



August 3, 2015

*Via Federal eRulemaking Portal, <http://www.regulations.gov>,
Docket ID No. ED-2015-ICCD-0074*

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**Re: ACLU Comments for 2015-2016 Mandatory Civil Rights Data Collection, 80
FR 31898, Docket ID number ED– 2015–ICCD–0074**

Dear Director Arrington:

The American Civil Liberties Union (ACLU) submits these comments in response to the Department of Education's proposed revision of the Civil Rights Data Collection (CRDC). The comments are joined by more than 20 disability organizations listed at the end. For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. The ACLU takes up the toughest civil liberties cases and issues to defend all people from government abuse and overreach. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin. The ACLU's Disability Rights Program envisions a society in which discrimination against people with disabilities no longer exists, and in which people with disabilities are valued, integrated members of the community, and have jobs, homes, education, healthcare, and families.

We request that the CRDC be revised to require that public school districts, also known as local education agencies (LEAs), report on the restraint and seclusion experienced by students with disabilities who are placed by the districts into segregated nonpublic schools. This is data that public school districts already receive and maintain, or can access readily. The current scope of the CRDC fails to encompass a substantial proportion of the restraint and seclusion being experienced by public school district students with disabilities.

Statement of the Problem.

Children with disabilities are disproportionately subjected to restraint and seclusion at school.¹ These interventions impose physical and emotional traumas on students that interfere with education and well-being, and can be dangerous and even life-threatening. Nevertheless, the use of restraint and seclusion on children with disabilities continues. To combat this ongoing violation of fundamental civil and human rights, the Department and other stakeholders must have access to basic data about use and prevalence.

Across the country, public school districts place tens of thousands of students with significant disabilities into hundreds of private state-approved special education schools.² These public placements occur when school districts conclude that they cannot themselves educate the students consistent with the IDEA. A significant number of the deaths and injuries reviewed by the 2009 GAO report – the report that helped spur the Department’s addition of the restraint and seclusion reporting elements to the CRDC in 2009 and the publication of its resource document in 2012 – occurred in such segregated private placements.³

¹ U.S. Dep’t of Educ., Office for Civil Rights, *Civil Rights Data Collection: Data Snapshot: School Discipline* 9 (2014) (showing that students with disabilities comprise 12 percent of all students enrolled in public schools, but 75 percent of those subjected to physical restraint, based on data submitted to the 2011-12 CRDC); Jane Meredith Adams & John C. Osborn, *Little Oversight of Restraint Practices in Special Education*, EDSOURCE (Apr. 19, 2015), <http://edsource.org/2015/little-oversight-of-restraint-practices-in-special-education/78040>; Oakland Unified Sch. Dist., Reply to ACLU Public Records Act Request Regarding Restraint and Seclusion Data Reporting (Feb. 9, 2015) (on file with ACLU Disability Rights Program); Los Angeles Unified Sch. Dist., Reply to ACLU Public Records Act Request Regarding Restraint and Seclusion Data Reporting (Mar. 6, 2015) (on file with ACLU Disability Rights Program); see also U.S. Gov’t Accountability Office, GAO-09-719T, *Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers* 5 (2009) (“Almost all of the allegations we identified involved children with disabilities.”).

