Journal of Gender, Social Policy & the Law

Volume 22 | Issue 1 Article 13

2013

The Questionable Constitutionality of Mechanical Restraints in the Classroom: A Critique of the Tenth Circuit's Decision in Ebonie S. V. Pueblo School District No. 60

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THE QUESTIONABLE CONSTITUTIONALITY OF MECHANICAL RESTRAINTS IN THE CLASSROOM: A CRITIQUE OF THE TENTH CIRCUIT'S DECISION IN *EBONIE S. V. PUEBLO SCHOOL DISTRICT NO. 60*

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I. INTRODUCTION

The use of mechanical restraints on students with disabilities in public schools is an emerging education law issue of national significance.[1] Following a 2009 study by the Government Accountability Office (GAO) that documented numerous accounts of abuse and death, the Secretary of Education called on states to review their current policies on the use of restraints and seclusion.[2] However, congressional efforts to address restraints have not been successful; for example, the *Keeping Students Safe Act* proposed in the House of Representatives failed to gain sufficient support to pass.[3] In 2011, Senator Tom Harkin introduced a new version of the bill in the Senate; however, he is unsure if the modified version will

1. *See, e.g.*, Kaukab Smith, *Senate Committee Considers Positive Alternatives to Seclusion and Restraint of School Children*, JUVENILE JUSTICE INFORMATION EXCHANGE (Jul. 13, 2012), http://jjie.org/senate-committee-considers-positive-alternatives-seclusion-restraint-of-school-children/ (discussing the dissatisfaction among parents about the use of restraints).

2. *See, e.g.*, NANCY LEE JONES & JODY FEDER, CONG. RESEARCH SERV., RL7-5700, THE USE OF SECLUSION AND RESTRAINT IN PUBLIC SCHOOLS: THE LEGAL ISSUES 2, 10 (2010) (relaying the Secretary of Education's Response to the Government Accountability Office (GAO) report); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 09-719T, SECLUSIONS AND RESTRAINTS: SELECTED CASES OF DEATH AND ABUSE AT PUBLIC AND PRIVATE SCHOOLS AND TREATMENT CENTERS 7 (2009) (describing the injuries sustained by students due to the use of restraints and seclusion).

3. *See* Perry Zirkel, *Restraining the Use of Restraints For Students With Disabilities: An Empirical Analysis of the Case Law*, 10 CONN. PUB. INT. L. J. 323, 328-29 (2011) (acknowledging how H.R. 4247, which called for sanctions for excessive restraint use, failed to pass in the Senate).

generate adequate approval from Congress.[4]

Although federal law does not specifically address restraints in the classroom context, the Individuals With Disabilities Education Act (IDEA) entitles all students with disabilities to a "free appropriate public education" (FAPE).[5] Nevertheless, federal courts have maintained a passive role in enforcing this requirement, as they are reluctant to interfere with local education policy.[6]

The Tenth Circuit demonstrated this reluctance in its decision in *Ebonie S. v. Pueblo School District No. 60*, holding that the school's use of a wrap-around desk with a mechanical restraint did not violate the student's Fourth or Fourteenth Amendment rights.[7] Additionally, the court refused to address the validity of the practice under the Americans with Disabilities Act (ADA) or IDEA.[8]

This Comment argues that the Tenth Circuit improperly dismissed the student's claims because the use of a desk with a mechanical restraint violated the student's rights.[9] Part II of this Comment provides a brief overview of IDEA.[10] Part II also examines the special education jurisprudence on the use of restraints in public schools and explains the facts and procedural history of *Ebonie S. v. Pueblo School District No. 60*.[11] Part III argues that the school's use of a wrap-around desk was an unreasonable seizure that deprived the student of due process and of a free

4. *See* Smith, *supra* note 1 (conceding that the legislation may fail to pass through a deadlocked Congress).

5. *See* Individuals With Disabilities Education Act, 20 U.S.C. § 1412 (1978) (introducing a "free appropriate public education" which is provided at public expense, meets state content standards, and conforms with the Individualized Education Program).

6. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973) (insisting that federal courts lack the expertise to make sound judgments on local educational policy).

7. *See* Ebonie S. v. Pueblo Sch. Dist. No. 60, 695 F.3d 1051, 1059 (10th Cir. 2012) (holding that the Fourth and Fourteenth Amendment claims fail as a matter of law).

8. *See id.* at 1054 (declining to address the validity of the desk under either of the federal special education statutes).

9. *See infra* Part III (critiquing the holding and rationale of the Tenth Circuit's decision in *Ebonie S.*).

10. *See infra* Part II.A (discussing the "discrimination" provision in § 504 of the Rehabilitation Act and the "free and appropriate public education" provision of the IDEA).

11. *See infra* Part II.C & D (describing the jurisprudential development of special education litigation).

and appropriate public education.[12]

Part IV recommends that legislators address the issue by requiring schools to work closely with parents of students with disabilities to ensure that these students are not deprived of their constitutional rights.[13] Finally, Part V concludes that by dismissing the constitutional claims and refusing to apply the federal special education statutes, the Tenth Circuit is allowing schools to deprive students of their right to learn.[14]

II. BACKGROUND

A. The Individuals With Disabilities Education Act

Less than twenty years after *Brown v. Board of Education*, federal courts began to assume a greater role in addressing the rights of students with disabilities.[15] In *Pennsylvania Association for Retarded Children v. Pennsylvania*, the District Court for the Eastern District of Pennsylvania struck down a law that permitted the school to exclude students who were mentally disabled.[16] Similarly, in *Mills v. Board of Education of D.C.*, the United States District Court for the District of Columbia held that the local school system was obligated to provide publicly funded support for exceptional children.[17]

Section 504 of the Rehabilitation Act was Congress' first response to these cases; passed in 1973, this statute recognized the right of disabled students to a public education and penalized states for discriminating against exceptional students.[18] Perhaps more monumental for education

12. *See infra* Part III (arguing that the use of the wrap-around desk violates the Fourth Amendment, the Fourteenth Amendment, and the "free appropriate public education" requirement of IDEA).

13. *See infra* Part IV (recommending a policy that corresponds with the objectives of H.R. 4247 and S. 2020 to ensure greater protection for students with disabilities).

14. *See infra* Part V (concluding that the Tenth Circuit erred in granting summary judgment).

15. *See generally* ALLAN G. OSBORNE & CHARLES RUSSO, SPECIAL EDUCATION AND THE LAW: A GUIDE FOR PRACTITIONERS 7 (2006) (suggesting that Brown v. Bd. of Educ., 347 U.S. 383 (1954), paved the way for exclusion to be examined for other marginalized groups).

16. *See* Pa. Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 302 (E.D. Pa. 1972) (mandating that the school cannot deny a student with mental disabilities access to school programs).

17. *See* Mills v. Bd. of Educ. of D.C., 348 F. Supp. 866, 878 (D.D.C. 1972) (holding that the school system must design educational facilities to accommodate exceptional children).

