

A Matter of Harm:
Why the U.S. Congress Must End Corporal Punishment Against
Children in U.S. Schools

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Introduction

When members of Congress proposed the Keeping All Students Safe Act¹ in December 2009, they did so as a national response to the numerous detailed accounts of children, in particular children with disabilities, being harmed in educational settings by the use of the practices of restraint, seclusion, and aversive interventions by school officials. The use of these practices time and again has resulted in children being severely harmed and even killed.² Although the incidents driving this legislation primarily involved children with disabilities, the proposed federal legislation was made applicable to all children in both public and private schools.³ While the recent swift passage of this bill⁴ by the U. S. House of Representatives in March 2010 is a monumental legislative moment by attempting to provide national standards for an otherwise largely undeveloped federal framework and inconsistent protections at the state level, another significant practice being used to “correct” problems in the classroom is causing significant harm to children and being used disproportionately on children with disabilities: corporal punishment. These concerns were brought to light most notably by a 2008 report prepared by the ACLU and Human Rights Watch released in August 2009 documenting the current lack of federal and state regulations on corporal punishment in educational settings and outlining the impact of the use of these practices on children with disabilities.⁵ The current lack of legal protections for children against the use of corporal punishment in the classroom and the data collected of these occurrences demonstrate that the severity of harm caused to children by the use of corporal punishment mirrors that caused by the use of restraint or seclusion. However, despite this evidence Congress has managed to turn its head from this critical issue.

¹ Keeping All Students Safe Act (formerly Preventing Harmful Restraint and Seclusion in the Schools Act), HR 4247, 111th Cong., (2009), available at http://edlabor.house.gov/documents/111/pdf/legislation/HR4247Seclusion_Restraint.pdf; National Disability Rights Network, *School is Not Supposed to Hurt: Investigative Report on Restraint and Seclusion in Schools*, January 2009, available at <http://www.napas.org/sr/SR-Report.pdf>.

² ACLU/Human Rights Watch, *A Violent Education: Corporal Punishment of Children in U.S. Schools*, August 2008, available at <http://www.hrw.org/en/reports/2008/08/19/violent-education-0>.

³ HR 4247 Sec. 4(19).

⁴ Wrightslaw, Abuse & Restraints in Schools, available at <http://www.wrightslaw.com/info/abuse.index.htm>.

⁵ ACLU/Human Rights Watch, *Impairing Education: Corporal Punishment of Students with Disabilities in U.S. Public Schools*, August 2009, available at <http://www.hrw.org/node/84950>.

In this paper, I will argue that the extensiveness of the use of corporal punishment in educational settings against children rises to a level of severity similar to that of restraint and seclusion practices which requires the U.S. Congress to respond through federal legislation. I will further argue that this must be accomplished through either: 1) immediately amending the Keeping All Students Safe Act to prohibit corporal punishment in educational settings, or 2) creating separate federal legislation banning corporal punishment in educational settings. Whatever route is taken, it is critical for the U.S. Congress to define the term “corporal punishment” to ensure national uniformity in what constitutes these actions in order to prevent future harm to children.

This paper will examine the unique challenges to lawmakers in addressing the legal dilemma created by the disproportionate use of corporal punishment involving children with disabilities in educational settings. First, this paper will detail the widespread use of the practice of corporal punishment by teachers in the American education system on disabled children. Next, this paper will turn to the U.S. legal response to corporal punishment in the judiciary by the U.S. Supreme Court and the current state of the law both at the federal and state levels on the issue of corporal punishment. Finally, this paper will offer suggestions for a federal roadmap for creating a change in America for children to be free from corporal punishment in the classroom.

The Disproportionate Impact of Corporal Punishment on the Disabled Child

The number of children who are subjected to corporal punishment in classrooms around the U.S. alone is staggering.⁶ The ACLU/Human Rights Watch 2008 report was based on the documented instances of corporal punishment in U.S. schools during the 2006-07 academic year from the U.S. Department of Education's Office for Civil Rights (“OCR”).⁷ OCR indicated the following with regard to the occurrences of corporal punishment for the 2006-07 school year:

⁶ ACLU/Human Rights Watch, *A Violent Education: Corporal Punishment of Children in U.S. Schools*, August 2008, available at <http://www.hrw.org/en/reports/2008/08/19/violent-education-0>.

⁷ *Impairing Education* at 12-15.