² Nat’l Ctr. for Educ. Statistics, *Characteristics of Private Schools in the United States: Results From the 2011–12 Private School Universe Survey* 6 & table 1 (2013), <http://nces.ed.gov/pubs2013/2013316.pdf> (in 2011-12, 104,505 students were enrolled in 1,859 private, nonsectarian, special education schools); U.S. Dep’t of Educ., 29th Annual Report To Cong. on the Implementation of the Individuals With Disabilities Education Act, Vol. 2 160 (2007) (in Fall 2005, school districts placed 70,751 students with disabilities in private separate facilities); Paula Burdette, *Project Forum, Publicly Placed Private School Students with Disabilities: Issues and Recommendations* 1 (2006) (in 2004, according to state-reported data, approximately 90,000 or 1.5% of all students with disabilities were publicly placed in private day and residential settings); Cal. Dep’t of Educ., *Enrollment/Number of Schools by Grade Span & Type – CalEdFacts, Nonpublic Nonsectarian School*, <http://www.cde.ca.gov/ds/sd/cb/ce/enrollgradetype.asp> (in 2013-14, public school districts placed 10,887 students in 350 nonpublic public education school settings); N.Y. State Educ. Dep’t, *Approved Private, Special Act, State-Operated and State-Supported Schools in New York State*, <http://www.p12.nysed.gov/specialed/privateschools/home.html> (“NYS approved private 853 schools, created by Chapter 853 of the Laws of 1976, are operated by private agencies and provide day and/or residential programs for students with disabilities.”); Maryland State Dep’t of Educ., *Nonpublic School Approval, Special Education Schools Approved Under COMAR § 13A.09.10*, http://nonpublicschoolsdb.marylandpublicschools.org/nonpublic/nsab_directory/ApprovedSchoolLocations.asp?Condition=SpecialEducation (listing 100 approved private special education schools); Penn. Dep’t of Educ., *Pennsylvania Education Directory, Approved Schools for Special Education*, http://www.portal.state.pa.us/portal/server.pt/community/find_an_institution/7205/p/1422549 (listing 42 approved nonpublic schools for special education).

³ See U.S. Gov’t Accountability Office, *supra* n. 1, at 6 (describing restraint-related deaths of two children with disabilities placed in private settings), 13-14 (describing death following prone restraint of 14-year-old boy attending private special education school), 30-31 (describing restraint-related death of 12-year-old boy in private placement for emotional disturbance), 31-32 (describing restraint-related death of 16-year-old youth with bipolar disorder in private placement).

Currently, the CRDC only requires restraint and seclusion data to be reported at the public school level, and therefore does not gather information about the restraint and seclusion experienced by students with disabilities placed by LEAs into nonpublic school settings. But the best available data show that these students experience levels of restraint and seclusion that are magnitudes higher than those experienced by other publicly educated students with and without disabilities.

A recent review of restraint and seclusion experienced by California students found that during the 2011-12 school year, nonpublic special education schools in California educated about 2 percent of the IDEA students in the state, but filed 66 percent of the “behavioral emergency reports” (14,492). Behavioral emergency reports are the documents that memorialize restraint and seclusion interventions in California schools.⁴ For example, in 2011-12, Oakland Unified School District reported 1,710 behavioral emergencies pertaining to individuals placed in nonpublic special education school settings, compared to 0 pertaining to individuals placed in district schools.⁵

Students with disabilities who are educated in segregated special education environments such as nonpublic schools are among our most vulnerable children. They are more likely to be black.⁶ Many are also in foster care. A 2013 study of California students found that foster children are placed in nonpublic special education schools at more than three times the rate of other children, even when compared to children with low socioeconomic status.⁷

Proposed Solution.

We propose that the CRDC revise its collection to require that school districts report on the restraint and seclusion experienced by district students placed into nonpublic special education school settings. By state law, state practice, and contractual right, school districts already receive and maintain this data, and/or have the right of ready access to this data. See Appendix. The Department has the authority to request this data from school districts.

⁴ Cal. Educ. Code § 56521.1 (describing emergency interventions and associated behavioral emergency reports); Jane Meredith Adams & John C. Osborn, Little oversight of restraint practices in special education, Ed Source (Apr. 19, 2015), at http://edsources.org/2015/little-oversight-of-restraint-practices-in-special-education/78040#.VT_ShJOUKDK (“The vast majority of these emergencies involve the use of restraint and seclusion, according to an EdSource analysis.”).

⁵ Oakland Unified Sch. Dist. Reply, *supra*, n. 1.

