

HB1796

HD2 SD1



STATE OF HAWAII
STATE COUNCIL
ON DEVELOPMENTAL DISABILITIES
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April 01, 2014

The Honorable Clayton Hee, Chair
Senate Committee on Judiciary and Labor
and
The Honorable David Y. Ige, Chair
Senate Committee on Ways and Means
Twenty-Seventh Legislature
State Capitol
State of Hawaii
Honolulu, Hawaii 96813

Dear Senators Hee and Ige and Members of the Committee:

SUBJECT: HB 1796 HD2 SD1 - RELATING TO EDUCATION

The State Council on Developmental Disabilities **SUPPORTS HB 1796 HD2 SD1**. The purpose of the bill is to establish conditions and procedures for the use of restraint and seclusion in schools.

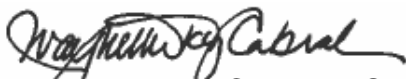
HB 1796 HD2 SD1 addresses the policies and procedures for the use of restraint and seclusion; provides all parents of students to receive, at least annually, written information about the policies and procedures for restraint or seclusion issued by the Department of Education; and training and certification for staff utilizing restraint and seclusion in facilities or programs.

According to a report entitled, How Safe Is The Schoolhouse? An Analysis of State Seclusion and Restraint Laws and Policies, May 2, 2013, "Hawaii has a limited statute and a board of education policy, both of which provide very weak protections" (Hawaii Revised Statutes, Section 302A-1141, and Board of Education Policy No. 4201). In the State by State Summary of the report, it is noted that for Hawaii, there are very minimal restraint protection and no seclusion limits.

The passage of HB 1796 HD2 SD1 would provide a framework for the Department of Education and Board of Education to establish comprehensive policies and procedures to keep all students and school personnel safe, and to provide a positive school environment.

Thank you for the opportunity to submit testimony **supporting HB 1796 HD2 SD1**.

Sincerely,


Waynette K.Y. Cabral, MSW
Executive Administrator


J. Curtis Tyler, III
Chair



S E A C
Special Education Advisory Council
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April 1, 2014

**Special Education
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Ms. Ivalee Sinclair, *Chair*
Ms. Martha Guinan, *Vice
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Dr. Robert Campbell
Ms. Deborah Cheeseman
Ms. Annette Cooper
Ms. Shari Dela Cuadra-Larsen,
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Ms. Gabriele Finn
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Ms. Amy Weich
Ms. Cari White
Ms. Susan Wood

Jan Tateishi, Staff
Susan Rocco, Staff

Senator Clayton Hee, Chair
Committee on Judiciary and Labor
Senator David Ige, Chair
Committee on Ways and Means
State Capitol
Honolulu, HI 96813

RE: HB 1796, HD2, SD1 - RELATING TO EDUCATION

Dear Chairs Hee and Ige and Members of the Committees,

The Special Education Advisory Council (SEAC), Hawaii's State Advisory Panel under the Individuals with Disabilities Education Act (IDEA), **strongly supports** HB 1796, HD2, SD1.

SEAC has been part of a working group that has given input on the language in the bill to provide clearer definitions, as well as a prohibition on the use of seclusion in our public schools. SEAC has also worked collaboratively with the Department on the content of the legislation as well as funding for implementation in the upcoming 2014-15 school year.

Historically, students with disabilities have been harmed by seclusion and restraints disproportionately more often than their non-disabled peers. A report by the Office of Civil Rights for the 2011-12 school year found that although students with disabilities represented only 12% of the public school population nationwide, they also represented 75% of students physically restrained at school and 58% of students placed in seclusion or involuntary confinement.

While Hawaii schools have not been collecting data on the use of restraints and seclusion, we know from high profile and often shocking media coverage that these practices have been inappropriately applied in response to the behaviors of Hawaii students with disabilities. These incidences probably represent the tip of the iceberg, despite the mandate in the Individuals with Disabilities Education Act to provide positive



Testimony on HB 1796 HD2 SD1
April 1, 2014
Page 2

behavioral supports and conduct functional behavioral assessments when a student's behavior interferes with his learning or that of other students.

HB 1796, HD2 , SD1 not only bars the use of seclusion and sets clear guidelines on the use of restraints only when a student's behavior poses a risk of imminent harm, it also provides school staff with the necessary tools, training and support to ensure the safety of all students. This training will include evidence-based interventions to intervene early, and hopefully prevent behavioral incidents from occurring and escalating. The bill also requires the collection and analysis of data to ensure accountability for the limited use of restraints.

SEAC believes that the passage of this legislation is critical to prevent future harm to Hawaii public school children and staff. We highly recommend the passage of HB 1796, HD2, SD1 with adequate funding to ensure timely implementation effective July 1, 2014.

Thank you for the opportunity to provide testimony on this important legislation. SEAC is happy to answer any questions or concerns.

Respectfully,

A handwritten signature in cursive script, appearing to read "Ivalee Sinclair", written over a light gray rectangular background.

Ivalee Sinclair, Chair



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March 21 2014

Senator Clayton Hee and Committee Members
Senate Committee on Judiciary and Labor

RE: HB1796 HD2 SD1
Seclusion and Restraint
Establishes conditions and procedures for the use of restraint and seclusion in schools.

Dear Senator Hee and Members of the Committee,

The 17 Community Children's Councils (CCC's) **supports with amendments.** As set forth in Standing Committee Report No. 2953. RE: HB1796 H.D.2 S.D.1 (See Attached)

We are currently collaborating with The Department of Education and other community stakeholders In an effort to provide you with a dollar amount required to carry out the purposes of this measure, and will provide further testimony once said number is determined.