According to the most recent data available from the U.S. Department of Education, Office for Civil Rights, 223,190 students nationwide were paddled at least once in the 2006-2007 school year, including at least 41,972 students with disabilities. Students with disabilities are paddled at disproportionately high rates, given their percentage of the student population.⁸

As the report noted, there is particular concern by the numbers for students with disabilities. The ACLU/Human Rights Watch report later gave the percentage breakdown of the students with disabilities subjected to corporal punishment: “Students with disabilities, therefore, made up 18.8 percent of those who received corporal punishment, even though they constitute just 13.7 percent of the nationwide student population.”⁹ While it was reported that 41,972 students with disabilities received corporal punishment during the 2006-07 academic year, a further breakdown of this number was done with regard to which of these students with disabilities fit under the legal definition of disability receiving federal protections.¹⁰ “Of these, 39,093 students are defined as disabled under the Individuals with Disabilities Education Act, and the additional 2,879 students receive assistance under Section 504 of the Rehabilitation Act.”¹¹ There is no further breakdown of these numbers in terms of the type of disability the child subjected to corporal punishment had, whether or not the behavior the child was corporally punished for by the school was a behavior manifested as a result of the child’s disability, or whether the child with a disability who was corporally punished experienced an aggravation of the disability or medical condition to the extent of causing a post-traumatic and/or severe regress of the child as a result.¹² However, what is significant about these statistics is that they show children with disabilities are being disproportionately corporally punished, that the disabilities that they have are ones that fall under federal legal definitions of disability (although there is no indication whether or not these students were actually identified as disabled and receiving services), and that because these are children with disabilities, there is

⁸ *Id.* at 15.

⁹ *Id.* at 26.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 35.

a likelihood that these children are potentially being corporally punished because of behaviors caused by their disability as opposed to intentional behaviors meant to disturb the classroom environment.

There is also further evidence that students with disabilities are subjected to corporal punishment more than non-disabled students by states where the use of corporal punishment continues to be legal.¹³

The following is illustrative of this point:

Some states with legal corporal punishment use it more than others; states that paddle all students at high rates also paddle students with disabilities at high rates. For instance, Texas paddles the most students in the nation, as well as the most students with disabilities: OCR data show that 10,222 students with disabilities were subjected to corporal punishment in the 2006-2007 school year, more than in any other state.¹⁴

Additionally, evidence exists that in several states where corporal punishment is used “heavily” the percentages of students with disabilities subjected to the practice is generally higher than the non-disabled students:

Students with disabilities are corporally punished at disproportionately high rates in almost every state that uses paddling heavily. In Tennessee, for example, students with disabilities are 2.1 times as likely to be paddled as all students.⁸⁶ Likewise, in Georgia, students with disabilities are 1.7 times as likely to be paddled as all students.⁸⁷ Of these states that use corporal punishment heavily, only Oklahoma paddles students with and without disabilities at roughly the same rate.¹⁵

Again, these numbers show that the use of corporal punishment is disproportionate to children with disabilities. The ACLU/Human Rights Watch report contains a chart of the top ten states using corporal punishment in schools indicating that in all of those states, the use of corporal punishment of children with disabilities is more ranging from 0.97% in Oklahoma to 2.10% in Tennessee.¹⁶

The report also offered various reasons that the actual occurrences of the use of corporal punishment are likely much greater.¹⁷ These statistics demonstrate that while the use of corporal punishment in schools against children is generally pervasive, it has been used more often against

¹³ *Id.* at 28.

¹⁴ *Id.*

¹⁵ *Id.* at 29.

¹⁶ *Id.*

¹⁷ *Id.* at 30.

children with disabilities suggesting that special considerations may be necessary in devising legal protections concerning corporal punishment for disabled children.

The Law & Corporal Punishment

The consideration of the law and corporal punishment has had a storied history even reaching the U.S. Supreme Court in 1977 when students alleged their constitutional rights were violated by the use of corporal punishment in a public school under the Eighth Amendment's¹⁸ prohibition on cruel and unusual punishment and the Due Process Clause of the 14th Amendment¹⁹ on the basis of procedural due process in *Ingraham v. Wright*, 430 U.S. 651(1977). The Court ultimately held that the use of corporal punishment in a public school did not violate the child's constitutional rights in either of these situations.²⁰ In examining the issue of corporal punishment in schools, the Supreme Court made the following observations:

The use of corporal punishment in this country as a means of disciplining school children dates back to the colonial period. It has survived the transformation of primary and secondary education from the colonials' reliance on optional private arrangements to our present system of compulsory education and dependence on public schools. Despite the general abandonment of corporal punishment as a means of punishing criminal offenders, the practice continues to play a role in the public education of school children in most parts of the country. Professional and public opinion is sharply divided on the practice, and has been for more than a century. Yet we can discern no trend toward its elimination.²¹

The language used by the Court is intriguing as it implies that the Court may be informed by a consideration of whether or not a trend has developed in eliminating corporal punishment in any future decision making on this issue. The Court made it clear in *Ingraham* that corporal punishment may be used by school officials so long as it is reasonable.²² The Court offered its view of the purposes of having corporal punishment available in the classroom and how the reasonableness standard should be applied when a school official uses corporal punishment:

¹⁸ U.S. Const. Amend. VIII.