18. *See* Rehabilitation Act, 29 U.S.C. § 794 (1973) (making the receipt of federal funds contingent upon the fair treatment of all students).

law, the Education for All Handicapped Children Act (EAHCA) declared that each child was entitled to a FAPE.[19] Since its passage, EAHCA has been amended and reauthorized several times and is presently known as IDEA.[20]

Like most federal education statutes, IDEA has a financial incentive for states that comply.[21] Unfortunately, this financial incentive does not guarantee the quality of public education that states provide to students; thus, states can still abide by IDEA without properly addressing the needs of students.[22]

The Supreme Court first addressed the meaning of the FAPE provision of IDEA in *Board of Education of Hendrick Hudson Central School District v. Rowley*.[23] In *Rowley*, parents of a deaf child sued the school district after the district refused to provide the child with a sign language interpreter.[24] The Court ruled that the child was not eligible for an interpreter because the child was making satisfactory academic progress.[25] Noting that the school provided the child with enough specialized instruction to allow her to advance, the *Rowley* Court held that the school satisfied IDEA requirements.[26] Accordingly, the progeny of post-*Rowley* special education cases have relied upon this interpretation of FAPE, thus perpetuating a judicial reluctance to interfere in local educational policy.[27]

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19. *See* Education for All Handicapped Children's Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (requiring that schools provide students with disabilities access to a public education, and that school resources are devoted to education).

20. *See* OSBORNE & RUSSO, *supra* note 15, at 9 (discussing the legislative history of special education statutes).

21. *See* Individuals with Disabilities Education Act, 20 U.S.C. §§ 1412(a)(1), 1415(a) (1978) (emphasizing that states only receive funding if they provide free appropriate public education that fits the individualized needs of the child).

22. *See generally* Sarah Marquez, Note, *Protecting Students With Disabilities: Amending the Individual With Disabilities Education Act To Regulate The Use of Restraints in Public Schools,* 60 SYRACUSE L. REV. 617, 626 (2010) (asserting the low standard that schools have to meet to comply with IDEA).

23. *See* Bd. of Educ. of Hendrick Hudson Cen. Sch. Dist. v. Rowley, 458 U.S. 176, 201 (1982) (declaring that IDEA requires states to provide supportive services that allow a handicapped child to benefit from special education).

24. *See id.* at 185 (recounting the Rowleys' unsuccessful attempts to obtain an interpreter for their deaf daughter).

25. *See id.* at 203 (noting that advancement to higher grade levels is an important factor in ascertaining educational benefit).

26. *See id.* at 200-01 (affirming that a "free appropriate public education" is one that provides each child a basic floor of educational opportunity).

27. *See, e.g.*, Couture v. Bd. of Educ. of Albuquerque Pub. Sch., 535 F.3d 1243, 1255 (10th Cir. 2008) (asserting that courts should not evaluate educational policy

B. A Free Appropriate Public Education

According to IDEA, a FAPE is an educational program that meets state content requirements and corresponds with the Individualized Education Program (IEP) for each child.[28] An IEP is a written document that contains specific goals and achievement markers that correspond to a child's needs.[29] Additionally, an IEP describes a child's academic goals and describes the special education services needed to achieve these goals.[30]

While IEPs vary depending on the needs of each child, all IEPs are to be developed by parents, special education teachers, and school administrators.[31] Additionally, IDEA requires that the IEP teams give consideration to some specific factors, such as behavioral problems, visual impairments, and physical disabilities.[32] Because IDEA's purpose is to ensure quality education for students with disabilities, the IEP is a fundamental component of a FAPE.[33]

C. Case Law Interpreting the Use of Restraints

The Supreme Court has consistently held that a child's liberty interest may be modified in an educational setting.[34] In *Ingraham v. Wright*, junior high students who were paddled by teachers sought declaratory and injunctive relief.[35] The Court ruled for the school, holding that corporal

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because such responsibility is that of local officials).

28. *See* Individuals With Disabilities Education Act, 20 U.S.C. § 1401 (1978) (highlighting the importance of an Individualized Education Program (IEP) in the public education of exceptional children).

29. *See id.* § 1414(d)(1)(A) (requiring an appropriate program to contain measurable academic and functional goals).

30. *See, e.g.*, *id.* (suggesting that specific goals are essential for enabling students with disabilities to make satisfactory academic progress).

31. *See id.* § 1414(d)(1)(B) (providing for an IEP team comprising parents, special and/or regular education teachers, and local education agency representatives, among others).

32. *See id.* § 1414(d)(3)(B) (obligating IEP teams to consider the use of Braille instruction and hearing aids for blind and deaf children, respectively).

33. *See* OSBORNE & RUSSO, *supra* note 15, at 92 (suggesting that the IEP requires collaboration from teachers and parents in order to ensure the success of a special education program).

34. *Compare* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (acknowledging that the rights of students in schools are fundamentally different than those of adults in other settings), *with* Ingraham v. Wright, 430 U.S. 651, 675-76 (1977) (contending that a student does not have an absolute liberty interest in avoiding corporal punishment).

35. *See Ingraham*, 430 U.S. at 653-54 (recounting the petitioner's dissatisfaction with the school's practice).

punishment may be necessary in a child's education.[36] Because the paddling was only used to discipline disobedient students, the *Ingraham* Court upheld the policy.[37] However, the Court still acknowledged that a school could violate due process if a teacher exceeds the *de minimis* level.[38]

Additionally, the Court established standards for determining the liberty interests of people with disabilities.[39] In *Youngberg v. Romeo*, the Court considered the liberty interests of a man who was involuntarily confined to a state mental institution.[40] While the Court declined to rule on the due process claim, in dicta, the *Youngberg* Court stated that to prevail on a claim, one must show that the defendant's conduct deviated from professional standards.[41] Following *Youngberg*, several courts have applied this test when addressing the use of physical restraints in schools.[42]

Although this Comment is about the use of mechanical restraints, the way that several federal courts have addressed physical restraints illustrates the insufficient legal remedies available for plaintiffs.[43] For example, in *M.H. v. Bristol Board of Education*, the teacher squirted water on the student and forcibly restrained him.[44] Despite the denial of the school's motion for summary judgment, the court ultimately rejected the student's claim.[45] Accordingly, because so many state laws do not expressly prohibit restraints, students who are subject to them are often unable to maintain a

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36. *See id.* at 676 (upholding a teacher's use of force for moderate correction).

37. *See id.* at 677-78 (concluding that the paddling was valid because it was used sparingly).

38. *See id.* at 674 (suggesting that a school could implicate a liberty interest if a teacher deliberately punishes a child to the point of inflicting appreciable pain).

39. *See* Youngberg v. Romeo, 457 U.S. 307, 324-25 (1982) (proposing a balancing test of the government's interest and the liberty interest of the involuntarily committed).

40. *See id.* at 311 (recounting the allegations of unconstitutional restraints by doctors in the mental hospital).

41. *See id.* at 330 (Burger, J., concurring) (proclaiming that the proper test for examining a liberty interest violation is when a caretaker does not exercise his proper professional judgment).

42. *See generally* Marquez, *supra* note 22, at 629-30 (reviewing the judicial treatment of physical restraints in public schools).

43. *See, e.g.*, Heidemann v. Rother, 84 F.3d 1021, 1025 (8th Cir. 1996) (upholding a school's use of "blanket wrapping" on a student). *But see* M.H. v. Bristol Bd. of Educ., 169 F. Supp. 2d 21, 30 (D. Conn. 2001) (denying summary judgment for the school after a teacher physically threatened and spit on a child).

44. *See M.H.*, 169 F. Supp. 2d at 24-25 (recounting how the teacher unnecessarily physically restrained a student).