We urge you to set an implementation date of July, 1 2014 as there are numerous concerns being voiced by parents and stakeholders RE: the use of seclusion and restraint in the educational setting.

The 17 Community Children's Councils (CCC's) are community-based bodies comprised of parents, professionals in both public and private agencies and other interested persons who are concerned with specialized services provided to Hawaii's students. Membership is diverse, voluntary and advisory in nature. The CCC's are in rural and urban communities organized around the Complexes in the Department of Education.

Thank you for the opportunity to testimony if there are any questions or you need further information please contact us at 586-5370

Sincerely yours

Tom Smith, Co-Chair

Jessica Wong-Sumida, Co-Chair

(Original signatures are on file with the CCCO)

Restraint

STAND. COM. REP. NO. 2953

Honolulu, Hawaii

RE: H.B. No. 1796
H.D. 2
S.D. 1

Honorable Donna Mercado Kim
President of the Senate
Twenty-Seventh State Legislature
Regular Session of 2014
State of Hawaii

Madam:

Your Committee on Education, to which was referred H.B. No. 1796, H.D. 2, entitled:

"A BILL FOR AN ACT RELATING TO EDUCATION,"

begs leave to report as follows:

The purpose and intent of this measure is to establish conditions and procedures for the use of restraint or seclusion in public schools.

Your Committee received testimony in support of this measure from the Department of Education, State Council on Developmental Disabilities, Hawaii Disability Rights Center, Hawaii Association of School Psychologists, Community Children's Council of Hawaii, Special Education Advisory Council, and six individuals. Your Committee received testimony in opposition to this measure from three individuals. Your Committee received comments on this measure from Handle with Care Behavior Management System, Inc. and one individual.

Your Committee finds that this measure will promote the safety and well-being of students and school personnel by requiring the Board of Education and Department of Education to establish policies and procedures for the limited use of restraint in public schools.

Your Committee has amended this measure by:

(1) Prohibiting the use of seclusion, chemical restraint, or mechanical restraint in public schools;

(2) Prohibiting the use of physical restraint unless a student's behavior poses an imminent danger of property damage or physical injury to the student, school personnel, or others and only for so long as the danger persists; provided that other less intrusive interventions have failed or been determined to be inappropriate for the student;

(3) Prohibiting the use of any physical restraint that is:

(A) Life threatening, including physical restraint that may restrict breathing; or

(B) Contraindicated based on the student's disability, health care needs, or medical or psychiatric condition, as documented in a health care directive or medical management plan, a behavior intervention plan, an individual education program, or an individualized family service plan, or plan developed pursuant to Section 504 of the Rehabilitation Act of 1973;

(4) Clarifying that staff who use restraint must be trained and certified at least annually;

(5) Clarifying that a mechanical restraint includes the use of devices that restrict a student's ability to communicate in the student's primary language or mode of communication;

(6) Defining and including chemical restraint as a type of restraint;

(7) Amending the definition of "seclusion" to mean the confinement of a student alone in a room or structure from which the student is physically denied voluntary egress;

(8) Adding language to require the Department of Education to submit a report to the Legislature no later than twenty days prior to the convening of the Regular Sessions of 2017, 2018, and 2019, on the Department of Education's policy and procedures on the use of restraint in public schools; and

(9) Making technical, nonsubstantive amendments for the purposes of clarity and consistency.

If this measure is considered for passage by your Committee on Ways and Means, your Committee requests that your Committees on Judiciary and Labor and Ways and Means give consideration to any funding request by the Department of Education for the purposes of carrying out the purposes of this measure.

As affirmed by the record of votes of the members of your Committee on Education that is attached to this report, your Committee is in accord with the intent and purpose of H.B. No. 1796, H.D. 2, as amended herein, and recommends that it pass Second Reading in the form attached hereto as H.B. No. 1796, H.D. 2, S.D. 1, and be referred to the Committees on Judiciary and Labor and Ways and Means.

Respectfully submitted on behalf
of the members of the Committee
on Education,

JILL N. TOKUDA, Chair



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March 31, 2014

Senator Clayton Hee
Chair - Judiciary and Labor Senate Committee
Hawaii State Capitol Room, 407
415 S. Beretania Street
Honolulu, HI 96813

Dear Senator Hee:

On behalf of Crisis Prevention Institute (CPI) and the 27,000 active members of the CPI Instructor Association, we thank you for the opportunity to provide comment on Hawaii House Bill No. 1796. For over 30 years, CPI has been active in educating and training educators in the skills necessary to manage a crisis situation and to safely intervene physically when required. We share the State of Hawaii's goals of ensuring the safety of students and staff in public schools through minimizing risks associated with the use of restraint and seclusion by focusing on early prevention and safe, effective interventions.

CPI commends the Legislature for drafting the proposed bill which amends the current state guidelines regarding the use of restraint and seclusion. For years, CPI has supported legislatures, departments of education, and advocacy groups in developing rules and policies for the use of restraint and seclusion in public schools. CPI makes the following suggestions, based on our knowledge of best practices and our expertise, on the use of physical restraint and in supporting organizations to become restraint-free environments.

We believe the Legislature has acted prudently in proposing this legislation and as a minimal change would encourage the Legislature to alter the bill to remove the use of restraint for the purpose of protecting property. While we recognize this as a valid stance, we believe it may not inherently result in the reduction in the number of restraints administered.

