 2019). *See* 68 D.C. Reg 009091, 009127, 009228.

189. *See* DEP'T OF EDUC. FIFTEEN PRINCIPLES, *supra* note 13, at 12, 16 (recommending that mechanical or prone restraints never be used on students and that restraint and seclusion are not used as a form of discipline. These methods should instead be limited to emergency situations).

190. *See id.* at 12 (recommending that states limit restraint and seclusion solely to emergency circumstances, and to never use restraint and seclusion as a form of discipline).

improved school climate for all.<sup>191</sup>

OSSE's new proposed rule must also include a reporting requirement for restraint and seclusion incidents. The language from the current proposed rule in §§ 3047.1–3047.5 should be incorporated into a new rule, as this would require all schools to create an incident report every time a restraint or seclusion occurs.<sup>192</sup> In particular, the new proposed rule would include the reporting requirement from the current proposed rule, which would require schools to inform the student's parent or guardian within one business day of any restraint or seclusion.<sup>193</sup> This is extremely important because there is currently no reporting requirement, and thus parents are left unaware of what is happening to their children and are unable to intervene and address problems occurring in schools.<sup>194</sup>

After the inclusion of a reporting requirement, the new proposed rule must also address what happens after a restraint and seclusion incident to prevent it from happening again. The current proposed rule requires the IEP team to meet within ten days of a restraint or seclusion incident to consider the need for an FBA.<sup>195</sup> If a student already has a BIP, assess whether or not it is appropriate to address the student's needs.<sup>196</sup> OSSE's new proposed rule must include a similar requirement for students without disabilities. The new proposed rule could include a provision that for students who are not served under the IDEA, a student support team (SST) would meet within ten days of an incident to consider the student's need for an FBA as well as a BIP. This would ensure that all

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191. See Katsiyannis et al., *supra* note 11, at 277; NAT'L COUNCIL ON DISABILITY, *supra* note 127 at 50–51.

192. 66 D.C. Reg. 014963, 015059–60 (Nov. 8, 2019). These sections of the current proposed rule, which would be incorporated in a new comprehensive proposed rule covering all public school students, detail what must be included in the incident report. *Id.* An incident report would include the child's name, date of incident, beginning and end times of incident, beginning and end times of actual restraint or seclusion, the events leading up to the restraint or seclusion, any interventions used prior to the restraint or seclusion, a log of events used during the restraint or seclusion, a description of any injuries or property damage that occurs, a list with the signatures of all LEA personnel who were involved in the restraint or seclusion, and a short-term plan for addressing the student's behavior. *Id.*

193. *Id.*

194. Abamu, *supra* note 27; Gomez, *supra* note 6.

195. UNDERSTOOD, *Functional Assessment: What it is and How It Works*, <https://www.understood.org/en/school-learning/evaluations/evaluation-basics/functional-assessment-what-it-is-and-how-it-works> (last visited Sept. 11, 2021). A functional behavioral assessment (FBA) defines the student's problematic behavior and analyzes why the student acts in this way. *Id.*

196. 66 D.C. Reg. 014963, 015060 (Nov. 8, 2019).

students who are restrained or secluded receive the proper behavioral supports and interventions that they require to help prevent future restraint or seclusion.

This proposed rule would have a positive impact on the current restraint and seclusion epidemic in D.C. There would be a requirement that restraint and seclusion can only be used in an emergency situation by trained personnel. Additionally, the incidences of restraint and seclusion among all students would decrease due to the implementation of PBIS strategies.<sup>197</sup> Most importantly, parents would be informed, and an SST meeting would occur immediately following any incident of restraint and seclusion on a child. This will not only alert the parent to potential issues occurring with their child in school, but the school will have an affirmative responsibility to intervene and prevent future incidents.