⁶ Compare Nat’l Ctr. for Educ. Statistics, Characteristics of Private Schools in the United States: Results From the 2011–12 Private School Universe Survey 14 & Table 9 (2013) (in 2011-12, 21 percent of students enrolled in private special education schools were black) and U.S. Dep’t of Educ., IDEA Section 618 Data Products: State Level Data Files, Educational Environments 2011, row 466 (in 2011-12, 45,170 out of 170,996 IDEA students educated in separate schools were black – more than 26 percent) with U.S. Dep’t of Educ., 35th Annual Report To Cong. on the Implementation of the Individuals With Disabilities Education Act 44 & Exh. 26 (2013) (in 2011-12, 1,093,628 out of 5,670,680 children served under IDEA were black – about 19 percent); Nat’l Ctr. for Educ. Statistics, Fast Facts, <https://nces.ed.gov/fastfacts/display.asp?id=55> (in 2011-12, 15 percent of students enrolled in public schools were black).

⁷ Vanessa X. Barrat BethAnn Berliner, *The Invisible Achievement Gap, Part 1: Education Outcomes of Students in Foster Care in California’s Public Schools* 19 & fig. 8 (2013), at <http://www.stuartfoundation.org/docs/default-document-library/the-invisible-achievement-gap-report>.

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Barring a direct threat situation, the use of restraint and seclusion on students with disabilities is a form of discrimination that violates the Americans with Disabilities Act. Public school districts may not discriminate against students with disabilities through their contractual arrangements with private special education schools. 28 C.F.R. § 35.130(b)(1), (3). The changes we recommend will help make the goal of ending such discrimination a reality.

For questions or comment about our recommendations, please contact Legislative Counsel Jennifer Bellamy (202-715-0828; jbellamy@aclu.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Michael W. Macleod-Ball".

Michael W. Macleod-Ball
Acting Director
Washington Legislative Office

A handwritten signature in black ink, appearing to read "Claudia Center".

Claudia Center
Senior Staff Attorney
Disability Rights Program

American-Arab Anti-Discrimination Committee
American Association of Colleges for Teacher Education
The Arc of the United States
Association of University Centers on Disabilities
Bazelon Center for Mental Health Law
Children and Adults with Attention Deficit/Hyperactivity Disorder
Council of Parent Attorneys and Advocates, Inc.
Disability Rights Education and Defense Fund
Family Alliance to Stop Abuse and Neglect
Gamaliel Foundation
National Association of State Head Injury Administrators
National Autism Association
National Coalition for Mental Health Recovery
National Association of Councils on Developmental Disabilities
National Disability Rights Network
National Down Syndrome Congress
National Down Syndrome Society
National Fragile X Foundation
Respect ABILITY Law Center
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APPENDIX OF SELECTED STATE LAWS

Arizona. Ariz. Rev. Stats. Ann. § 15-105(D) (“Schools shall establish reporting and documentation procedures to be followed when a restraint or seclusion technique has been used on a pupil.”), (G)(2) (“‘School’ means a school district, a charter school, a public or private special education school that provides services to pupils placed by a public school, the Arizona state schools for the deaf and the blind and a private school.”), Ariz. Admin. Code R7-2-402(C)(7), (15) (“In order for a private special education school to be approved by the Department for the purpose of contracting with a public education agency, the private facility shall ... [m]aintain student records in accordance with the statutory requirements [and] [p]ermit onsite evaluation of the program by the Department or its designees, and the representatives of the public education agencies.”).

California. Cal. Educ. Code §§ 5621(a) (“This chapter applies to any individual with exceptional needs who is in a public school program ..., or who is placed in a nonpublic school program[.]”), 56521.1(e) (“A behavioral emergency report shall immediately be completed and maintained in the file of the individual with exceptional needs.”), (f) (“All behavioral emergency reports shall immediately be forwarded to, and reviewed by, a designated responsible administrator.”), 49076(a)(1)(C) (“Access to those particular records relevant to the legitimate educational interests of the requester shall be permitted to ... [a]uthorized representatives of the Comptroller General of the United States, the Secretary of Education, and state and local educational authorities, or the United States Department of Education’s Office for Civil Rights, if the information is necessary to audit or evaluate a state or federally supported educational program, or in connection with the enforcement of, or compliance with, the federal legal requirements that relate to such a program.”), 5 Cal. Code Regs. § 3062(c)(1) (“The master contract [between the LEA and the certified nonpublic school] shall, at a minimum, include: general provisions relating to ... record-keeping, and reporting requirements[.]”).