That said, if we were to make a recommendation with regard to amending the rule based on best practices we would encourage the following changes/additions. Under 302A-B, we recommend a section should be added that states more in-depth the permitted and the prohibited forms of physical restraint, who may use them and a section discussing the monitoring and termination of a restraint. The following represents an example of a comprehensive rule which addresses many of the concerns that normally result from the introduction of such legislation:

1. Permitted uses of physical restraint

- A. Physical restraint may be used only as an emergency intervention when the behavior of a student presents imminent risk of injury or harm to the student or others, and only after other less intrusive interventions have failed or been deemed inappropriate.
- B. Physical restraint must be implemented by staff trained in a nationally-recognized training program. If, due to the nature of the emergency, untrained

staff have intervened and initiated a physical restraint, trained personnel must be summoned to the scene and assume control of the situation as rapidly as possible.

- C. Physical restraint may be used to move a student only if the need for movement outweighs the risks involved in such movement.
- D. If a student is demonstrating imminent risk while on the ground, or if during the process of physical restraint the student directs the restraint to the ground, staff should make attempts to disengage or utilize a transitional hold to move the student back to a safer restraint position.
- D. Protective equipment or devices that are part of a treatment plan as prescribed by a licensed health care provider are not prohibited by this rule.

2. Prohibited forms and uses of physical restraint

- A. Physical restraint may not be used for punitive purposes, staff convenience or to control challenging behavior.
- B. Physical restraint may not be used to prevent property destruction or disruption of the environment in the absence of imminent risk of injury.
- C. No physical restraint may be used that restricts the free movement of the diaphragm or chest or that restricts the airway so as to interrupt normal breathing or speech (restraint-related positional asphyxia) of a student.
- D. No physical restraint may be used that involves taking the student to the floor and forcibly holding him or her in a prone, supine, seated or side position.
- D. No physical restraint may be used that relies on pain for control, including but not limited to joint hyperextension, excessive force, take-down (supported or unsupported), the use of any physical structure (e.g. wall, railing or post), punching and hitting.
- E. Physical restraint may not be used as a therapeutic or educational intervention.
- F. Aversive procedures and mechanical and chemical restraints may not be used under any circumstances.
- G. Prescribed assistive devices are not considered mechanical restraints when used as prescribed. Their use must be supervised by qualified and trained individuals in accordance with professional standards.
- H. Prescribed medications administered by a health care provider consistent with a student's health care plan are permitted.

3. Monitoring of a student in physical restraint

- A. At least two adults must be present at all times when physical restraint is used except when, for safety reasons, waiting for a second adult is precluded.
- B. A student in physical restraint must be continuously monitored by an adult not directly involved in the restraint until the student no longer presents imminent risk of injury or harm to self or others.
- C. In the event of an injury, local policy must be followed.



4. Termination of physical restraint

- A. The staff involved in the use of physical restraint must continually assess for signs that the student is no longer presenting imminent risk of injury or harm to self or others, and the emergency intervention must be discontinued as soon as possible or at the first sign of distress.
- B. Time must be recorded consistent with the requirements of the documentation section of this rule and local policy.
- C. The covered entity may request assistance from parents at any time during the incident.
- D. If attempts to release from physical restraint have been unsuccessful and a student is still presenting behaviors that create an imminent risk of injury or harm to self or others, then the covered entity may request assistance from outside sources such as caregivers, case managers, crisis intervention teams, local EMS, or other community resources.
- E. If physical restraint continues for more than 10 minutes, an administrator or designee shall determine whether continued physical restraint is warranted, and shall continue to monitor the status of the physical restraint every 10 minutes until the physical restraint is terminated.

Additionally, Section 302A-B(c) states that the department shall establish procedures to be followed after each incident involving the imposition of restraint upon a student, CPI recommends a section should be added discussing more in-depth requirements for debriefing activities after an incident in which restraint or seclusion have occurred. This type of requirement can assist staff in understanding and determining what led to the incident, how might it have been prevented and how to prevent further episodes from occurring. In our experience, the one common factor in the elimination of restraint and seclusion use, regardless of the setting, has been staff and student debriefing. A post-evaluation of the incident allows the school's leadership to assess gaps in training and practice so they can effectively adapt their ongoing training process to better meet staff needs

Debriefing

- A. Following each incident of physical restraint or seclusion, the covered entity shall ensure that, within two school days, an administrator or designee reviews the incident with all staff persons who implemented the use of physical restraint or seclusion to discuss:
 - (1) Whether the use of restraint or seclusion was implemented in compliance with this rule and local policies, and
 - (2) How to prevent or reduce the future need for physical restraint and/or seclusion.
- B. Following each incident of physical restraint or seclusion, the covered entity shall ensure that, as soon as possible, but no later than two school days or upon the return to school, an administrator or designee shall review the incident with the student(s) involved to discuss:



- (1) Details of the incident in an effort to assist the student and staff in identifying patterns of behaviors, triggers or antecedents.
 - (2) Alternative positive behaviors or coping skills the student can opt for in future incidents.
- C. When physical restraint or seclusion has resulted in serious bodily injury to a student or staff member requiring emergency medical treatment, the debriefing must take place as soon as possible but no later than the next school day.
 - D. Following the debriefing, a written plan for response and de-escalation must be developed (or, if a plan already exists, must be revised) and implemented for the student.