The combination of these requirements will help prevent the overuse of restraint and seclusion among all students. Schools will no longer be allowed to implement restraint and seclusion for disciplinary purposes, but rather solely for severe emergencies.<sup>198</sup> Schools will have PBIS in place that can reduce the incidence of restraint and seclusion.<sup>199</sup> Lastly, if a restraint or seclusion incident does occur, schools must convene SST meetings regardless of disability to determine if they must have further interventions to prevent the recurrence of restraint or seclusion.

### *C. Expand Expedited Due Process Timeline for Restraint and Seclusion*

The current seventy-five day processing period for the resolution of a due process complaint is far too long, especially when parents are concerned with the use of restraint and seclusion on their children with disabilities.<sup>200</sup> The D.C. Council should expand the expedited due process hearing timeline to allow a parent or guardian to raise concerns of FAPE violations due to restraint or seclusion incidents. If D.C. offers protections that go beyond the federal level, an individual is still able to file suit under federal law to enforce D.C.'s regulation.<sup>201</sup> Therefore, if the D.C. Council were to pass legislation

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197. See Katsiyannis et al., *supra* note 11 at 277.

198. See DRDC 2019 OVERSIGHT REPORT, *supra* note 5, at 7 (reporting on how restraint and seclusion is believed to be used as a form of discipline).

199. See Katsiyannis et al., *supra* note 11 at 277.

200. See *supra* Part II. More Due Process Protections are Needed for Students with Disabilities (describing how additional restraints and seclusions could occur during the seventy-five day due process period, potentially causing additional harm to the child and their education).

201. See *Middleton v. District of Columbia*, 312 F. Supp. 3d. 113, 122 (D.D.C. 2018)

that allows hearings regarding restraint and seclusion disputes to follow the expedited due process timeline, any counterargument trying to require the full seventy-five day timeline would fail.

Similarly, the D.C. Council should pass a new legislation amending the Special Education Student Rights Act of 2014<sup>202</sup> to expand the expedited due process protections beyond the federal requirements of the IDEA.<sup>203</sup> The expanded due process protections would create a new subsection to D.C. Code § 38–2571.03, which defines procedural safeguards and due process requirements in addition to the IDEA.<sup>204</sup> The new subsection could require that the expedited due process timeline outlined in 34 C.F.R. § 300.532 be applicable to any disputes arising when a parent or guardian of a child alleges that a restraint or seclusion incident caused a FAPE violation, or if the LEA believes that the restraint or seclusion incident was necessary and not in violation of the child’s FAPE.<sup>205</sup>

This proposed legislation by the D.C. Council should not be controversial because OSSE already understands the serious nature of restraint and seclusion.<sup>206</sup> Sections 3047.6–47.7 of OSSE’s current proposed rule requires the IEP team to meet within ten days of a restraint or seclusion incident to consider the student’s needs.<sup>207</sup> If there are additional incidents within ten days of the original incident, the parent and LEA can agree to consolidate meetings to discuss all incidents within fifteen days of the original incident.<sup>208</sup>

Moreover, the proposed legislation is fair to LEAs as it allows them to dispute and defend their use of restraint and seclusion. Currently, an LEA is able to request an expedited due process hearing regarding changing a child’s education placement if the LEA believes that keeping the child in their current placement is “substantially likely to result in injury to the child or

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(describing that the District of Columbia is able to provide protections that go beyond the federal protections of IDEA); D.C. CODE § 38–2572.02(a) (2015) (granting OSSE the authority to administer due process hearings and to issue regulations for this purpose).

202. Special Education Student Rights Act of 2014, 61 D.C. Reg. 12411 (Dec. 5, 2014).

203. D.C. CODE § 38–2571.03; *see also* 34 C.F.R. § 300.532(c)(1) (2020) (describing the limited circumstances in which expedited due process is available under IDEA).

204. D.C. CODE § 38–2571.03.

205. *See* 34 C.F.R. § 300.532(c)(3) (stating the current ways a parent or LEA can file for an expedited due process hearing).