45. *See id.* at 23-24 (dismissing the claim because the student failed to show that the practice was a school policy).

cause of action.[46]

In a school context, the chief argument related to mechanical restraints is that they are unreasonable classroom seizures.[47] Under the Fourth Amendment, a seizure occurs when a reasonable person would believe that she is not free to leave.[48] To determine whether there is an unreasonable seizure, the inquiry is two-fold: (1) whether the challenged action is justified at its inception; and (2) whether it is reasonably related in scope to the circumstances.[49]

Furthermore, to qualify as an unreasonable seizure in a classroom, the limitation on the student's movement must significantly exceed the ordinary restrictions inherent in compulsory classroom attendances.[50] In *Couture v. Board of Education of Albuquerque Public Schools*, the teachers frequently placed a child with severe emotional disabilities in a time-out room.[51] In addition to physically carrying the child into the room, the teachers also denied his requests for release.[52] Because the student had severe emotional disabilities, the Tenth Circuit held that the time-out room was a valid seizure because it was necessary for the child to cooperate.[53]

D. Facts and Procedural History of Ebonie S. v. Pueblo School District No. 60

In *Ebonie S. v. Pueblo School District No. 60*, a student diagnosed with developmental and intellectual disabilities was placed in a class for

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46. *Compare* JONES & FEDER, *supra* note 2, at 7 (noting the insufficient protection that states give to students with disabilities because IDEA does not specifically address the use of restraints), *with* Perry Zirkel, *Restraining the Use of Restraints For Students With Disabilities: An Empirical Analysis of the Case Law*, 10 CONN. PUB. INT. L.J. 323, 327 (2011) (conceding that nineteen states entirely lack legislation regarding restraints).

47. *See* JONES & FEDER, *supra* note 2, at 4-5 (explaining that restraints are frequently challenged on Fourth Amendment grounds).

48. *See, e.g.*, Couture v. Bd. of Educ. of Albuquerque Pub. Sch., 535 F.3d 1243, 1250 (10th Cir. 2008) (proclaiming the proper test for a Fourth Amendment claim).

49. *See id.* (insisting that the treatment of seizures must differ in a classroom context because students are not free to leave at their own volition).

50. *See id.* at 1251 (stressing the need for context to determine the reasonableness of an in-school seizure because students in school are under the authority of the teachers).

51. *See id.* at 1247 (describing the troublesome behavior of a child that led the teachers to isolate him from the rest of the class).

52. *See id.* at 1251 (approving of the detention due to the student's violent threats and temper tantrums).

53. *See id.* at 1253 (finding that the seizure was necessary because of the unique challenges that the student posed).

exceptional students taught by Marilyn Golden.[54] The classroom featured desks that were U-shaped in a way that surrounded a student on three sides when the chair was completely pulled in.[55] Additionally, the desk featured a wooden bar that rested behind the chair to secure the student into place.[56] Although Ebonie had an IEP that authorized the use of the desk, such use was not authorized as a disciplinary method.[57] Golden insisted on using the desk in order to discipline Ebonie and to ensure that she remained on task.[58] On April 9, 2007, Golden sent Ebonie home with a fractured upper arm; an expert later opined that the fracture could be related to the desk.[59] Subsequently, Ebonie's mother, Mary, removed her from the school and filed an administrative claim against the school district.[60]

While the hearing officer determined that Ebonie had been deprived of a FAPE and that the desk was prohibited by the Colorado Protection of Persons from Restraint Act, the officer declined to award Ebonie any damages.[61] Mary subsequently filed suit in the District Court for the District of Colorado, which, on May 3, 2011, dismissed Ebonie's Fourth and Fourteenth Amendment claims.[62] On August 28, 2012, on appeal, the Tenth Circuit affirmed the district court's judgment.[63] Additionally, the court refused to issue a ruling on whether the desk violated state law or IDEA.[64] The plaintiffs appealed to the U.S. Supreme Court, but on March

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54. *See* Ebonie S. v. Pueblo Sch. Dist. No. 60, 695 F.3d 1051, 1054 (10th Cir. 2012) (discussing Ebonie's condition upon being enrolled at Bessemer Academy).

55. *See id.* (detailing how the distinct characteristics of the desk, like the wooden bar, the shape of the desk, and the barrel bolt, restricted Ebonie's movement).

56. *See id.* (describing the bar that runs the length of the back of the desk that rests behind the student's chair, thereby restricting movement).

57. *See id.* at 1055 (noting that Mary revoked her consent upon learning that the desk was not being used in accordance with the IEP).

58. *See, e.g., id.* (conceding that the teachers placed students with disabilities in the desks in non-emergency situations).

59. *See id.* (describing the events that led Mary to file suit).

60. *See id.* (explaining that Mary removed her daughter from the school after Ebonie fractured her arm).

61. *See id.* (noting the hearing officer's refusal to award damages due to lack of subject matter jurisdiction).

62. *See* Ebonie S. v. Pueblo Sch. Dist. No. 60, 819 F. Supp. 2d 1179, 1193 (D. Colo. 2011) (granting summary judgment in favor of defendants).

63. *See Ebonie S.*, 695 F.3d at 1059 (holding that plaintiff's Fourth and Fourteenth Amendment claims fail as a matter of law).

64. *See id.* at 1054 (declining to offer a view on the validity of the desk under either statute).

18, 2013, the Supreme Court refused to grant certiorari.[65]

III. ANALYSIS

A. The Tenth Circuit Improperly Granted Summary Judgment to the School Because Mechanical Restraints Are Unreasonable Seizures and Thus Violate the Fourth Amendment.

In granting summary judgment, the Tenth Circuit held that the plaintiff did not allege sufficient facts to support a plausible legal claim.[66] Summary judgment is only appropriate when there is no genuine issue of material fact and the movant is entitled to legal judgment.[67] In *Ebonie S.*, the grant of summary judgment was improper because the plaintiff presented enough material facts to support her Fourth Amendment claim.[68]

1. The Mechanical Restraints Were Unreasonable Because They Were Not Justified at the Inception.

The Fourth Amendment protects "the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[69] However, when assessing this right in a school setting, context is imperative to the analysis.[70] Accordingly, both the interests of the school as well as those of the student must be balanced in order to make this determination.[71]

The first step in this analysis is to determine if a seizure occurred.[72] In a school context, the school must restrict a student's freedom to a degree that

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65. *See* Ebonie S. v. Pueblo Sch. Dist. No. 60, 2013 U.S. LEXIS 2257 (U.S. 2013) (declining to review the Tenth Circuit's decision).

66. *See id.* at 1059 (affirming the summary judgment granted by the district court).

67. *See, e.g.*, Bertsch v. Overstock.com, 684 F.3d 1023, 1027 (10th Cir. 2012) (asserting that the nonmoving party must present salient evidence in order to reverse a lower court's summary judgment grant).

68. *See Ebonie S.*, 695 F.3d at 1055 (recounting the school's practice of frequently placing Ebonie in the desk).

69. *See* U.S. CONST. AMEND. IV (establishing one's right to be free from unwarranted intrusions that violate privacy interests).

70. *See* Couture v. Bd. of Educ. of Albuquerque Pub. Sch., 535 F.3d 1243, 1250-51 (10th Cir. 2008) (discussing the fundamental differences between seizures in law-enforcement settings and educational settings).

71. *See id.* at 1250 (proposing a balancing of student's privacy rights with the school's tutelary and custodial responsibility).

72. *See id.* (discussing the need to balance privacy rights with school responsibility in a seizure inquiry).

is greater than what is ordinarily compulsory for daily attendance.[73] In *Couture*, the court upheld the school's use of a time-out room as a method of disciplining a troublesome student.[74] Because the student's emotional outbursts presented unique problems to his teachers, it was reasonable for the school to limit his movement.[75] Therefore, in *Couture*, the Tenth Circuit correctly held that the student was seized.[76]

Similarly, in the instant case, Ebonie was confined to a U-shaped desk that surrounded her on three sides.[77] Because Ebonie did not have the motor skills to unfasten the desk and was often placed in the desk with the bar down for extended periods of time, she, like the student in *Couture*, was seized for Fourth Amendment purposes.[78]

One could argue that Ebonie was not seized since the desk did nothing more than force her to assume a position required of all students.[79] However, because Ebonie lacked the motor skills that most ordinary students possess, the desk significantly restricted her freedom of movement.[80] Thus, the Tenth Circuit incorrectly granted summary judgment because Ebonie presented a cognizable Fourth Amendment claim.[81]

In *Ebonie S.*, the use of the desk constituted a seizure because the wooden bar that rests behind the chair made it impossible for Ebonie to push her chair out.[82] Because the desk was a seizure, the Tenth Circuit

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73. *See, e.g.*, *id.* at 1251 (describing an invalid seizure as an intrusion that is not justified at its inception and not reasonably related in scope to the circumstances).