CPI also recommends that the Section 302 A-B(f) should include requirements that the Hawaii State Board of Education maintain a directory of nationally recognized, evidence-based training programs approved for use on its website. These training programs must require participants to demonstrate physical and written competency to achieve certification, and must include instruction in at least the following core components:

- A.** The use of non-physical interventions for responding to potentially dangerous behaviors, including de-escalation and the use of positive alternatives;
- B.** Identification of dangerous behaviors that may indicate the need for physical restraint or seclusion and methods for evaluating the risk of harm to determine whether such interventions are warranted;
- C.** Instruction and simulated experience in administering safe physical restraint techniques across a range of increasingly restrictive interventions, including the safe movement of a student, and in recognizing and avoiding positions involving a high risk of restraint-related positional asphyxia (restricting a student's ability to breathe);
- D.** The effects of physical restraint and seclusion on a student, including monitoring physical and psychological signs of distress and when to obtain medical assistance in compliance with the covered entity's procedures for emergency interventions;
- E.** The risks and realities of physical restraint and seclusion; and
- F.** A review of the process of student and staff debriefing.

Each covered entity shall provide all staff with training in the use of non-physical interventions for responding to potentially dangerous behaviors, including de-escalation and the use of positive alternatives and the process for student and staff debriefing. Each covered entity shall ensure that a sufficient number of staff have additional training in the identification of dangerous behaviors that may indicate the need for physical restraint, how to safely administer physical restraint techniques across a range of increasingly restrictive interventions, including the safe movement of a student, recognizing and understanding the risks of the use of physical restraint and seclusion, including monitoring for signs of physical and psychological distress and when to obtain medical assistance in compliance with the covered entity's procedures for



emergency interventions. This training shall occur at the time of hire and shall be formally refreshed annually.

CPI shares the Hawaii state legislature's vision that in order to reduce or eliminate the use of restraint and seclusion a school leadership must share and articulate that goal and provide the necessary oversight to achieve it.

Creating a physically and psychologically safe, trauma-free environment is a task that requires the efforts of all staff at all times. It is imperative to equip staff with the skills necessary to accomplish these goals and reinforced by policies and procedures that support the goals. We believe that adoption of this bill will encourage and aid school staff in their efforts to provide a safe and caring environment positioned to reduce or eliminate the need for physical interventions within those settings. We believe strongly that any bill encouraging a reduction in restraints is a worthy cause, and make our recommendations for change on the basis that such reduction is best made possible by a rule which addresses both the interests of the legislature and the concerns of those involved in these situation.

Should you have any questions with regard to the nature of the changes requested or about this comment letter in general, please feel free to contact me at your convenience to discuss. On behalf of CPI and all of our certified instructors, accept my thank you for the chance to comment on this important bill.

Sincerely,

Daniel S. Gugala

Daniel S. Gugala
General Counsel



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Bruce Chapman
President

Hilary Adler
Vice President

March 28, 2014

VIA Email and Facsimile

Hawaii Legislature

Senate Bill Sponsors: Chun, Oakland, Galuteria & Shimabukuro

House Bill Sponsors: Mizuno, Evans and Hanohano

Hawaii State Capitol

415 South Beretania St

Honolulu, HI 96813

Re: 2nd Comments Re: Proposed HB1796 and SB2371: Use of Restraint and Seclusion In Schools.

To: Senators: Chun, Oakland, Galuteria & Shimabukuro, and
Representatives: Mizuno, Evans and Hanohano,

This correspondence concerns Proposed House Bill 1796 (“HB1796”) and its companion Senate Bill 2371 (“SB2371”) (collectively “Bill” or “Bills”): Use of Restraints & Seclusions in Schools.

As an entity that provides verbal de-escalation, crisis intervention and restraint training across this country, we are in a unique position to see first-hand what legislation and behavior management/restraint policies work and what do not. We can tell you that the states that have passed unduly restrictive legislation are now encountering increased incidents in misbehavior, and an increased need to have law enforcement handle what schools have traditionally and historically been able to manage. There is a balance that needs to be maintained in life and in law, and, when the balance is disrupted, unintended consequences occur.

Currently the proposed bill, as we see it, has three areas that can be improved upon:

1. The current bill does not allow the use of physical restraint to be written into a student’s educational (IEP) or behavioral plan (BP), and it should.
2. The current bill does not allow the use of physical restraint to be used if the use is contraindicated based on the student’s disability, and the bill should make exceptions for certain situations i.e. when the use is necessary to protect the student, staff or other student’s from harm.

3. The bill should also state that nothing in the bill shall be deemed to limit a person's rights under Hawaii Rev. Stat. §703-304: Use of force in self-protection; §703-305: Use of force for the protection of others §703-306. Use of force for the protection of property and §703-309: Use of force by persons with special responsibility for care, discipline, or safety of others.

POINT I: The current bill does not allow the use of physical restraint to be written into a student's educational (IEP) or behavioral plan (BP), and it should.

The reason restraints should be allowed as part of a student's IEP or BP is best illustrated by the retelling of a real life story of how incorporating restraint into a student's IEP/BP actually warded off behaviors that would have resulted in the student being place in a physical hold.

The story: A teacher working in a public school that services students on the Autism Spectrum from ages 3-21 writes:

While using the PRT [physical hold] procedure I have seen that some of our students with sensory integration disorder are actually requesting the PRT [hold] because of the proprioceptive input they are receiving. I had always thought students were getting sensory input from the PRT [hold]. Thanks to one of our verbal students, he was able to explain it to me. While in the PRT [hold], the student started requesting to be "squeezed tighter" because he liked the way it felt. He also began to request to be [placed in the physical hold] so that he could be squeezed for days and weeks after the PRT [hold] was used.