Colorado. 1 Colo. Code Regs. 301-45:2620-R-2.00(5)(i), (vi) (“public education agency” includes “[a]ny public or private entity that has entered into a contract for services with “[a]ny public school district”), 301-45:2620-R-2.04(2), (5) (“If restraints are used, a written report must be submitted within one (1) school day to school administration. ... A copy of the written report on the use of restraint shall be placed in the student’s confidential file.”), 301-45:2620-R-2.05 (“Each public education agency shall ensure that a review process is established and conducted for each incident of restraint used. ... Each public education agency shall ensure that a general review process is established, and conducted and documented in writing at least annually. ... The review shall include but is not limited to ... [a]nalysis of incident reports[.]”); Colo. Rev. Stat. Ann. § 22-32-122(3)(a) (“A contract entered into pursuant to this section shall set forth fully the purposes, powers, rights, obligations, and responsibilities, financial or otherwise, of the parties so contracting and shall require the service, including educational service, activity, or undertaking to be of comparable quality and meet the same requirements and standards that would apply if performed by the school district.”).

District of Columbia. D.C. Mun. Regs. Subt. 5-A, § 2820.4 (“A copy of the written incident report shall be sent within one (1) business day of the incident to the student's parent(s), the sending LEA and any other District of Columbia agency involved in the student's placement.”).

Florida. Fla. Admin. Code r. 6A-6.0361(5)(f) (“A contract between a district school board and a nonpublic school or community facility to provide educational programs for an exceptional student with a disability ... shall include ... [p]rovision for notifying appropriate school district personnel and the parent of the use of seclusion or restraint of the student, in accordance with Section 1003.573, F.S.”); Fla. Stats. § 1003.573(1)(a), (2)(b) (“A school shall prepare an incident report within 24 hours after a student is released from restraint or seclusion. ... Documentation prepared as required in subsection (1) shall be provided to the school principal, the district director of Exceptional Student Education, and the bureau chief of the Bureau of Exceptional Education and Student Services electronically each month that the school is in session.”).

Illinois. 23 Ill. Adm. Code 401.270(c) (“The record of a student enrolled in a program at a facility subject to this Part pursuant to Section 14-7.02 of the School Code [governing nonpublic schools] shall be the property of the student’s public school district of residence[.]”), 401.250(b)(4) (“[E]ach [nonpublic school] provider shall provide specific training to all personnel, including but not limited to: ... the use of isolated time out or physical restraint, if any, subject to the requirements of 23 Ill. Adm. Code 1.280 and 1.285[.]”), 1.285(f) (“A written record of each episode of isolated time out or physical restraint shall be maintained in the student’s temporary record.”).

Maryland. Code of Md. Reg. 13A.08.04.01 (“This chapter applies to student behavior interventions by public agencies and nonpublic schools.”), 13A.08.04.05(A)(3) (detailing contents of required “Documentation of the Use of Restraint”), (4) (“The documentation described in §A(3) of this regulation shall be maintained in the student's educational record[.]”), (B)(6) (detailing contents of required “Documentation of Seclusion”), (B)(7) (“The documentation described in §B(6) of this regulation shall be maintained in the student's educational record[.]”), 13A.08.04.06(D)(2) (“The Department may monitor and request any information regarding any matter related to exclusion, restraint, or seclusion implemented by a public agency or nonpublic school.”), 13A.08.02.19(A)(3) (local school system or educational institutions may disclose information from student records to state and local educational authorities, and to the Secretary or the Assistant Secretary for Education), 13A.08.02.23(A) (“This chapter does not preclude authorized representatives or officials listed in Regulation .19A(3) of this chapter from having access to student and other records which may be necessary in connection with the audit and evaluation of federal or State-supported education programs, or in connection with the enforcement of or compliance with the federal legal requirements which relate to these programs.”), 13A.09.10.11(C)(1) (“A school that provides special education services shall develop and implement policies and procedures for the ... documentation of student behavior interventions, including exclusion, restraint, and seclusion[.]”).

