# REPUBLICAN VIEWS
# H.R. 4247, THE PREVENTING HARMFUL RESTRAINT AND SECLUSION IN SCHOOLS ACT

*Introduction*

Committee Republicans believe all students should be able to learn in a safe, productive, and positive environment. Teachers, principals, and other school personnel have a responsibility to ensure this environment is maintained at all times. Even in situations in which students have serious problems that pose a threat to themselves and others, it is vitally important that school personnel use interventions and supports that are both physically and emotionally safe for the child. Sadly, efforts to maintain order in the classroom have sometimes led school personnel to misuse certain techniques resulting in the abuse or even death of students.

The legislation presented to the Committee in H.R. 4247 posits that the solution to the misuse of seclusion and restraint techniques lies in the hands of the Secretary of Education in Washington, D.C. Republicans, however, believe Washington does not always know best, and education policy is best handled at the state and local levels. We praise the work of school personnel who oftentimes work under very challenging circumstances. We commend those states and local areas that have passed comprehensive laws restricting the misuse of restraints and seclusion rooms. At the same time, we condemn those teachers and classroom aides who have been found guilty of child abuse and neglect, which has resulted in the injury or death of school-age children; their actions have no place in public or private school settings.

In determining whether the federal government, acting through the U.S. Department of Education, should begin the unprecedented step of regulating the use of restraint techniques and seclusion rooms in public and private schools, Committee Republicans raise four substantive concerns with H.R. 4247, *the Preventing Harmful Restraint and Seclusion in Schools Act*:

*Lack of reliable data on the use of restraint and seclusion in public and private schools*

First, Committee Republicans believe H.R. 4247 fails to recognize that the federal government, state educational agencies, local educational agencies, or schools lack any type of reliable data on the prevalence of harmful restraint techniques in public and private schools and whether they result in child abuse. This fact is indisputable. Gregory D. Kutz, Managing Director of Forensic Audits and Special Investigations for the U.S. Government Accountability Office, offered testimony before the Committee that the GAO "could not find a single Web site, federal agency, or other entity that collects information ***on the use of these methods or the extent of their alleged abuse"*** (emphasis added).[1] The Democratic majority in the Committee Report accompanying H.R. 4247 also uses this startling statistic to make the case for action on federal legislation regulating the use of restraint and seclusion techniques, although a more

[1] See "Testimony of Gregory D. Kutz, Managing Director of Forensic Audits and Special Investigations, U.S. Government Accountability Office (GAO), Hearing, U.S. House of Representatives, Committee on Education and Labor, Examining the Abusive and Deadly Use of Seclusion and Restraint in Schools" at http://republicans.edlabor.house.gov/Media/file/111th/hearings/fc/051909/gao.pdf.

appropriate precursor to taking any federal legislative action, would be to collect information from states in an effort to determine the problem's prevelance first.

This point has also been substantiated by the actions of the U.S. Department of Education, through the Office for Civil Rights (OCR), which recently issued a draft regulation requiring state and local educational agencies to collect data on the use of restraint and seclusion in schools.[2] The Civil Rights Data Collection, which has been pending for more than five months since September 2009, is expected to include data from 7,000 school districts and 77,000 schools. Under the proposal, school districts would submit three tables of data on restraint and seclusion – one for all students, one for students with Individualized Education Plans (IEPs), and one for those without IEPs. OCR's draft proposal was published in the *Federal Register* in an effort to use the Department's current data collection authority to determine how prevalent the problem of restraint and seclusion techniques is at the state or local level so the Department could determine whether they needed to act to protect student safety.

In a letter dated May 22, 2009, Congressman Howard P. "Buck" McKeon attempted to gather relevant information on the topic by asking U.S. Secretary of Education Arne Duncan to provide information on the number, nature, and resolution of any allegations of abuse from restraint and seclusion techniques that have been reported to the Department for the last five years. In his response to the Committee, the Secretary stated:

> "With regard to your...question about allegations of abuse from seclusion and restraint, the Department received a copy of a letter sent by a parent to the parent's State educational agency concerning the use of restraint on that parent's child in 2004. The letter was sent to the Department as 'information only' – no response was requested or provided.
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> "In addition, the Office for Civil Rights (OCR) contacted its regional offices and was able to identify 89 OCR cases that appear to be responsive to your request. Of these 89 cases, 81 cases raised allegations of disability discrimination, four raised allegations of race/color/national origin discrimination, and four cases raised allegations of disability and race/color/national origin discrimination. As of September 8, 2009, of those 89 cases, nine cases are open and 80 are closed. Of those closed 80 cases, 33 cases were dismissed or closed for administrative reasons (e.g. lack of consent, the complaint was withdrawn, and the complaint was untimely); 40 of those cases were closed as 'insufficient evidence/no violation found' with regard to allegations involving restraint or seclusion...and four of those cases were resolved by Early Compliant Resolution..."