74. *See id.* (recounting the way that the teachers treated a child with severe emotional disabilities).

75. *See id.* at 1254 (approving of the student's lengthy detention because his teachers had a reasonable apprehension of violence).

76. *See id.* at 1251 (finding that there was a seizure since the student was carried into the room by the teachers).

77. *See* Ebonie S. v. Pueblo Sch. Dist. No. 60, 695 F.3d 1051, 1054 (10th Cir. 2012) (explaining how the desk restricted movement because it forced the student to be surrounded when the chair was completely pulled in).

78. *Compare id.* at 1055 (describing the way that the barrel bolt restricted Ebonie's movement), *with Couture*, 535 F.3d at 1255 (describing the confining features of the small room, specifically, the black construction paper on the windows).

79. *See Ebonie S.*, 695 F.3d at 1057 (insisting that the desk did nothing more than force the student to maintain standard classroom posture).

80. *Compare id.* at 1054-55 (admitting that Ebonie lacked the motor skills required to unfasten the desk), *with Couture*, 535 F.3d at 1251 (inferring that time-out rooms are seizures because they subject a student's movement to great restrictions).

81. *See Ebonie S.*, 695 F.3d at 1057 (holding that Ebonie was not seized).

82. *See id.* at 1055 (explaining how the desk seized Ebonie because the wooden bar that runs the length of the desk prevents a student from getting out of her seat).

should have proceeded to apply the two-fold inquiry to assess the reasonableness of the practice.[83] The use of the desk with a restraint was unreasonable because it was not justified at its inception and was not reasonably related to the circumstances that justified the interference in the first place.[84]

The determination of whether a seizure is justified at its inception is a question of law that examines the reasonableness of the seizure in light of the school environment.[85] In *Couture*, the court held that the use of a time-out room was valid because the student presented unique behavioral challenges to his teachers.[86]

In Ebonie's case, however, the use of the desk was not justified because Ebonie did not need the desk for orthopedic purposes.[87] Moreover, because it was never used for emergency or safety purposes, the first prong of the seizure inquiry is not met.[88] Thus, unlike the situation in *Couture*, the school's motivation for seizing Ebonie was unreasonable.[89]

Furthermore, Ebonie's behavior in school does not justify the school's practice of restraining her in the wrap-around desk.[90] In *Couture*, the student's IEP indicated that time-outs were needed in order to obtain his cooperation.[91] Conversely, Ebonie's IEP only provided for the use of the wrap-around desk in order to keep her in her seat, not for behavioral modification purposes.[92] Thus, because the teachers in the instant case

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83. *See Couture*, 535 F.3d at 1251 (applying the two-part test to determine the reasonableness of a seizure).

84. *See id.* at 1251-53 (explaining the justification and reasonableness prongs of the seizure inquiry and stressing the need for context to be a facet in this determination).

85. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 342-43 (1985) (holding that reasonableness encompasses the student's privacy interests and the school's interest in preserving order).

86. *See Couture*, 535 F.3d at 1251 (explaining that the student's IEP called for time-outs to promote cooperation).

87. *See Ebonie S.*, 695 F.3d at 1055 (conceding that the teachers placed Ebonie in the wrap-around desk in order to discipline her).

88. *See id.* at 1054-55 (suggesting plausible explanations for the use of a wrap-around desk that do not apply to Ebonie's case).

89. *But see Couture*, 535 F.3d at 1247 (recounting how the student frequently used profanity and threatened to kill others).

90. *See* Ebonie S. v. Pueblo Sch. Dist. No. 60, 819 F. Supp. 2d 1179, 1183 (D. Colo. 2011) (admitting that Ebonie's IEP specified for the desk to be used only to keep her in her seat).

91. *See Couture*, 535 F.3d at 1256 (upholding the use of the time-out room since the student's problems posed a major challenge).

92. *See Ebonie S.*, 819 F. Supp. 2d at 1183 (noting that Ebonie's mother did not authorize the desk to be used for disciplinary purposes).

exceeded the limits that were stipulated in Ebonie's IEP, the seizure was not justified at its inception.[93]

2. The Mechanical Restraints Were Unreasonably Related in Scope to the Circumstances That Justified the Interference in the First Place.

The second step is to determine if the seizure was permissible in scope to the circumstances that justified the interference.[94] A seizure is permissible in scope when it is reasonable both in light of the characteristics of the student as well as those of the infraction.[95] In *Couture*, the use of the time-out room was valid because the time-outs were used for the behavioral modification of a disruptive student.[96] Because the student in *Couture* posed a clear threat to his teachers, the school's use of the time-out room was reasonably related in scope to the circumstances.[97]

In the instant case, the Tenth Circuit relied on *Couture* to justify the use of the wrap-around desk.[98] This reliance on *Couture* was improper because of some critical factual differences between the circumstances of the two cases.[99] These differences relate to: (1) the student's behavior prior to being seized; (2) the school's motivation for seizing the student; and (3) the scope of the limitation in relation to the student's conduct.[100]

First, the teachers in *Ebonie S.* regularly placed Ebonie in the desk, even though her IEP required her teachers to use the desk only to ensure that she

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93. *Compare Ebonie S.*, 695 F.3d at 1055 (noting that Ebonie was placed in the desk for a longer time than her IEP required), *with Couture*, 535 F.3d at 1253 (noting that the student continued to be violent even after being detained).

94. *See, e.g.*, *Couture*, 535 F.3d at 1253 (emphasizing the importance of context in order to satisfy the second prong of the in-school seizure reasonableness test).

95. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 342 (1985) (suggesting that factors such as the age and sex of the student as well as the nature of the infraction are germane to the reasonableness inquiry); *accord Couture*, 535 F.3d at 1253 (establishing the relationship between the measures and objectives of the seizure).

96. *See Couture*, 535 F.3d at 1251 (observing that the student repeatedly cursed at his teachers and was physically violent).

97. *See id.* at 1253 (justifying the use of the time-out room because of the student's violent behavior).

98. *See* Ebonie S. v. Pueblo Sch. Dist. No. 60, 819 F. Supp. 2d 1179, 1187 (D. Colo. 2011) (affirming a reluctance to depart from *Couture's* interpretation of reasonableness).

99. *Compare Couture*, 535 F.3d at 1251 (remarking on the student's violent outbursts), *with Ebonie S.*, 819 F. Supp. 2d at 1184 (conceding that the school regularly placed Ebonie in the desk with the bar down although the bar was to be used solely for safety purposes).

