

Dear COPAA Board Member:

I am emailing to ask that you work to remove COPAA's sponsorship and support for the Miller bill since it will, on balance, do more harm than good and there are other viable alternatives for stopping restraint and seclusion abuse in schools.

The Miller bill:

1. Contains no individual right of action.
2. Will not be enforced by US DOE's Office of Elementary & Secondary Education (OESE), nor by OSERS/OSEP, nor by any other part of US DOE.
3. Will make it harder for parents to litigate R&S abuse on non-IDEA grounds.
4. And, there are better, more easily-attainable alternatives.

First of all, I should tell you that when I began to be concerned about the alarming abuse of children with disabilities in schools, I researched the disability-abuse issue carefully and had the pleasure and privilege of communicating with well-known, highly respected experts in that field. School abuse of children with disabilities is no different than institutional abuse of persons with disabilities and needs be dealt with in that context. We do not need to reinvent the wheel. We do need to remember that those who fail to study history are condemned to repeat it. **I am sorry that my offer to make these experts available to COPAA's folks working on the school abuse issue was not taken advantage of. These experts are uniform in stating that staff development and voluntary measures will not meaningfully stop the disability abuse going on in our schools. There must be sanctions; there must be enforcement, and the sanctions and enforcement efforts must be swift and severe.** Otherwise staff development will be given lip service: abuse will continue unabated. For example, the US Dept. of Justice is currently suing the NYS govt. agency which operates juvenile detention facilities because of widespread restraint and seclusion abuse which continues unabated despite a Commissioner who has attempted to retrain staff and strenuously change these facilities' coercive behavioral orientation ... in vain.

For all intents and purposes, what the Miller bill does is establish a PBIS system for the education industry to stop the unwanted behaviors of restraint and seclusion. Unfortunately, **there is no research showing that PBIS works to change organizational behavior in industries and institutions such as schools.** It only works on individuals. And the history of the movement to stop institutional disability abuse is clear. No enforcement; no sanctions; no cessation of abuse. It's that simple.

As to the Miller bill's obvious defects:

1. Individual parents can't enforce it. I was told when Miller negotiations were going on that the issue of parental enforcement was a non-starter. If the education industry was confident that more children would not be severely injured or killed after Miller staff development was implemented, it would not oppose individual rights of action so stridently. Let us be clear about that.
2. Miller will not be enforced by OESE, OSERS-OSEP or any other branch of US DOE. I'm not surprised that we're told that OESE will handle Miller issues since we all know - indeed, the whole world knows - that OSERS-OSEP is fundamentally unable, and most likely unwilling, to enforce anything which gives meaningful rights and protections to disabled kids and their parents.

A. OESE enforces nothing. The most recent - **very** recent - documentation for this was published by the US DOE's Inspector General on January 13, 2010. [Alert Memorandum - Virgin Islands Department of Education's Current Efforts to Address Prior Audit Findings](http://www.ed.gov/about/offices/list/oig/audit%20reports/AlertMemorandums/I04j0015.pdf), [http://www.ed.gov/about/offices/list/oig/audit reports/AlertMemorandums/I04j0015.pdf](http://www.ed.gov/about/offices/list/oig/audit%20reports/AlertMemorandums/I04j0015.pdf). That memo says that the Virgin Islands Dept. of Education hasn't been brought into compliance with minor and major,

federal financial requirements **and the first US DOE OIG audit report citing these failures was published in 1999.**

I have confidential sources who say flatly that there will be major national scandals within the next few months re OESE's failure, and in at least one case, absolute refusal, to enforce clear federal grant requirements when massive state ed. dept. noncompliance was identified.

OSERS-OSEP's unwillingness to enforce is exemplified by OSERS Ass't. Sec'y. Alexa Posny's recent abysmal interview re the Miller bill, <http://www.blogcatalog.com/blog/special-education-law-blog/41d3178f9c00380cea7d29aa9588f32b>. It is perfectly clear: Posny enforced nothing good for disabled kids when she headed OSEP - and as OSERS Ass't. Sec'y., she'll enforce nothing protecting them now.

OCR is, simply put, a joke. In a recent NYS case, OCR found a district in violation of Section 504 because it had simply failed to provide the OT in any student's IEPs for a lengthy period of time. The OCR "remedy" was to "require" that the district meet with parents to decide if these children required compensatory OT or not. The district then announced that it had been decided that no children required compensatory OT. The parent who'd filed the complaint notified OCR that the district had never met with him. OCR's response was simple: if the district said it had met with him, that was good enough for OCR. Case closed. Such OCR tales are simply legend.

And when was the last time that any office in US DOE referred a school or district over to US DOJ for investigation and prosecution of flagrant IDEA or Section 504 violations? It's had that authority for many years: it only lacks the will to do so.