He was put on a sensory diet to help satisfy his sensory needs and ward off behaviors that would result in him needed the PRT[hold], teaching him how to request hugs or squeezes when he felt that he needed the input.

We responded to this communication as follows:

What an outstanding plan for this child! You are top loading him with sensory input during his best moments to extinguish a pattern of setting the stage [through misbehavior] to get it with the PRT [hold]....

In the above real-life situation, a hold was incorporated into the student's IEP/BP to teach the student how to engage in positive behaviors to obtain the sensory input he desired.

In contrast to the above story, the proposed legislation would preclude schools from using a physical hold to reinforce positive behavior, i.e. the student asking to be held rather than engaging in maladaptive behaviors.

The bill defines “Physical Restraint” as:

...a personal restriction, other than a chemical or mechanical restraint, that immobilizes or reduces the ability of a student to move the student’s arms, legs, or head freely.”

The bill then prescribes the limited situations when Physical Restraint can be used in Section 302A-B(a):

“The use of physical restraint shall be prohibited in public schools unless a student’s behavior poses an imminent danger of property damage or physical injury to the student, school personnel, or others and only for so long as the danger persists; provided that other less intrusive interventions have failed or been determined to be inappropriate for the student.”

This Bill’s definition Physical Restraint along with the limitation on when schools can use Physical Restraint, would preclude school staff from using physical holds as part of a student’s IEP or BP. This is also precisely why the legislature should add IEPs and BPs to the instances when restraint can be used.

The reference to §703-309: Use of force by persons with special responsibility for care, discipline, or safety of others should be incorporated into 302A-B. The reason is that the statute is written to allow physical intervention to be used for “safeguarding” and/or the “care and welfare” of the child. The statute is not limited to instances where the child is being punished. The reason being is that physical holds as part of an IEP or BP are incorporated “for” the child, not as punishment “to” the child. In the case above, the student needed to be held so much, that he was willing to engage in extreme behavior to obtain it. A much better solution is the one the school implemented which was to satisfy the student’s need to be held when the student was acting appropriately, and thus eliminating the student’s need to engage in destructive behavior. Prohibiting the use of restraint as part of an IEP or BP, can have the opposite of the intended effect, and actually prevent teachers from meeting the needs of their students in a positive way.

We are not alone in our opinion. As mentioned in our first set of comments:

1. Congress rejected banning the use of restraint and seclusion as part of an IEP or behavioral plan on three separate occasions. NDRN and Protection and Advocacy, thwarted at the Federal level before going state by state to try and convince legislators or unelected administrative agency employees to enact restraint rules that the Federal government repeatedly dismissed as illegal and ill-advised.

2. The National School Boards Association and the American Association of State Administrators have also expressed serious objections to the prohibition of restraint and seclusion as part of a behavior management plan.
 - AASA has long opposed the prohibition of seclusion and restraint in public schools. AASA believes the use of seclusion and restraint has enabled many students with serious emotional or behavioral conditions to be educated not only within our public schools, but also in the least restrictive and safest environments possible.
 - IDEA was never meant to restrict parents from receiving a unique, effective education plan for their child: For these students, legislation or state policy that prohibits these practices from being written into an individualized education plan (IEP) or behavioral intervention plan means that school personnel are unable to work with parents to create a plan for coping with the student when their behavior becomes unmanageable.
 - Legislation or policy that prohibits parents and school personnel from communicating about the student's needs and corresponding school interventions runs counter to the entire purpose of the Individuals with Disabilities in Education Act (IDEA).
3. The Supreme Court has held that a child is deprived of FAPE if the school system has violated IDEA's procedural requirement. *Rawley* (SCOTUS 1982) The proposed Bill does not allow licensed, qualified professionals, guardians and parents working with and familiar with the child and his needs to develop an appropriate IEP. See also, *Youngberg v. Romeo*, 457 U.S. 307 (1982)(the legal responsibility for making treatment decisions is exclusively in the hands of the professionals who work directly with the child...); and *St. Catherine's Care Center of Findlay v. Centers for Medicare & Medicaid Services*, Docket No. C-01-721; Decision No Cr1190 (June 14, 2004)(it is the responsibility of the entity that directly cares for the [student] to determine crisis intervention program...[T]he [school] must meet the real needs of the [student] and "neither federal reimbursement practices nor state screening practices relieves the [school] of its responsibility to provide its [students] with necessary care and services.")

Conclusion: Treatment and educational decisions including i.e. what should be included in a behavioral or educational plan rests with the person and the professionals treating and/or educating the person, not the legislature. Banning the use of restraint as part of a behavioral/educational plan can also be an unlawful limitation of a child's right to a free and appropriate public education, as well as their right to an effective individual education and/or behavior plan.

Point II: The current bill should have exceptions to Section 302-A-B(b)(2).

Section 302A-B(b)(2) states that No physical restraint may be imposed that is:

“Contraindicated based on the student’s disability, health care needs, or medical or psychiatric condition, as documented in a health care directive or medical management plan, a behavior intervention plan, an individual education program, or an individualized family service plan....”