Maine. 05-071 Code Me. Regs. Ch.33, § 8(1) (“Each use of physical restraint or seclusion must be documented in an incident report.”), (2)(B) (“A copy of the incident report must be provided, within 7 calendar days of the incident to: ... [i]f the student is receiving his or her education in an out-of-district placement through a tuition agreement or other agreement, the entity responsible for the student's education.”).

Massachusetts. 603 Code Mass. Reg. 46.01(2) (“603 CMR 46.00 governs the use of physical restraint on students in publicly funded elementary and secondary education programs, including ... [public or private] special education schools approved under 603 CMR 28.09....), 46.06(1), (2) (“Program staff shall report the use of physical restraint as specified in 603 CMR 46.06(2) after administration of a physical restraint that results in any injury to a student or staff member, or any physical restraint of a duration longer than five minutes. ... The principal or director or his/her designee shall maintain an on-going record of all reported instances of physical restraint, which shall be made available for review by the Department of Education, upon request.”), 28.09(10) (“Approved special education schools shall keep current and complete files for each publicly funded enrolled student and shall manage such files consistent with 603 CMR 23.00.”), 23.07(4)(d) (“Federal, state and local education officials, and their authorized agents shall have access to student records as necessary in connection with the audit, evaluation or enforcement of federal and state education laws, or programs[.]”).

Nevada. Nev. Rev. Stats. Ann. §§ 394.367 (“A person employed by a private school or any other person shall not: 1. Except as otherwise provided in NRS 394.368, use physical restraint on a pupil with a disability. 2. Except as otherwise provided in NRS 394.369, use mechanical restraint on a pupil with a disability.”), 394.368(3) (“If physical restraint is used on a pupil with a disability in an emergency, the use of the procedure must be reported in the pupil's cumulative record not later than 1 working day after the procedure is used. A copy of the report must be provided to the Superintendent, the administrator of the private school, the pupil's individualized education program team, if applicable, and the parent or guardian of the pupil.”), 394.369(3) (“If mechanical restraint is used on a pupil with a disability in an emergency, the use of the procedure must be reported in the pupil's cumulative record not later than 1 working day after the procedure is used. A copy of the report must be provided to the Superintendent, the administrator of the private school, the pupil's individualized education program team, if applicable, and the parent or guardian of the pupil.”).

New Mexico. N.M. Stats. Ann. 1978, § 22-13-8(I) (“All agreements between local school boards and private, nonsectarian, nonprofit educational training centers and residential treatment centers must be reviewed and approved by the secretary.”), (J) (“The agreements must also acknowledge the authority and responsibility of the local school board and the department to conduct on-site evaluations of programs and student progress to ensure that the education provided to the qualified student is meeting state standards.”), (L) (“The department shall adopt the format to report individual student data and costs for any qualified student or school-age person attending public or private educational training centers or residential treatment centers ... Every public and private educational training center and every public and private residential treatment center that serves school-age persons in this state shall comply with this provision.”).

New York. 8 N.Y. Code of Rules & Regs. §§ 19.5(b)(1) (“No ... registered nonpublic nursery, kindergarten, elementary or secondary school in this State shall employ the use of aversive behavioral interventions to reduce or eliminate maladaptive behaviors, except as provided pursuant to section 200.22(e) and (f) of this Title.”), 200.22(d)(4) (“The school must maintain documentation on the use of emergency interventions for each student ...”), (f)(7)(i) (“The program shall provide for ongoing monitoring of student progress, including the collection and review of data and

information.”), (ii) (“A school district that places a student in a program that uses aversive interventions with such student shall be responsible to ensure that the student’s IEP and behavioral intervention plan are being implemented. ... [R]eview [by the district Committee on Special Education (CSE)] shall include the review of written progress monitoring and incident reports”); see also Summary of Amendments to the Regulations of the Commissioner of Education, Effective June 23, 2006, at <http://www.p12.nysed.gov/specialed/behavioral/requirements606.htm> (“The program using aversive behavioral interventions must: submit quarterly written progress reports on the implementation of the student’s behavioral intervention program to the CSE or CPSE and to the agency that placed the student in the program. ... School district responsibilities: ... [R]eview must include the review of written progress monitoring and incident reports”).