B. State ed. depts. get to approve the required training under Miller. A misguided NYS legislator got a law passed a few years ago mandating that all special educators receive training in autism, but made the mistake of allowing the NYS Ed. Dept. to set the requirements for the training. State Ed. first proposed a 2-hour lecture. After considerable fuss, State Ed. changed this to a 3-hour lecture. The harmful result is that every special ed. staffer who sleeps through this lecture is now deemed a fully qualified and trained expert in autism. For parents disputing school autism "expert's" decisions and recommendations, and abuse, this leaves them in a worse position than they were before the training was required. **Bad training is worse than no training.** And again, experts say that without stringent safeguards in place mandating fidelity of implementation, staff development rarely results in substantive behavioral change on the part of those trained - especially if what they are told to do is difficult or counter-intuitive. And PBIS, if done properly, is both hard and counter-intuitive. If Miller passes, I expect NY, for example, to approve a 3-minute training video called "Don't Use Choke Holds." Other states will follow in rapid order.

I'm a little disturbed that Illinois is cited as an example of how effective PBIS can be. Am I the only person who read the IL DOE's published data before deciding whether PBIS was the way to go? What there was of it! Apparently so. PBIS spin won't help restrained and secluded kids.

C. Miller permits a school building to have restraints and seclusion in a behavior or discipline code applicable to all students, even if these are only used for kids with disabilities. So they aren't needed in kids' IEPs. NYS already has buildings with such codes. You can be sure this easy way to evade the "don't put them in an IEP" will spread like wildfire starting the day after Miller is passed. It will be close to impossible for parents' attorneys and advocates to prove that only disabled kids are subjected to these aversive behavioral control methods.

D. **The Willowbrook consent decree flatly prohibited seclusion back in 1975. Why are we reversing 35 years of disability anti-abuse progress?** I have yet to hear a good reason for this - and do not believe there are any.

3. Miller will make it much more difficult to litigate restraint and seclusion abuse on non-IDEA grounds. Of course, every time a child is injured, or killed, due to use of restraints and/or seclusion, staff

will testify that it was an emergency. And states will approve training programs which are so loose and low level that defendants will easily be able to claim they followed official policy, rules and regulations as set forth in that training. Using this to invoke a qualified immunity defense will spread like wildfire.

4. There are available, better alternatives. When I researched the school abuse problem, I conferred with high level, well-known professionals in the anti-abuse enforcement and Medicaid fraud fields. They were, and are, in agreement with me that school abuse of kids with disabilities can be stopped reasonably effectively by pressuring the White House to direct the Dept. of Health and Human Services to do what it already has the power to do, i.e., revoke the Medicaid Provider Agreements of any school, district, or other entity which harms or endangers disabled children. The HHS literature on the dangers of these behavior control modalities in all environments is substantial. Most American schools now receive, directly or indirectly, Medicaid reimbursement for related services they (allegedly) provide to disabled children. A number of these schools also operate Intermediate Care Facilities or day treatment programs and receive heavy per capita payments for each student's treatment and care via Medicaid.

Any school, district or other entity which uses restraints and/or seclusion in violation of the extant federal laws and regulations governing them is putting children in "imminent" danger of serious physical harm, or death. And providing Medicaid services to children enrolled in such entities constitutes a waste of Medicaid funds, since Medicaid services are, or will be, needed to help the children heal from the harms caused by the use of restraints and seclusion, rather than providing them with the curative or rehabilitative treatments Medicaid is supposed to subsidize. These are well-accepted, highly-defensible reasons for having a Medicaid provider agreement revoked. The best estimates I've seen are that Medicaid pays over \$2 billion in reimbursement for school services yearly, and growing. That's a powerful incentive to stop the abuse.

I was also told that the education industry had fought tooth-and-nail, back channel, for over 20 years to keep the HHS laws, regulations and enforcement processes out of schools. While this has been effective in the past, the current pervasiveness of schools taking Medicaid reimbursements no longer makes this position legally viable. There is no reason we should honor it, since it does disabled children a vast disservice.

The Miller bill doesn't even require that seclusion rooms be required to meet applicable health codes. How many times have we read about time out rooms which smelled "urine soaked"? Well, any room which smells of urine represents a serious public health danger according to professional contagious diseases officials. Several parents around the country have been successful in getting school seclusion rooms closed on this basis. Most school seclusion rooms stand no chance of meeting these requirements. A request that this standard be put into the Miller bill was ignored, or rejected, I don't know which. So it would appear that **even the seemingly minor things the bill could have included which would actually do a significant amount of good were unacceptable to the education industry or deemed unimportant by negotiators for our side.** Again, it would not be difficult to have HHS deem a seclusion room which violated health codes an "imminent" danger to disabled children - and shut down.

As they say, you've got to know when to hold, and know when fold. The education industry is simply too powerful to get a meaningful anti-abuse bill through regular education legislative channels. Rather than accepting a substandard and harmful bill which will not deal with most of the egregiously abusive situations, it's time to be clear-headed and cut our Miller bill losses. And work on Plan B.

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Publisher, SpecialEducationMuckraker.com