Similar legislation was originally proposed, but never passed in Kentucky as this provision was vehemently objected to by the attorneys representing 37 school districts (37-KYSDs) and the Kentucky Board of Education and School Boards Association (“KSBA”). The law that Kentucky passed incorporates State self-defense, defense of others, defense of property and parental/school rights exceptions to the “contraindicated” preclusion. Below are some of the arguments submitted by KSBA and 37-KYSDs adapted for these comments, and a recent case illustrating what happens in the real world when teachers are prohibited from physically intervening:

Section 302A-B(b)(2): Restraint prohibited in a healthcare directive, medical, behavior, education or family service plan

Section 302A-B(b)(2) of the proposed legislation provides that school personnel are prohibited from restraining a student at any time it is contraindicated by a health care directive, medical, behavior, education or family service plan. For instance, if a doctor provides a note that restraint cannot be performed for a particular student, then school personnel will be in violation of the legislation if they restrain that child. Even in a cut and dry situation where a student is clearly putting himself or another in imminent danger of physical or even serious physical injury, school personnel could not restrain the student.

Under this proposed legislation, a student who has received a prohibition against physical restraint by a health care directive, medical, behavior, education or family service plan could literally kill another student and the school district would be powerless to act. Or, if the school district acted, the district would be in violation of this law.

One Public School recently found out what happens when staff are prohibited from protecting the students in their care, and a student is injured. In this situation a student intervened to stop a fight when the teacher failed to, and was seriously injured. The student is now suing the school and teacher for \$20 million claiming the school breached its duty to protect i.e. maintain a safe and effective learning environment.

POINT III: The proposed bill should make the restraint legislation subject to the rights afforded under Hawaii Rev. Stat. §703-304: Use of force in self-protection; §703-305: Use of force for the protection of others §703-306. Use of force for the protection of property and §703-309: Use of force by persons with special responsibility for care, discipline, or safety of others, and incorporate these statutes by reference in section 302A-B.

- (a) Hawaii Rev. Stat. §703-304 thru 306 are simply natural rights that have been codified. The right to life, liberty and property are preserved under the U.S. and Hawaii

Constitutions, and are unwaivable rights. The proposed restraint bill is really a subcomponent of defense of self, others and property law, the purpose of which is to provide guidelines of when it is reasonable to use a physical holding method on a student. As the restraint legislation overlap with defense of self, others and property rights, the legislature cannot make this law more restrictive than what the Constitution allows. To do so would be an unlawful infringement on a person's liberties. A person does not surrender their right to self-defense, defense of others, or right to property, just because they work at a school. Therefore, the laws regarding the use of restraint, cannot infringe upon a person's right to protect self, others and property. This is why these statutes should be incorporated under section 302A-B.

(b) Hawaii Rev. Stat. §703-309: Use of force by persons with special responsibility for care, discipline, or safety of others should also be incorporated under 302A-B. The reason is that the statute is written to allow physical intervention to be used for "safeguarding" and/or the "care and welfare" of the child. The statute is not limited to instances where the child is being punished. The statute gives the parent and acting parent a much wider breadth of when physical force or intervention can be used. Some examples of physical intervention that is done "for" a child rather than to punish a child are found in Dr. David Ziegler's, *The Therapeutic Value of Using Physical Interventions*.

- Physical touch can be very therapeutic to children, particularly in a crisis. Touch is considered a basic need for all children. When a young child is frightened, the first instinct is to hold on to a trusted adult. Children who demonstrate serious acting out often do not know how to ask for what they need, yet supportive, firm, and safe physical touch can give a child a message of reassurance. When a young child is in a crisis situation, touch can be one of the most reassuring interventions when the touch lets the child know that the adult will insure the situation will be managed safely for everyone.
- Children need to know the adult will insure everyone's safety. The adult is responsible to insure the child cannot hurt him or herself or others. The adult cannot put the responsibility on a child to regain inner control once it has been lost. The amount of time it takes for any crisis situation to be under control, during which time chaos reigns, is the amount of inner fear the child has.
- Young children with emotional disturbances need and often seek closeness with adults and violence is less threatening than other forms of intimacy. Behavior cannot always be taken at face value with children who experience violent rages. In fact, these children can often act counter-intuitively. They can push you away when they want closeness, they can strike at you when they are beginning to care about you, and they can act in ways to receive reassuring touch by becoming aggressive and violent to self or others. It is important to understand why a child is acting the way they are. At times, a frightened child seeks and needs the reassurance of physical touch when they can't allow themselves to ask for physical comfort. It is often trusted adults that

young children become violent with, because they know they are safe and they will get the reassurance they need. If they do not find the physical reassurance they need and seek, they will often raise the level of acting out until they get it.