¹⁹ U.S. Const. Amend. XIV.

²⁰ *Ingraham*, 430 at 683.

²¹ *Id.* at 660-61.

²² *Id.* at 661.

Although the early cases viewed the authority of the teacher as deriving from the parents, the concept of parental delegation has been replaced by the view more consonant with compulsory education laws that the State itself may impose such corporal punishment as is reasonably necessary “for the proper education of the child and for the maintenance of group discipline.” 1 F. Harper & F. James, *Law of Torts* s 3.20, p. 292 (1956). All of the circumstances are to be taken into account in determining whether the punishment is reasonable in a particular case. Among the most important considerations are the seriousness of the offense, the attitude and past behavior of the child, the nature and severity of the punishment, the age and strength of the child, and the availability of less severe but equally effective means of discipline. *Id.*, at 290-291; Restatement (Second) of Torts s 150, Comments c-e, p. 268 (1965).²³

There has not been another U.S. Supreme Court case examining the issue of corporal punishment of children, especially in light of the recent evidence of the harm caused to children and the global move towards the elimination of the practice even beyond the educational setting.²⁴ However, at the time of *Ingraham*, the Court noted that only two states—Massachusetts and New Jersey--had completely banned corporal punishment in schools.²⁵ In 2009, Ohio became the 30th state to ban corporal punishment in schools to join the “accelerating” trend of banning corporal punishment.²⁶ In 1993, the U.S. Congress attempted to pass a ban on corporal punishment federally that failed.²⁷ This raises the question of separation of powers and whether the U.S. Congress should simply step away completely from the corporal punishment debate and instead allow the issue to make its way through the courts to the point of a return to the U.S. Supreme Court. However, the evidence of harm to children from these practices suggests that the lengthy time spent waiting for a case to go through the judiciary all the way up to the U.S. Supreme Court is too long to wait. The U.S. Supreme Court in *Ingraham* also responded that it should not be involved in deciding matters of corporal punishment that should essentially remain with legislators on the state and local levels:

²³ *Id.* at 662.

²⁴ Global Initiative to End All Corporal Punishment of Children *available at* <http://www.endcorporalpunishment.org/>.

²⁵ *Ingraham*, 430 at 663.

²⁶ Human Rights Watch, *Ohio Bans Corporal Punishment in Schools*, (September 16, 2009), *available at* <http://www.hrw.org/en/news/2009/09/16/ohio-bans-corporal-punishment-public-schools>.

²⁷ E1032--CONGRESSIONAL RECORD-- March 21, 1991, *available at* <http://nospank.net/owens.htm>.

Elimination or curtailment of corporal punishment would be welcomed by many as a societal advance. But when such a policy choice may result from this Court's determination of an asserted right to due process, rather than from the normal processes of community debate and legislative action, the societal costs cannot be dismissed as insubstantial. We are reviewing here a legislative judgment, rooted in history and reaffirmed in the laws of many States, that corporal punishment serves important educational interests. This judgment must be viewed in light of the disciplinary problems common-place in the schools. As noted in *Goss v. Lopez*, 419 U.S., at 580, 95 S.Ct., at 739: "Events calling for discipline are frequent occurrences and sometimes require immediate, effective action." Assessment of the need for, and the appropriate means of maintaining, school discipline is committed generally to the discretion of school authorities subject to state law. "(T)he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 507, 89 S.Ct. 733, 737, 21 L.Ed.2d 731 (1969).²⁸

At the state level, recent efforts to ban the practice of corporal punishment in schools have also been blocked.²⁹ Time is precious and the immediacy with which the U.S. Congress has already moved on restraint and seclusion speaks volumes of the fear that children are in danger of harm in the classroom if they are not being afforded appropriate legal protections. However, the U.S. Supreme Court has acknowledged that while corporal punishment is a legislative matter, it should be handled by the states and at the local levels. The question then becomes why should a federal solution to corporal punishment in schools be sought?

Today in twenty states the use of corporal punishment on children continues to be legal in schools.³⁰ While these states do not ban corporal punishment, it has been recognized that many schools in these states prohibit the use of the practice.³¹ The ACLU/Human Rights Watch report noted that children with disabilities in these states where the use of corporal punishment is legal are not provided any separate protections from the use of corporal punishment in educational settings:

In each of those states, corporal punishment of students with disabilities—regardless of the type or degree of disability—is permitted. The vast majority of state laws permitting paddling do not

²⁸ *Ingraham*, 430 at 681-82.