Committee Republicans support the actions of the Department to begin collecting data on the use of restraint and seclusion techniques and believe the Democratic majority should suspend action on H.R. 4247 until OCR completes its review to see how widespread the problem of harmful seclusion and restraint techniques may be. To do otherwise suggests that the majority is supportive of legislating prematurely, bereft of any reliable or factual information on which to base federal education policy.

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[2] See http://edocket.access.gpo.gov/2009/pdf/E9-21935.pdf

*Creation of a one-size-fits-all federal mandate*

Second, Committee Republicans believe H.R. 4247 fails to acknowledge the work of 31 states that have acted to address restraint and/or seclusion techniques. Instead, it creates a one-size-fits-all federal mandate. The use of restraint and seclusion techniques, including defining what constitutes a restraint or seclusion, is primarily regulated at the state level. Thirty-one states currently have laws and regulations in place that govern the use of restraint and/or seclusion in schools.[3] In addition, school districts may also have their own guidelines governing the use of such practices in the classroom.

While state laws vary widely, an overwhelming majority of states are taking and have taken action to address problems that have arisen over time. The federal government should respect the rights of states to exercise their capacity and expertise to regulate in this area. The Democratic majority uses this fact in the Committee Report accompanying H.R. 4247 to criticize states for not developing uniform policies around restraint and seclusion policies; however it should recognize that states are in the best position to develop and implement policies and laws that protect their students.

In August 2009, U.S. Secretary of Education Arne Duncan conceded this fact by sending a letter to each Chief State School Officer urging them to review their current policies and guidelines regarding the use of restraints and seclusion in schools to ensure every student is safe and protected.[4] The Secretary urged each state to do such a review prior to the start of the 2009-2010 school year and directed the Office of Elementary and Secondary Education to work with each state to discuss relevant state laws, regulation, policies, and guidance that affect the use of seclusion and restraint.

Unfortunately, the Secretary has failed to release the transcripts of the state reviews; more than seven months after he pledged to the Committee that he would take appropriate action, the transcripts have still not been released. These transcripts could include important information on recent actions taken by states, including those 19 states that lack any state laws regulating restraint and seclusion techniques, to protect the safety of students. Committee Republicans urge the Department to release the transcripts of state conversations immediately so federal and state policymakers can see whether states have made progress on preventing the misuse of restraint and seclusion techniques.

*Inclusion of traditional private schools is unprecedented*

Third, Committee Republicans believe H.R. 4247 fails to exempt traditional private schools from its broad reach. Even though the GAO's report[5] found no instances of misuse of

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[3] For a full breakdown of state policy affecting restraint and seclusion techniques, see "Testimony of Gregory D. Kutz, Managing Director of Forensic Audits and Special Investigations, U.S. Government Accountability Office (GAO), Hearing, U.S. House of Representatives, Committee on Education and Labor, Examining the Abusive and Deadly Use of Seclusion and Restraint in Schools" at http://republicans.edlabor.house.gov/Media/file/111th/hearings/fc/051909/gao.pdf.

[4] For a copy of the letter sent by Secretary Duncan, see http://www2.ed.gov/policy/elsec/guid/secletter/090731.html

[5] See "Testimony of Gregory D. Kutz, Managing Director of Forensic Audits and Special Investigations, U.S. Government Accountability Office (GAO), Hearing, U.S. House of Representatives, Committee on Education and

seclusion and restraint at traditional private schools, H.R. 4247 would apply to any school that receives federal funding or federal services under any federal education program. Under the Individuals with Disabilities Education Act (IDEA), students with disabilities are entitled to receive special education and related services if they attend a private school. This "equitable participation of private schools" provision is an important component of special education law and is mirrored in all major education statutes passed by the Committee, including the Elementary and Secondary Education Act (ESEA). Although private schools and their students do receive services entitled to them under the law, they do not receive funding. Nonetheless, they are covered by the bill's provisions, establishing a dangerous precedent that has been rejected for decades of federal education law.

In their February 17, 2010 letter[6] sent to the Committee, the Council for American Private Education (CAPE) states that:

> "...this legislation would impose an unprecedented degree of federal mandates on religious and independent schools. The class of schools that would be affected by this bill is broad. Based on the definition of "school" found in section 4(11), a religious school with even a single student receiving math or reading instruction under Title I of the Elementary and Secondary Education Act (ESEA) would be subject to all of the provisions of this bill, as would a school receiving a single piece of instructional material or professional development for a single teacher under any other ESEA title. The U.S. Department of Education reported in 2007 that a full 80 percent of Catholic schools across the country participate in one or more programs under ESEA.
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> ***"In the history of education legislation, the federal government has never imposed training or certification requirements on religious and independent schools for any reason"*** (emphasis added).