Ohio. Ohio Admin. Code §§ 3301-35-15 (“Any incident of seclusion or restraint shall be documented in a written report that is made available to the parent within twenty-four hours and that is maintained by the school district.”), 3301-35-01(A) (The rules in this chapter establish specific expectations for school districts and schools to use in creating the best learning conditions for meeting the personalized and individualized needs of each student and achieving state and local educational goals and objectives.”), (“‘School,’ with the exception of the term “school” as used in rule 3301-35-08 of the Administrative Code [regarding religious schools], means an environment organized for learning and chartered pursuant to this chapter and section 3301.16 of the Revised Code to provide a community of students with the opportunity to acquire skills and knowledge necessary to meet state and local performance objectives.”); Ohio Rev. Code Ann. § 3301.16 (discussing chartering of nonpublic schools).

Tennessee. Tenn. Comp. R. & Regs. 0520-01-09-.23(9) (“School personnel who must isolate or restrain a student shall report the incident to the school principal or the principal's designee. ... A copy of the report form must be provided to the local education agency's director of special education[.]”).

Vermont. Vt. Admin. Code §§ 7-1-12:4501.4 (“Schools may have policies and procedures for the use of physical restraint and seclusion in school-wide safety plans, provided such plans are consistent with these Rules.”), 7-1-12:4500.2 (“These rules are applicable to all learning environments that receive public funding, or over which the Vermont Department of Education has regulatory authority”), 7-1-12:4503.3.1 (“Learning environments other than public schools shall fulfill this reporting requirement by reporting to the Superintendent of the Supervisory Union that is the LEA or sending district for the student. If there is no sending district or LEA, this requirement shall be fulfilled by reporting to the Commissioner of the Department of Education in accordance with Rule 4503.4.”).

Virginia. 8 Vir. Admin. Code §§ 20-671-640(5) (“The use of time-out and staff checks on the student shall be documented.”), 20-671-660(10) (“Each application of physical restraint or seclusion shall be fully documented in the student's record including date, time, staff involved, justification for the physical restraint or seclusion, behavior antecedents, less restrictive interventions that were unsuccessfully attempted prior to using physical restraint or seclusion, duration, description of method or methods of physical restraint techniques used, signature of the person completing the report and date, and reviewer's signature and date.”), 20-671-660(11) (“Schools shall collect and

annually report to the Department the number of times restraint and seclusion were used during the school year. The data shall be disaggregated by students and number of occurrences.”), 20-671-700(A) (“Any serious incident, accident, or injury to a student that occurs at the school or a school-sponsored activity shall be reported to the parent immediately, but no later than the end of the school day. A publically placed student’s home school division and the placing agency shall be notified as soon as possible, but not later than 24 hours of the occurrence.”), 20-671-76(D) (“Authorized parties [for disclosure of information from a student's education record] shall be limited to school employees, including contracted employees, and representatives of placing school divisions, accrediting agencies, and state licensing agencies who need access to the student's records to carry out their work responsibilities.”) (effective August 26, 2015).

Washington. Rev. Wash. Code Ann. § 28A.600.485(5) (“Any school employee, resource officer, or school security officer who uses isolation or restraint on a student during school-sponsored instruction or activities must ... within two business days submit a written report of the incident to the district office.”); Wash. Admin. Code §§ 392-172A-01060 (“Elementary or secondary school means a public school, a nonprofit institutional day or residential school including a private school[.]”), 392-172A-03135(2) (“School districts shall document each use of an aversive intervention”).