²⁹ "On the other hand, efforts to ban school CP by legislation have failed in 2003 in Wyoming and repeatedly in Missouri, and also in North Carolina in 2007 and Louisiana in 2009." *Available at* <http://www.corpun.com/counuss.htm>.

³⁰ *Impairing Education* at 2.

³¹ *Id.*

distinguish between students with disabilities and students without disabilities, despite the fact that corporal punishment is prohibited in some states' psychiatric institutions.³²

Even one state permits corporal punishment on the basis of disability status for the "mentally disabled".³³

This continues to be the state of affairs on the state level even since the ACLU/Human Rights report was compiled in 2008 as evidenced by the recent decision of a Texas city to reverse its previous ban of corporal punishment in schools with reference to the current legal landscape on this issue.³⁴ As the ACLU/Human Rights Watch report noted, children continue to be subjected to corporal punishment in U.S. schools even though corporal punishment use is prohibited in other settings: "Though children are protected from corporal punishment in most U.S. juvenile detention centers and mental health facilities, they are still vulnerable in U.S. public schools."³⁵ Also, even with the existence of federal civil rights law to give individuals with disabilities protection from discrimination, including children with disabilities, these laws have not been used to shield children with disabilities from being subjected to corporal punishment in the classroom:

U.S. federal law is not clear as to whether corporal punishment administered for conduct resulting from a student's disabilities is permissible. The Rehabilitation Act of 1973 and the Americans with Disabilities Act (ADA) prohibit discrimination against people with disabilities, including students; discipline for conduct that is a manifestation of disability may rise to the level of discrimination. However, the Office for Civil Rights at the U.S. Department of Education, which enforces the Rehabilitation Act and the ADA, has issued regulations which do not expressly prohibit corporal punishment.³⁶

Federal civil rights legislation has left children with disabilities unprotected in these circumstances. This issue is already making its way into the U.S. Congress as the Healthy Families and Subcommittee of the U.S. House Committee on Education and Labor heard testimony on corporal punishment on April 15,

³² *Id.* at 27-28.

³³ *Id.*

³⁴ Michael Bimbaum, *Texas City Revives Paddling as it Takes a Swat at Misbehavior*, Washington Post, (April 16, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/15/AR2010041505964.html?g=0>.

³⁵ *Impairing Education* at 7.

³⁶ *Id.* at 36-37.

2010.³⁷ The U.S. Congress is afforded the ability to seek such legislation through the Spending Clause power in the U.S. Constitution which states that “Congress shall have the Power To ... provide for the ... general Welfare of the United States.”³⁸ This power has been used by the U.S. Congress as a common mechanism for securing legislation in the realm of education despite the general authority of states and localities over regulation of education when serious issues demanding national standards have arisen including the enactment of the Individuals with Disabilities Education Act (“IDEA”)³⁹ and No Child Left Behind⁴⁰. The gravity of the concerns raised by the use of corporal punishment on children in educational settings likewise demands that the only way to systematically and efficiently combat the problem is through federal legislation.

“Corporal Punishment” Undefined

According to the ACLU/Human Rights Watch report, the definition of “corporal punishment” remains largely undeveloped in both state and federal law.⁴¹ If members of Congress are going to pursue federal legislation banning the use of corporal punishment in educational settings as it should, the best way to define the term must be examined. The question becomes what can and should be included in the definition of “corporal punishment” in the U.S. and whether there are any current definitions of “corporal punishment” that provide insight in making this critical legislative decision.

First, it is curious that with the current congressional push to enact federal legislation prohibiting the use of restraint and seclusion against children in schools under the Keeping All Students Safe Act that corporal punishment is not included unless a presumption is being made that some of the acts considered “corporal punishment” fit within the bill’s definition of restraint. However, examining the proposed definition of “physical restraint” compared to the instances of “corporal punishment” identified by the

³⁷ *Corporal Punishment in Schools and its Effect on Academic Success: Hearing before the H. Comm. On Ed. & Labor, 111th Cong., (2010), available at <http://edlabor.house.gov/hearings/2010/04/corporal-punishment-in-schools.shtml>.*

³⁸ U.S. Const. art. I, § 8, cl. 1.

³⁹ 20 U.S.C. § 1401 et seq.

⁴⁰ PL 107-110.

⁴¹ *Impairing Education* at 15.