Committee Republicans support long-standing federal policy that exempts private schools from the overreach of the federal government and urge the Democratic majority to exclude private schools from the provisions of H.R. 4247. This legislation represents an unprecedented expansion of the federal government into the affairs of private schools. In practice and contrary to the authors' intentions, most private schools may simply stop educating disruptive students, including disabled students, or decline the services offered by local school districts instead of subjecting themselves to federal control if this bill were to become law.

*Inclusion of language that may open states and school districts up to litigation*

Fourth, Committee Republicans believe H.R. 4247 may expose states and school districts to unnecessary and damaging litigation. While this bill does not contain a private right of action, it contains vague language on restricted actions and explicit language empowering the Protection and Advocacy system to investigate and enforce the protections under this Act, which would

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Labor, Examining the Abusive and Deadly Use of Seclusion and Restraint in Schools" at http://republicans.edlabor.house.gov/Media/file/111th/hearings/fc/051909/gao.pdf.

[6] For a copy of the letter sent by the Council for American Private Education (CAPE), see http://www.capenet.org/pdf/CAPEHouse4247.pdf

open schools to potential litigation. For example, the bill includes broad phrases such as requiring states to restrict "aversive behavioral interventions that compromise health and safety," an undefined term that would be defined and litigated across the country. Additionally, trial lawyers could be empowered to sue the 21 states that currently allow corporal punishment, since advocates may make the case that it compromises student health and safety. The legislation would also expand the role of the Protection and Advocacy system, the state-based system of trial lawyers, to enforce the protections under the bill.

In addition to these provisions, the bill's restriction on the use of restraints that could be used to protect the safety of teachers and the majority of students in the classroom could in itself open states and school districts to additional litigation. The lawsuits may come not only from overreaching trial lawyers intent on suing school districts for using restraint and seclusion techniques, but also from school personnel and students who were harmed because schools were not allowed to control disruptive students.

In order to avoid these and other lawsuits, schools may simply stop disciplining students and default to calling law enforcement to intercede rather than violate the law and guidance. This situation has occurred in several states, such as Kansas, which have implemented vague or overreaching restraint and seclusion requirements. As the American Association of School Administrators (AASA), the national association representing 13,000 educational leaders around the country, pointed out in their February 2, 2010 letter[7] to the Committee:

> "...the policy in HR. 4247 may result in schools relying on police to handle more dangerous situations because action by school employees is too restrained to be safely undertaken...the restrictive rules...will mean that students who have a history of explosive outbursts will be increasingly placed in more restrictive settings to reduce the difficulties of teachers in protecting students during violent outbursts."

Again, supporters of H.R. 4247 claim it will not breed litigation because it does not expressly contain a private right of action. But, in reality, this bill will open schools to increased litigation through the power given to the protection and advocacy organizations under this bill and existing law.

*Conclusion*

As outlined in these Republican Views, Committee Republicans believe all students, regardless of their educational ability or behavioral problems, deserve to be treated with respect and are entitled to a safe and rich learning environment. While the federal government lacks any reliable and relevant information on the prevalence of restraint and seclusion techniques at public and/or private schools, state and local leaders are taking important steps to protect the safety of their students after recent revelations that school personnel have misused restraint techniques and seclusion rooms.

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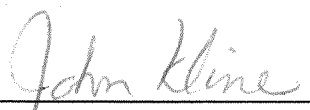
[7] For a copy of the letter sent by the American Association of School Administrators (AASA) see http://www.aasa.org/uploadedFiles/Policy_and_Advocacy/files/Ed%20Labr%20Cmte%20Letter%20020210.pdf

Committee Republicans certainly understand the goals of H.R. 4247; we support efforts to protect our children from abuse, neglect, and harm. However, we remain concerned that the bill legislates prematurely, ignores the work of the 31 states that have laws in place restricting the use of restraint and seclusion policies, creates a one-size-fits-all framework, imposes unprecedented bureaucratic and burdensome requirements on independent private schools, and opens states and school districts to a litany of lawsuits that will enrich trial lawyers.

Signed:



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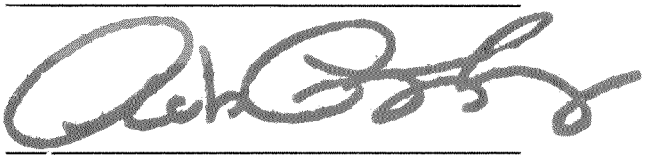

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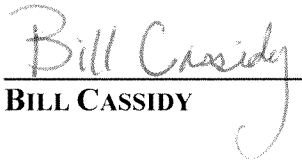

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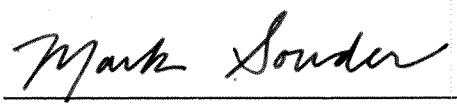

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