206. *See* 66 D.C. Reg. 014963, 015060 (Nov. 8, 2019) (describing the requirement to meet within ten days of a restraint or seclusion incident for students with disabilities). This requirement illustrates the serious nature of restraints and seclusions and how they can warrant an FBA, and possibly a behavioral intervention plan (BIP), to prevent the maladaptive behavior which led to the restraint or seclusion from recurring. *Id.*

207. *Id.*

208. *Id.*

others.”<sup>209</sup> The same logic applies to allowing an LEA to argue that restraint or seclusion was necessary to keep the child safe and that the restraint or seclusion did not violate the provision of FAPE to the child.

The proposed legislation would be applicable to public charter schools because under D.C. Mun. Regs. tit.5-E § 3019(e), public charter schools that are LEAs must follow state policies and procedures established under federal regulations.<sup>210</sup> The proposed legislation would create an expansion of the due process rights under the IDEA, and therefore public charter schools would be obligated to follow it.<sup>211</sup> Thus, no additional steps would need to be taken to allow OSSE to enforce this requirement among all public schools, both DCPS and public charter schools.<sup>212</sup>

### CONCLUSION

The lack of regulations regarding restraint and seclusion on D.C. public school students and its impact are well-documented.<sup>213</sup> In particular, statistics show that the lack of regulations harm Black students and students with disabilities due to the overuse of these practices among these populations.<sup>214</sup> While there currently are regulations and laws in place regulating restraint and seclusion for other students with disabilities in non-public special education schools,<sup>215</sup> OSSE should take steps to regulate restraint and seclusion for all students to better fulfill its purpose of “raising the quality of education for all DC residents.”<sup>216</sup>

The best way to address the epidemic of restraint and seclusion is a three-step process.<sup>217</sup> First, the D.C. Council should pass legislation that affirmatively grants OSSE the authority to regulate restraint and seclusion in both DCPS and D.C. public charter schools. This will ensure that any regulations promulgated have the proper authority and cannot be disputed.<sup>218</sup>

209. 34 C.F.R. § 300.532(a).

210. D.C. Mun. Regs. tit.5-E § 3019.3(e) (2014).

211. D.C. CODE § 38-2572.02 (2021).

212. D.C. CODE § 38-2572.02; D.C. Mun. Regs. tit. 5-E § 3019.3(e).

213. *See supra* INTRODUCTION (describing the lack of restraint and seclusion regulations, specific instances of improper restraint and seclusion, as well as the disproportionate usage of restraint and seclusion on Black students and students with disabilities).

214. *See id.* (detailing the overuse of restraint and seclusion on Black students and students with disabilities).

215. D.C. Mun. Regs. tit. 5-A, §§ 2816-2820 (2010).

216. OFF. OF THE SUPERINTENDENT OF EDUC., *supra* note 4.

217. *See supra* RECOMMENDATIONS

218. *See supra* RECOMMENDATIONS

Second, once this is completed, OSSE should promulgate rules regulating restraint and seclusion for all public school students.<sup>219</sup> This will ensure the protection of all D.C. students from the overuse of restraint and seclusion, and in particular, will provide a level of protection for Black students who currently are subjected to restraint and seclusion at higher levels compared to other races.<sup>220</sup> Moreover, this comprehensive proposed rule would bring D.C. in line with the fifteen principles guidance proffered by the DOE.<sup>221</sup>

Additionally, for the most vulnerable students with disabilities who are covered under the IDEA, their due process rights should be expanded to protect against restraint and seclusion.<sup>222</sup> The D.C. Council should expand the expedited due process timeline to disputes regarding restraint and seclusion, which will notably decrease the time where continued—and potentially harmful—restraints and seclusions may occur. By taking these steps, D.C. can make a real change in protecting the rights and improving education outcomes of all of its public school students.

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219. *See supra* RECOMMENDATIONS B.

220. *See supra* INTRODUCTION (comparing the rates of restraint for Black students compared to the general student population).

221. DEP'T OF EDUC. FIFTEEN PRINCIPLES, *supra* note 13, at 12–13.

222. *See supra* RECOMMENDATIONS