100. *See infra* Part III (explaining the key differences between *Ebonie S.* and *Couture* to critique the Tenth Circuit's decision).

remained on task.[101] However, on some occasions, Ebonie was in the desk for one hour with the bar in place the entire time.[102] Similarly, in *Couture*, the student was seized on a regular basis as his detentions sometimes lasted for periods of greater than an hour.[103] However, the critical difference between the instant case and *Couture* is that Ebonie's behavior prior to being seized did not justify the school's frequency in restraining her.[104]

Furthermore, the desk was never used as an emergency measure.[105] While one could argue for the use of the wrap-around desk to ensure safety within the classroom, such use was unjustified because Ebonie did not pose a threat to her teachers.[106] Conversely, in *Couture*, because the student's taunts and tantrums threatened the safety of his teachers, the teachers were justified in confining him to the time-out room.[107] Unlike that of the student in *Couture*, Ebonie's behavior was never dangerous; thus, because the school's motivation for seizing Ebonie was not reasonably related to the circumstances, the Tenth Circuit's reliance on *Couture* was improper.[108]

Lastly, the use of the wrap-around desk was a limitation on Ebonie's movement that exceeded reasonable bounds.[109] In placing Ebonie in the wrap-around desk for long time periods, the school exceeded reasonable bounds because Ebonie never behaved violently.[110] In *Couture*, the frequent use of the time-out room was not excessive because that student

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101. *Compare* Ebonie S. v. Pueblo Sch. Dist. No. 60, 695 F.3d 1051, 1055 (10th Cir. 2012) (indicating that Ebonie's mother did not intend for the desk to be used for discipline), *with Ebonie S.*, 819 F. Supp. 2d at 1183 (remarking that the paraprofessionals kept Ebonie in the wrap-around desk on a regular basis).

102. *See Ebonie S.*, 695 F.3d at 1055 (relaying Mary's observations of Ebonie being placed in the desk too frequently).

103. *See Couture*, 535 F.3d at 1253 (recounting the long periods of the time that the student was detained due to his conduct).

104. *Compare Couture*, 535 F.3d at 1254 (finding that the time-out room was valid because the student posed a threat to his teachers), *with Ebonie S.*, 819 F. Supp. 2d at 1184 (conceding that the use of the desk exceeded the limits of the IEP).

105. *See Ebonie S.*, 695 F.3d at 1055 (admitting that Ebonie was never violent).

106. *See Ebonie S.*, 819 F. Supp. 2d at 1184 (noting that the bar was to be used solely for emergency and safety purposes).

107. *See Couture*, 535 F.3d at 1254 (emphasizing how the student continued to spit, scream, and curse even after being detained).

108. *See Ebonie S.*, 695 F.3d at 1056-57 (deciding to rely on *Couture* despite its critical differences from the instant case).

109. *See Ebonie S.*, 819 F. Supp. 2d at 1187 (acknowledging that the desk placed significant restrictions on Ebonie's movement because she was physically unable to lift the bar up).

110. *See id.* at 1184 (admitting that the teachers only intended for the desk to be used for students who presented an imminent threat).

exhibited destructive behavior.[111] Accordingly, because Ebonie's conduct was distinct from that of the student in *Couture*, the Tenth Circuit erred in its application of *Couture*.[112]

Due to these crucial factual differences between the two cases, the Tenth Circuit should not have granted summary judgment for the school.[113] The facts pertaining to Ebonie's behavior prior to being seized, the school's motivation prior to seizing her, and the scope of the limitation all merit further examination with respect to the Fourth Amendment claim.[114] Because these facts could conceivably support Ebonie's assertion that the desk was an unreasonable seizure, the Tenth Circuit should not have granted summary judgment to the school.[115]

B. The Tenth Circuit Improperly Dismissed the Student's Fourteenth Amendment Claim Because the Teachers Exceeded the De Minimis Level of Imposition By Disciplining the Student in a Way that Caused Appreciable Physical Pain.

Furthermore, the Tenth Circuit erred in granting summary judgment on the due process claim.[116] As previously discussed, a movant is only entitled to judgment as a matter of law when there is no genuine issue of material fact with respect to the plaintiff's claims.[117] However, because the facts that the plaintiff in *Ebonie S.* alleged were material and could conceivably support a due process violation, the Tenth Circuit erred in dismissing the Fourteenth Amendment claim.[118]

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111. *See Couture*, 535 F.3d at 1251-52 (implying that the time-outs were an appropriate response to control the student's troublesome behavior).

112. *But see Ebonie S.*, 819 F. Supp. 2d at 1184 (conceding that Ebonie never behaved violently).

113. *See, e.g.*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (affirming that the legal significance of a fact depends on its materiality to the plaintiff's allegations).

114. *See Ebonie S.*, 819 F. Supp. 2d at 1183-84 (conceding that Ebonie was never dangerous, that the school used the desk to threaten her, and that Ebonie was in the desk for excessive time periods).

115. *See Anderson*, 477 U.S. at 249 (maintaining that a movant is not entitled to summary judgment if the non-movant has presented material facts that warrant further analysis).

116. *See* Ebonie S. v. Pueblo Sch. Dist. No. 60, 695 F.3d 1051, 1058 (10th Cir. 2012) (dismissing the Fourteenth Amendment claim due to the lack of an intent to cause harm).

117. *See, e.g.*, Bertsch v. Overstock.com, 684 F.3d 1023, 1028 (10th Cir. 2012) (averring that the summary judgment inquiry is one that determines whether a plaintiff has alleged facts to persuade a reasonable jury).

118. *See Ebonie S.*, 819 F. Supp. 2d at 1184 (admitting that the teachers used the

When the Tenth Circuit granted summary judgment on the due process claim, the court held that Ebonie did not assert adequate facts to support a tenable claim.[119] This judgment was improper because the Tenth Circuit relied heavily on *Ingraham v. Wright* without acknowledging critical differences between the two cases.[120] Further, the Tenth Circuit failed to acknowledge how Ebonie's disabilities could change the analysis.[121]

The Supreme Court, in *Ingraham*, held that a school could use corporal punishment on middle school students.[122] Because the practice of paddling disobedient students was a reasonable aspect of disciplinary authority, the Court held that such force was justifiable.[123] Nevertheless, the Court acknowledged that a teacher could violate a student's due process rights if that teacher exceeds the *de minimis* level of imposition.[124] Specifically, the Court stated that this level is exceeded when a teacher deliberately decides to punish a child in a manner that causes appreciable physical pain.[125]

In *Ebonie S.*, the Tenth Circuit relied on *Ingraham* to conclude that the teachers did not violate Ebonie's rights.[126] This application of *Ingraham* was improper because the teachers in the instant case exceeded the *de minimis* level of imposition by placing Ebonie in the desk with the bar down in a manner that could conceivably result in physical injury.[127]

First, in *Ebonie S.*, the teachers deliberately punished Ebonie for

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desk to regularly threaten Ebonie even though she was never violent).

119. *See Ebonie S.*, 695 F.3d at 1059 (finding that the restraint did not implicate due process interests because it did not rise to the level of a seizure).

120. *Compare* Ingraham v. Wright, 430 U.S. 651, 656-57 (1977) (recounting the practice of paddling students in a way that did not cause any injury), *with Ebonie S.*, 695 F.3d at 1055 (suggesting a connection between the desk and the injury).

121. *See Ebonie S.*, 695 F.3d at 1054 (describing how Ebonie's developmental impairments affected her motor skills and perception of restraint in the classroom).

122. *See Ingraham*, 430 U.S. at 682 (holding that the practice of paddling students was valid because it had a reasonable relationship to educational goals).

123. *See id.* at 676 (finding that the paddling maintained the proper balance of both the student's and school's interests).

124. *See, e.g., id.* at 674 (noting that the *de minimis* level that exceeds due process is when a teacher disciplines a student using force that ultimately causes physical harm).

125. *See id.* (identifying the necessary factors that could allow one to present a valid Fourteenth Amendment claim).