ACLU/Human Rights Watch report clearly distinguish these two phrases. Under the Keeping All Students Safe Act, the proposed definition of “physical restraint” “has the meaning given the term in section 595(d)(3) of the Public Health Service Act(42 U.S.C. 290jj(d)(3)).”⁴² The term is defined as follows:

any physical restraint that is a mechanical or personal restriction that immobilizes or reduces the ability of an individual to move his or her arms, legs, or head freely, not including devices, such as orthopedically prescribed devices, surgical dressings or bandages, protective helmets, or any other methods that involves the physical holding of a resident for the purpose of conducting routine physical examinations or tests or to protect the resident from falling out of bed or to permit the resident to participate in activities without the risk of physical harm to the resident (such term does not include a physical escort)⁴³

This definition neglects numerous instances of harm to children that could be categorized as “corporal punishment.” The most common form of corporal punishment is paddling⁴⁴ which is not addressed in the definition of “restraint” in the Keeping All Students Safe Act. This form of corporal punishment is described as follows: “Corporal punishment most often takes the form of paddling: a wooden board swung repeatedly against the child’s buttocks, causing immediate pain and sometimes lasting injury.”⁴⁵

The ACLU/Human Rights Watch report acknowledged that instances of corporal punishment often occur while a school official is restraining a child with a disability:

According to interviews conducted for this report, students with disabilities have been subjected to a wide range of corporal punishment, including hitting children with rulers; pinching or striking very young children; grabbing children with enough force to bruise; throwing children to the floor; and bruising or otherwise injuring children in the course of restraint.⁴⁶

Some other examples of corporal punishment include hitting, slapping, spanking, pinching, grabbing, and bruising.⁴⁷ In addition to incorporating into the definition of corporal punishment the type of harms that are at issue, it may be necessary for legislators to get into the dynamics of defining the actual practices

⁴² HR 4247 Sec. 4(8).

⁴³ 42 U.S.C. 290jj(d)(3).

⁴⁴ *Impairing Education* at 3.

⁴⁵ *Id.* at 15.

⁴⁶ *Id.* at 3.

⁴⁷ *Id.* at 19-20.

themselves such as paddling, “Paddling (also commonly called “swats,” “pops,” or “licks”) usually means hitting a student three or more times on the buttocks and upper thighs with a wooden paddle.”⁴⁸

Thus, to limit the legal protections of children to only instances of the use of restraint does not necessarily prevent children from harm in schools as it has been demonstrated “corporal punishment” includes a wide range of actions that have the potential to harm children before the point of physical restraint. While it is advantageous for the Keeping All Students Safe Act to prohibit “physical restraint”, this does not cover “corporal punishment” and will leave children still vulnerable to harm in schools.

A Call for Action on Corporal Punishment in the U.S.

There is considerable evidence that the use of corporal punishment in U.S. schools is not going to end any time soon unless there is action taken on the federal level in light of the absence of any federal direction on the issue and the inconsistency of state law. It is disturbing based on this evidence that the Keeping All Students Safe Act which addresses prohibiting restraint and seclusion in schools is moving forward quickly with federal congressional approval while it does not address the use of corporal punishment on children. The first response to this is that efforts should be made to appropriately amend the Keeping All Students Safe Act to address corporal punishment. While the demand for this legislation is high, the same urgency is rising for a ban on corporal punishment in schools. As previously discussed, corporal punishment and restraint often occur nearly simultaneously making it illogical to create separate legislation on corporal punishment unless that ban is going to go beyond the classroom. Otherwise, the Keeping All Students Safe Act could easily be amended to define corporal punishment and prohibit its use similar to the practices of restraint and seclusion. It is not merely enough to define “corporal punishment” which should be similar to the definition advocated by ACLU/Human Rights Watch based on the UN Committee on the Rights of the Child. It is necessary to also specify examples of corporal punishment as described by the ACLU/Human Rights Watch report. As many U.S. schools such as those in Texas that reversed a ban on corporal punishment in schools continue to view corporal punishment as

⁴⁸ *Id.* at 16.

an acceptable means of discipline, the U.S. Congress will be forced to wrestle with the issue of whether a federal ban on corporal punishment should be extended to all circumstances. If restraint is not banned and still available under the Keeping All Students Safe Act in situations where the child poses a threat of danger to himself or others, it may be argued that corporal punishment is a less severe alternative to restraint at least in terms of paddling. However, the extent of harm documented both mentally and physically to children caused by the use of corporal punishment is no less severe and in some cases even more severe than restraint to support its complete ban.

While there remain many questions to be answered by the U.S. Congress in addressing the issue of corporal punishment in U.S. schools, the one unavoidable answer is that something must be done or children both with and without disabilities will be left vulnerable in the classroom in the U.S.