- Physical restraint is the surest and most direct way to prevent injury and significant property damage when the child loses control. There was an article in *Children's Voice* (Kirkwood, 2003) describing a child doing significant damage to a company van with a rock. In this example the adults stood by and did not stop the child and the author called this a better, however more costly, intervention. This seems to defy common sense. Would any parent stand by as a child does thousands of dollars in damage to the family car? By standing by, instead of taking responsibility and correcting the behavior, the adults are reinforcing the destructive and socially maladaptive behavior.
- Traumatized children must learn that emotionally charged situations and all physical touch does not end in being used or abused. The human being has several types of memory, including factual (explicit), subjective (implicit), emotional, experiential and body memories (Ziegler, 2002). Early experiences of touch can establish a lifelong trajectory of meaning attributed to physical touch. It is common that children with emotional disturbances have difficulty with caring touch. Body memories need to be addressed while the child is still young or the child can avoid the very closeness they need. Abused children learn that when someone gets angry someone else gets hurt. Supportive physical restraint retrains the body not to fear touch from others.
- An intervention considered to be good parenting is likely to be good psychological treatment. Psychologists, family therapists and parent trainers would all call stopping a child from running into a busy street good supervision and effective parenting. They would also recommend a parent prevent an older and much larger sibling from physically harming a younger sibling. It is not hard to imagine the same parenting consultants suggesting that when an angry child is heading for the family car with a baseball bat, that the bat be taken away before the damage occurs. If these parenting interventions would be basic common sense to most everyone, why would some call these same interventions unhelpful and non-therapeutic to children with serious anger problems?
- Children with emotional disturbances need the assurance that adults are safely and appropriately in control of the environment. Serious acting out such as violence is often seeking this assurance. Most emotional problems in children have their source in chaotic, abusive and/or neglectful home environments at some point in the child's life. To be in a home where the adults are not in control of themselves or the environment is like going down the road in the back seat of a car with no one driving, it is terrifying to a child who has been there. These children often test that the adults can safely and appropriately manage the challenges. Often it is only when the child has such reassurance and can rely on others for basic needs (Maslow), he or she can once again get back to the task of being a child.

In all the above situations, restraint is being used to help the child, not punish him/her. By referencing §703-309 under Section 302A-1141: punishment wrongfully suggests that anytime a restraint is performed, it is to punish a child. As illustrated above, this is far from the truth.

Summary:

For the foregoing reasons we believe the cited provisions of the proposed legislation are not reflective of the real world, and likely will cause very real harm to Hawaii students and educators. For all these reasons, the legislation should be amended to delete the objectionable provisions as noted in these written comments.

Sincerely,

Bruce Chapman

Bruce Chapman, President

Cc All Hawaii legislators; Hawaii Governor's Office and Staff; Hawaii's AG's Office; Hawaii DOE; Hawaii BOE, Hawaii Teachers Association, Hawaii Superintendents, Principals and Schools, Hawaii Charter School Commission

RETALIATION WILL NOT BE TOLERATED. This correspondence is being sent in accordance with our first amendment right to freedom of speech which includes the right to comment on any state action or legislation. Any retaliation including, but not limited to, restriction of free access to a marketplace in order to silence and punish legal speech including i.e. limiting any school's ability to purchase quality training will not be tolerated by us and should never be tolerated by a free society or any entity in the State of Hawaii.

Honorable Clayton Hee, Chair
Honorable Maile S. Shimabukuro, Vice Chair
Committee on Judiciary and Labor

Honorable David Y. Ige, Chair
Honorable Michelle N. Kidani, vice Chair
Committee on Ways and Means

Chairs, Vice Chairs and respected Members of the Committees,

We fully support the passage of bill HB 1796 HD2 SD1 with comments.

I am the parent of a 6 year child with Down syndrome/Autism who was inappropriately and unnecessarily secluded from her peers (during the 2012/2013 school year) in her Department of Education special education pre-school classroom. This seclusion took place for approximately 90 minutes per day for 5 months, and was for convenience sake only as our child was not compliant with remaining in her designated area for the required naptime. The seclusion resulted in severe trauma and aversive behaviors that have taken months to heal and resolve.

I contacted Senator Chun-Oakland as I know her to be a strong champion for our children. I told her in detail what had taken place with our daughter, and she responded immediately by putting together a committee to develop a bill that would protect our children in our public schools. I have worked tirelessly and collaboratively with a respected group consisting of an educational advocate, an educational rights attorney and a fellow parent of a special needs child to amend the original draft of the bill to make it a strong one that will protect our children and make the state of Hawaii one of the strongest in the nation in protecting our children from restraint and seclusion in school. Those amendments were adopted unanimously by the Education Committee on March 12, 2014.

Extensive research has shown and proven that the types of dangerous restraints and seclusions, that would be prohibited in the passage and implementation of HB 1796 HD2 SDI, cause trauma, injury and death when used on our children in our public schools.

It is not acceptable to use seclusion in our schools, especially for those children with disabilities. It not acceptable to use mechanical restraints that restrict movement, impede breathing or the ability to communicate. There is no reason for administration of drugs or medications in our schools, except those prescribed by a licensed physician and part of the student's standard and documented treatment plan.

There is no place for restraint in our public schools, other than those used under specific guidelines and used only in the event that imminent danger is about to occur or is already occurring that will cause physical harm to oneself, school personnel or school property.

We strongly request that you do not delay the passage of bill HB 1796 HD2 SDI. This delay will cause the state of Hawaii's standing as one of the worst states in the union compared to the contiguous USA in having weak at best laws to protect our students from the use of dangerous restraints and seclusions in our public schools, to remain for the current generation.

We strongly urge you to pass and implement Bill HB-1796 HD2 SDI at the beginning of the new 2014-2015 school year scheduled to begin August 1, 2014. Doing so will ensure the safety and well being of our students in our Hawai'i Department of Education public school.

We thank you for the privilege of submitting this testimony.

Respectfully yours,

Naomi Grossman- Educational Advocate
John Deller – Educational Attorney
Carlton Ching- Parent, special needs child
Maureen McComas- Parent, special needs child

“There can be no keener revelation of a society's soul than the way it treats it's children” – Nelson Mandela

JOHN P. DELLERA

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**TESTIMONY IN SUPPORT OF H.B. 1796, H.D. 2, S.D. 1
RELATING TO EDUCATION**

Tuesday, April 1, 2014, 10:00 a.m., Conference Room 211

March 31, 2014

The Honorable Clayton Hee, Chair
The Honorable Maile S. Shimabukuro, Vice Chair
Committee on Judiciary and Labor

The Honorable David Y. Ige, Chair
The Honorable Michelle N. Kidani, Vice Chair
Committee on Ways and Means

Dear Chairs, Vice Chairs, and Members of the Committees:

I am pleased to **testify in support** of H.B. 1796, H.D. 2, S.D. 1, which prohibits the use of seclusion and prohibits or limits the use of certain types of restraint in our public schools.