126. *See Ebonie S.*, 695 F.3d at 1058 (analogizing between the paddling in *Ingraham* and the use of the desk to conclude that both measures were valid because they did not cause appreciable pain).

127. *Compare Ingraham*, 430 U.S. at 656-57 (recounting that the paddling consisted of a few blows and did not cause any tangible injury), *with Ebonie S.*, 695 F.3d at 1055 (noting that Ebonie was placed in the desk for excessive time periods and that she subsequently sustained an injury).

misconduct.[128] Because Ebonie's teachers routinely placed her in the desk to intimidate and discipline her, the first element in establishing that a *de minimis* level was exceeded is met.[129] One may argue that the teachers' conduct did not exceed this level since Ebonie's disabilities presented unique challenges to her teachers.[130] However, because Ebonie was placed in the desk for excessive time periods and because several teachers admitted to using the wrap-around desks in order to intimidate the students, the school officials deliberately punished Ebonie in a way that is inconsistent with the holding in *Ingraham.*[131]

Furthermore, the disciplinary practice in the instant case restrained Ebonie because the teachers placed Ebonie in the wrap-around desk with the bar down, thus encumbering her movement.[132] Accordingly, because the desk was equipped with a barrel bolt that prevented Ebonie from moving while seated, the bolt restrained Ebonie.[133] One could argue that Ebonie was not restrained since the restraining mechanisms were not attached to her body.[134] However, because Ebonie had limited motor skills that stymied her ability to escape from the sedentary position, Ebonie was indeed restrained by the wrap-around desk.[135] Thus, the teachers disciplined Ebonie in a manner that is significantly different from that of the students in *Ingraham.*[136]

Lastly, the teachers in *Ebonie S.* inflicted appreciable physical pain on

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128. *See* Ebonie S. v. Pueblo Sch. Dist. No. 60, 819 F. Supp. 2d 1179, 1184 (D. Colo. 2011) (noting that the teachers often used the desks for discipline).

129. *See id.* at 1184 (admitting that the teachers placed Ebonie in the desk to intimidate her).

130. *See Ebonie S.*, 695 F.3d at 1059 (upholding the school's practice because Ebonie's disabilities could frustrate classroom management).

131. *See Ingraham*, 430 U.S. at 656-57 (concluding that the paddling was a minor form of discipline since it was limited to one to five blows). *But see Ebonie S.*, 695 F.3d at 1055 (suggesting that the teachers used the desk excessively since they never needed it for emergencies and often kept Ebonie in the desk with the bar down for over an hour).

132. *See Ebonie S.*, 695 F.3d at 1054-55 (remarking that the bolt restricted Ebonie's movement since it extended across the chair, thus locking Ebonie in one position).

133. *See id.* (noting that the desk restrained Ebonie because the barrel bolt precluded Ebonie from pushing out her chair).

134. *See id.* at 1057 (arguing that Ebonie was not seized because the mechanisms did not physically bind her down, making it possible for her to escape the desk by crawling out).

135. *See id.* at 1054-55 (admitting that Ebonie's poor motor skills prevented her from escaping from the desk).

136. *Contra Ingraham*, 430 U.S. at 676 (approving of the paddling as a generally accepted form of punishment).

Ebonie.[137] In the instant case, the teachers placed Ebonie in the desk with the bar down in order to impede her movement.[138] As previously discussed, Ebonie did not have the motor skills to unfasten the bar or to escape from the desk.[139] Thus, because Ebonie fractured her upper arm after being placed in the desk, the teachers' disciplinary technique inflicted appreciable physical pain.[140] One could argue that the teachers did not inflict appreciable physical pain because they did not intentionally harm Ebonie.[141] However, because the teachers in *Ebonie S.* deliberately disregarded Ebonie's IEP in order to punish her in a way that caused her appreciable physical harm, the teachers' use of the desk fell outside the *de minimis* level of imposition articulated by the *Ingraham* Court.[142]

In *Ingraham*, the teachers did not exceed the *de minimis* level of imposition because the paddling was used sparingly and did not cause any appreciable physical pain.[143] Conversely, in *Ebonie S.*, the teachers frequently placed a student with limited motor skills in a desk that featured a mechanism restricting her movement.[144] Therefore, the Tenth Circuit erred in its application of *Ingraham* because the teachers in *Ebonie S.* exceeded the *de minimis* level of imposition.[145]

The Tenth Circuit erred in granting summary judgment to the school because Ebonie presented a cognizable due process claim.[146] In *Ebonie S.*,

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137. *Compare id.* at 657 (observing that the paddling did not cause any significant physical injury to the students), *with Ebonie S.*, 695 F.3d at 1055 (suggesting that the use of the desk could cause an injury).

138. *See* Ebonie S. v. Pueblo Sch. Dist. No. 60, 819 F. Supp. 2d 1179, 1184 (D. Colo. 2011) (explaining that the teachers used the desk for discipline and punishment).

139. *See Ebonie S.*, 695 F.3d at 1054-55 (noting that Ebonie's disabilities placed obstacles on her ability to move).

140. *See id.* (indicating that the use of the desk with the restraining bar was a probable explanation for Ebonie's arm fracture).

141. *See id.* at 1058 (insisting that a teacher's negligent act should not implicate a cognizable liberty interest).

142. *Contra Ingraham*, 430 U.S. at 676 (affirming that a due process violation may occur when a teacher deliberately disciplines a student and ultimately causes harm).

143. *Compare id.* at 657 (emphasizing that the paddling was minimal because of the small size of the paddle, the infrequency by which students were spanked, and the negligible pain it could cause), *with Ebonie S.*, 819 F. Supp. 2d at 1183-84 (noting that Ebonie was placed in the desk with regularity and that her limited motor skills made it difficult for her to escape).

144. *Contra Ebonie S.*, 695 F.3d at 1055 (noting that the teachers exceeded the limits of Ebonie's IEP by placing her in the desk for non-emergency situations).

145. *See id.* at 1058 (finding that the use of the wrap-around desks was a reasonable disciplinary measure similar to the corporal punishment in *Ingraham*).

146. *See, e.g.*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) (asserting

the teachers disciplined a student with mild learning disabilities excessively in a way that could conceivably cause injury.[147] Since the teachers exceeded the *de minimis* level of imposition, the Tenth Circuit should have conducted further examination into the due process violation because the facts that the plaintiff alleged are material.[148] Accordingly, the school district was not entitled to summary judgment.[149]

C. The School Deprived Ebonie of a FAPE Because Ebonie Did Not Receive a Specialized Education that Addressed Her Needs.

The Tenth Circuit did not rule on the plaintiff's claims under the ADA or the Rehabilitation Act in *Ebonie S.*[150] More importantly, the Tenth Circuit did not consider whether the school's use of the wrap-around desk deprived Ebonie of a free appropriate public education.[151] However, prior to the lower court proceedings, a hearing officer ruled that the school's practice did not satisfy IDEA; thus, the Tenth Circuit erred in failing to consider the merits of the IDEA claim.[152]

According to IDEA, every student with a disability is entitled to a FAPE.[153] The inquiry regarding the appropriateness of the education pertains specifically to the administration of the educational program.[154] An educational program is appropriate when the instruction is specially designed to meet the academic needs of an exceptional student.[155] Because

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that a cognizable claim precludes a grant of summary judgment).

147. *See Ebonie S.*, 695 F.3d at 1059 (holding that the teachers' actions were appropriate in the special education context).

148. *See Ebonie S.*, 819 F. Supp. 2d at 1183 (highlighting the frequency by which the teacher placed Ebonie in the desk).

149. *See* Ingraham v. Wright, 430 U.S. 651, 674 (1977) (declaring that a teacher can violate a student's due process rights when she exceeds the *de minimis* level); *see also Anderson*, 477 U.S. at 249 (affirming that summary judgment is only proper when there are no genuine factual issues).

150. *See Ebonie S.*, 695 F.3d at 1059 (refusing to address the claims under either federal statute because judgment on either would likely intrude on local educational policy).

151. *See id.* at 1054 (expressing a refusal to offer any view on the non-constitutional claims).

152. *See id.* at 1055 (remarking on the administrative law proceedings where the officer ruled that the school's use of the desk violated the statute).

153. *See* Individuals With Disabilities Education Act, 20 U.S.C. § 1412(a)(1)(A) (1978) (mandating that a school must provide all children with an "appropriate education" to receive public funding).

154. *See* 34 C.F.R. § 300.39 (2006) (noting that an appropriate education is specially designed to meet a student's unique needs).

155. *See, e.g.*, 20 U.S.C. § 401(26)(A) (mandating that schools provide students with

an integral component of special education is an IEP, it is imperative that the teachers adhere to the student's academic achievement and annual progress goals.[156]

In *Rowley*, the Supreme Court held that a school's IDEA obligation was to provide the child with a basic floor of opportunity for academic success.[157] The parents wanted the school to provide their deaf daughter with a sign language interpreter for her academic classes.[158] However, because the student was still able to perform well academically, the Court denied the parents' request.[159]

In *Ebonie S.*, the Tenth Circuit refused to address the validity of the school's use of the wrap-around desk under IDEA.[160] However, the school deprived Ebonie of her right to a FAPE because she did not receive specialized instruction tailored to her benefit.[161] Additionally, the teachers deprived Ebonie of a FAPE because they used the desk in a manner that is inconsistent with Ebonie's IEP.[162]

In *Rowley*, the student was able to adjust well to the classroom environment because the school provided her with supplementary services that assisted her with her disability.[163] Conversely, in *Ebonie S.*, Ebonie was routinely placed in the wrap-around desk and often neglected by her

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interpretive, psychological, and speech-language pathology services).

156. *See* § 1414(d)(1)(A)(i)(I)(cc) (emphasizing that an ideal IEP includes alternative assessments for students with special needs to ensure that they are able to progress academically).

157. *See* Bd. of Educ. of Hendrick Hudson Cen. Sch. Dist. v. Rowley, 458 U.S. 176, 201 (1982) (affirming the purpose of the statute as a means of ensuring that handicapped students have access to basic services).

158. *See id.* at 184-85 (recounting how the school refused to provide the student with an interpreter).

159. *See id.* at 210 (affirming the school's refusal to provide the student with an interpreter because the student had received sufficient personalized instruction to meet her needs).

160. *See* Ebonie S. v. Pueblo Sch. Dist. No. 60, 695 F.3d 1051, 1056 (10th Cir. 2012) (declining to offer insight on the legality of the desk in spite of the hearing officer's finding).

161. *Compare* 20 U.S.C. § 1414(d)(A)(i)(II)(1)(mandating for support services to be specially tailored to meet students' needs), *with Ebonie S.*, 695 F.3d at 1055 (remarking that Ebonie was not progressing academically). *But see* 20 U.S.C. § 1412(a)(A)(1) (requiring schools to ensure that the services benefit exceptional students).

162. *See Ebonie S.*, 695 F.3d at 1055 (recounting Mary's dissatisfaction with the school for using the desk for discipline).

163. *See Rowley*, 458 U.S. at 184 (recounting how the student benefited from supplemental services).

teachers.[164] While one could argue that the teachers needed to place Ebonie in the desk to maintain order in the classroom, Ebonie's IEP called for the teachers to remain in close proximity and work with her when she was in the desk.[165] Thus, the teachers deprived Ebonie of a FAPE by consistently failing to provide Ebonie with specialized instruction.[166]

Furthermore, the frequent use of the wrap-around desk did not provide Ebonie with a basic floor of opportunity.[167] In *Rowley*, the school provided the student with a hearing aid and a tutor to assist her in the classroom.[168] In *Ebonie S.*, however, the desk was only to be used to keep Ebonie in her seat.[169] Thus, since the teachers placed Ebonie in the desk to intimidate and discipline her, the school failed to use the desk in a way that provided Ebonie with meaningful educational benefit.[170]

Additionally, the school in *Ebonie S.* deprived Ebonie of a FAPE because the teachers used the desk in a way that did not comply with the IEP.[171] In *Rowley*, the Court acknowledged the importance of the IEP in promoting parental involvement in a student's education.[172] However, the teachers disregarded the IEP when they repeatedly placed Ebonie in the wrap-around desk to punish her for misbehavior.[173] In sum, the school deprived Ebonie of an appropriate education because the teachers violated

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164. *See* Ebonie S. v. Pueblo Sch. Dist. No. 60, 819 F. Supp. 2d 1179, 1183 (D. Colo. 2011) (observing that Ebonie's teachers confined Ebonie to the desk and did not assist her).

165. *See Ebonie S.*, 695 F.3d at 1055 (noting that Mary never consented to using the desk as a disciplinary measure).

166. *See id.* (remarking on Mary's dissatisfaction with her daughter's lack of academic progress and the school's failure to address the matter).

167. *Contra Rowley*, 458 U.S. at 201 (emphasizing Congress's intent for an appropriate education to be one that provides the child with some meaningful benefits).

168. *See id.* at 184 (describing the steps that the school took to permit a deaf student to make academic progress).

169. *See Ebonie S.*, 695 F.3d at 1055 (highlighting that Ebonie's mother had only consented for the use of the desk on rare occasions).

170. *Compare Rowley*, 458 U.S. at 185 (observing the deaf student's satisfactory progress without the interpreter), *with Ebonie S.*, 695 F.3d at 1055 (conceding that Ebonie had been deprived of a free and public education at Bessemer Academy).

171. *See Rowley*, 458 U.S. at 201 (emphasizing the importance of the IEP in the appropriateness inquiry).

172. *See id.* at 184 (relaying the parents' efforts to ensure that their deaf daughter had a hearing aid, a tutor, and a speech therapist during school hours).

173. *See* Ebonie S. v. Pueblo Sch. Dist. No. 60, 819 F. Supp. 2d. 1179, 1184 (D. Colo. 2011) (admitting instances where the teachers used the desk to intimidate Ebonie).

the provisions of her specific IEP.[174]

Lastly, the teachers deprived Ebonie of a FAPE because they undermined her mother's involvement in her education.[175] After Ebonie's mother observed that the teachers were ignoring the IEP, she revoked her approval of the use of the desk.[176] However, the teachers continued to discipline Ebonie through use of the desk, ultimately leading to Ebonie fracturing her arm.[177] While one could argue that the teachers did not deliberately cause Ebonie harm, they nevertheless deliberately disregarded the IEP and undermined the parent's role in the educational process.[178] Accordingly, the Tenth Circuit erred in not addressing the IDEA claim.[179]

IV. POLICY RECOMMENDATION

Although the use of mechanical restraints on exceptional and special needs students is an important education law issue, the absence of any federal law means the subject does not get the attention that it deserves.[180] Prior to the 2009 GAO report, there was no mandatory reporting requirement.[181] Although Congress has made an effort to address the issue, the resulting legislation has proved unsuccessful, and thus these measures can hardly be viewed as progress.[182]

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174. *But see* Individuals With Disabilities Education Act, 20 U.S.C. § 1401(9) (1978) (requiring that educational services be administered in accordance with the IEP).