The Department of Education (“DOE”) submitted testimony on House Draft 2 of this bill in which it requested delaying implementation until August 2016. That much time is not necessary to comply with the data collection, reporting, and training provisions, some of which could be implemented within 90 days, and the rest within one year. In any event, there should be **no delay on implementation of the prohibitions on seclusion and restraint.**

Seclusion is tantamount to solitary confinement, and it is especially damaging to children with disabilities who are in distress and need more, not less, intervention by caregivers. Chemical and mechanical restraints sometimes amount to child abuse that may be criminal conduct. They should not be tolerated in our public schools.

The DOE can send a memorandum to school personnel immediately advising them that seclusion and chemical and mechanical restraints are prohibited. **Section 302A-A of Senate Draft 1, therefore, should take effect on approval by the governor.** If the DOE needs time to implement Section 302A-B, the effective date of that section could be delayed for not more than one year after approval. Thank you for the opportunity to testify.

Respectfully submitted,

John P. Delleria

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Honolulu, HI 96824
(808) 393-5218/ kalma.keiko@gmail.com

March 31, 2014

Senator Clayton Hee
Chair, Senate Cmte. on Judiciary and Labor
Hawaii State Capitol, Room 407

Senator David Y. Ige
Chair, Senate Cmte on Ways and Means
Hawaii State Capitol, Room 208

Senator Maile S.L. Shimabukuro
Vice Chair, Senate Cmte. on Judiciary and Labor
Hawaii State Capitol, Room 222

Senator Michelle N. Kidani
Vice Chair, Senate Cmte on Ways and Means
Hawaii State Capitol, Room 228

Re: Testimony in **STRONG OPPOSITION** to HB1796, HD2, SD1; Establishes conditions and procedures for the use of restraint or seclusion in public schools; Senate Committee on Judiciary and Labor, Senate Committee on Ways and Means, April 1, 2014, Room 211, 10:00 a.m.

Dear Chair Hee, Chair Ige, Vice Chair Shimabukuro, Vice Chair Kidani, and Members of the Senate Committees on Judiciary and Labor, and Ways and Means:

I am writing to express my **STRONG OPPOSITION** to House Bill 1796 HD 2 SD1, which establishes the conditions and procedures for the use of restraint and seclusion in public schools.

On the face of it, this bill appears to have the intention of protecting children in Hawaii public schools from improper restraint and seclusion. However, this bill is a Trojan Horse, and actually puts children at greater risk. The current draft of the bill conveniently offers the Hawaii Department of Education a vague excuse for restraining children.

First of all, on Page 3 lines 1-3, it states that "...physical restraint shall be prohibited in public schools unless a student's behavior poses an imminent danger of property damage or physical injury to the student, school personnel, or others..." This statement is far too vague and opens the door for children to be restrained by the public school staff for spurious reasons.

On Page 3 lines 4-6, it states that physical restraint may be used, "...provided that other less intrusive interventions have failed or been determined to be inappropriate..." This does not state WHO will determine what is appropriate or inappropriate in such situations, nor does it state what qualifications are needed to be able to make this determination.

On Page 3 lines 19-20, it states that, "The board shall establish a policy regarding the use of restraint in public schools." The current Board of Education (BOE) lacks the transparency that the previously elected BOE had. In the past, meetings were held later in the day when parents and guardians were more likely to be able to attend. Also, the public is no longer allowed to testify on

issues other than what is on the agenda, which in effect puts a muzzle on parents and guardians. The public is now allowed very little input when it comes to policy making by the BOE.

Finally, on Page 3 lines 20-21, and Page 4 lines 1-6, it states that the Department of Education will establish procedures regarding the "...immediate verbal or electronic communication on the same day as each incident; and written notification within twenty-four hours of each incident." This requirement is meaningless. A public school classroom or campus consists of Hawaii DOE staff and contracted providers who are **explicitly** told NOT to be honest with parents or guardians. Contracted providers, in particular, are threatened with termination should they offer such information to parents or guardians. Clearly, the Hawaii DOE prefers to hide under a veil of secrecy, and sees accountability as a mere nuisance.

The purpose of this bill is to effectively deny parents and guardians the right to have any legal recourse should the inappropriate use of restraint be used on their children. This goal was extremely blatant in the original draft of this bill, which also included mechanical restraints, chemical restraints, and seclusion. The state's desire to reduce spending should not occur at the expense of children's well-being.

In light of what has already occurred at Kipapa Elementary, Puohala Elementary, Holomua Elementary, and other schools that have not yet come to light for the general public, it is evident that the Hawaii DOE lacks the judgment and ethics to determine which situations are appropriate for such extreme measures. Furthermore, the Hawaii DOE lacks the judgment, ethics, and expertise to implement such measures. The Hawaii DOE should NOT be given the option of restraining or secluding children, particularly special education children, who are the specific targets of this bill.

Please OPPOSE HB 1796 HD 2 SD1, and protect the children in the Hawaii public school system.

Sincerely,

Kalma K. Wong