175. *Contra Rowley*, 458 U.S. at 209 (highlighting the importance of parental involvement in helping exceptional children progress academically).

176. *See* Ebonie S. v. Pueblo Sch. Dist. No. 60, 695 F.3d 1051, 1055 (10th Cir. 2012) (describing Mary's concern regarding her daughter's lack of progress).

177. *See id.* (remarking that the teachers continued to use the desk for a month after Ebonie's mother revoked her consent to the school).

178. *Compare Rowley*, 458 U.S. at 184 (recounting the several meetings that the parents had with the teachers), *with Ebonie S.*, 695 F.3d at 1055 (admitting that the teachers consistently used the desk for unauthorized purposes).

179. *See Ebonie S.*, 695 F.3d at 1054 (declining to rule on the lawfulness of the desk under the ADA or IDEA).

180. *See* JONES & FEDER, *supra* note 2, at 9-10 (noting the lack of federal standards regulating the issue, in contrast to a variety of state regulations).

181. *See id.* at 15 (suggesting how instances of unreported abuse that students endured could be due to the absence of reporting requirements).

182. *Compare* Daniel Stewart, *How Do The States Regulate Restraint and Seclusion in Public Schools? A Survey of the Strengths and Weaknesses in State Laws*, 34 HAMLINE L. REV. 531, 534 (2011) (acknowledging the weak federal policy response in spite of strong awareness efforts made by disability rights advocacy organizations), *with* Nat'l Disability Rights Network, *School Is Not Supposed to Hurt*, 17 (Mar. 2012), http://ndrn.org/images/documents/publications/reports/School_is_Not_Supposed_to_H

Since federal law does not specifically address restraints and seclusion, and because courts are reluctant to interfere with educational policy, efforts should be made on a local level to encourage active participation by parents, teachers, and local legislators in shaping education policy.[183] Specifically, legislators should require parents to meet four times during the school year to discuss appropriate behavioral management techniques within the students' IEPs; given that students are evaluated quarterly, four times a year is optimal.[184] Because an IEP is the blueprint that contains measurable goals for students with disabilities, legislators should require parents to do more to hold teachers accountable for complying with the IEPs.[185]

In *Ebonie S.*, the student's IEP specified for the wrap-around desk to be only used for emergencies and not as a disciplinary technique.[186] Nevertheless, the teachers exceeded the limits of the IEP without any rational justification.[187] Furthermore, after Ebonie's mother revoked her consent of the desk, the teachers persisted in using the desk for non-emergency measures, thus depriving Ebonie of a free and appropriate public education.[188] Accordingly, legislators should require parents to play an active role in devising the IEP and ensuring that teachers are acting in accordance with its terms.[189]

Additionally, legislators should encourage parents to use dispute

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183. *Compare* JONES & FEDER, *supra* note 2, at 10 (attributing the insufficient legal remedies to the absence of specific language in the IDEA), *with* OSBORNE & RUSSO, *supra* note 15, at 200 (proposing that parents should work closely with teachers in developing IEPs).

184. *See* JONES & FEDER, *supra* note 2, at 9 (emphasizing the critical role that IEP teams play in developing appropriate behavioral management techniques for students).

185. *See* OSBORNE & RUSSO, *supra* note 15, at 84 (averring the importance of parental involvement in the IEP process).

186. *See* Ebonie S. v. Pueblo Sch. Dist. No. 60, 695 F.3d 1051, 1055 (10th Cir. 2012) (noting Mary's dissatisfaction with the teachers' use of the desk).

187. *See* Ebonie S. v. Pueblo Sch. Dist. No. 60, 819 F. Supp. 1179, 1185 (D. Colo. 2011) (conceding that the teachers placed students in the desk to intimidate and punish students).

188. *See supra* Part III.C (arguing that the teachers deprived Ebonie of a FAPE because Ebonie did not enjoy any educational benefit from the frequent use of the desk).

189. *Compare* JOSHUA CORRIGAN, INDIVIDUAL WITH DISABILITIES EDUCATION ACT: DEVELOPMENTS 162 (2010) (arguing that an increased parental role will better address students' academic needs), *with* Osborne & Russo, *supra* note 15, at 84 (affirming the importance of the parent's role in the IEP process).

resolution.[190] Because litigation is costly and often an ineffective means of enforcing the rights of special education students, mediation could foster stronger parental collaboration with teachers.[191] Presently, IDEA requires states to offer free mediation services to parents prior to holding a due process hearing.[192] However, because litigation often arises out of minor misunderstandings between parents and teachers, mediation will reduce the amount of litigation in the courts.[193]

In *Ebonie S.*, mediation would have been beneficial since there was clear disagreement between Ebonie's mother and Ebonie's teachers about Ebonie's educational progress.[194] Because the active participation of parents is imperative to strengthen communication between parents and teachers, legislators should take more steps to enforce the mediation requirements of IDEA.[195]

V. CONCLUSION

Although the IDEA was a major milestone in special education law, the deference that courts give to teachers' actions frustrate a student's ability to prevail when she is deprived of a free and appropriate public education.[196] *Ebonie S.* illustrates the insufficient legal recourse available to many students because of judicial reluctance to interfere with education policy.[197]

In *Ebonie S.*, the Tenth Circuit improperly granted summary judgment to

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190. *See generally* OSBORNE & RUSSO, *supra* note 15, at 211 (noting that mediation is a more reasonable alternative to litigation).

191. *See* CORRIGAN *supra* note 189, at 208 (highlighting the inefficiency of litigation and suggesting that parents should take preventative measures).

192. *See* Individual With Disabilities Education Act, 20 U.S.C. § 1415(e)(1) (1978) (establishing mediation procedures between parents and teachers as a procedural safeguard to protect the rights of students).

193. *See generally* OSBORNE & RUSSO, *supra* note 15, at 211 (discussing the advantages of mediation).

194. *See, e.g.*, Ebonie S. v. Pueblo Sch. Dist. No. 60, 695 F.3d 1051, 1055 (10th Cir. 2012) (recounting how even after the mother revoked her consent of the wrap-around desk to school officials, the teachers used the desk).

195. *Compare* CORRIGAN, *supra* note 189, at 149 (asserting that the mediation requirement was added to IDEA in order to strengthen communication lines between parents and teachers), *with* OSBORNE & RUSSO, *supra* note 15, at 84 (proclaiming the importance of the parent's role in special education).

196. *See* Marquez, *supra* note 22, at 632 (attributing the flaws of the adjudicatory process to the difficulty of overcoming the presumption of validity that courts give to schools).

197. *See supra* Part III.C (criticizing the *Rowley* decision as a barrier to enforcing special education rights as it sets a low bar for schools to meet in order to comply with IDEA).

the school district because the school's use of a wrap-around desk on a student who was never dangerous or violent was an unreasonable seizure that deprived the student of due process and of a FAPE.[198] Because of the uncertainty regarding the role of Congress in addressing restraints and seclusion, and the absence of statutory guidelines in the IDEA, this problem may be better resolved on a local level. Specifically, a measure that calls for active parent involvement may be better suited.[199] Perhaps if parents are compelled to hold teachers accountable to the goals of the IEP, then the education that special education students have will ultimately be more appropriate.[200]

198. *See supra* Part III (arguing that the wrap-around desk was an unreasonable seizure and that the Tenth Circuit should have addressed the IDEA claims).

199. *See* OSBORNE & RUSSO, *supra* note 15, at 93 (asserting that because students needs change over the course of the academic year, and that parents need to periodically meet with teachers to discuss the educational progress of their children).

200. *See supra* Part IV (concluding that increased parental involvement will enhance the quality of education for students).