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INCORPORATING FOURTH AMENDMENT STANDARDS IN A MODEL POLICY FOR SCHOOL OFFICIALS' USE OF FORCE TO RESTRAIN & DETAIN STUDENTS

*Sean Croston**

I. INTRODUCTION

On March 5, 2005, the quiet community of Williamsburg, Virginia awoke to find a disturbing story on the front page of their newspaper's local news section. According to the paper:

Police arrested an 8-year-old boy who allegedly had a violent outburst in school, head-butting his teacher and kicking an assistant principal, when he was told he couldn't go outside to play with other students. The 4-foot-pupil was led away from Rawls Byrd Elementary School in handcuffs . . . [after his] chair-tossing, desk-turning outburst¹

That may seem like a "nightmare" scenario for many public school staff members who may want to spend their days as teachers, not as police officers or wardens overseeing violent or emotionally disturbed students. But sometimes it is the reality. That incident is not unique, even in a district as relatively small as the Williamsburg-James City County Public School District ("District"). For example, in one middle-school classroom, an angry student attempted to punch a female teacher in the head, from behind.² In such situations, school staff must consider using some level of force to prevent serious

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1. *8-Year-Old Arrested at School After Outburst*, RICHMOND TIMES-DISPATCH, Mar. 5, 2005, at B1.

2. Interview with Muriel Croston, former teacher, Williamsburg-James City County Public Schools, in Williamsburg, Va. (Sept. 15, 2006).

physical injury or otherwise defuse the crisis.

Like many schools, the District lacked a policy on staff use of force, other than a vague outline of procedures for removing a student from the classroom.³ Unfortunately, the above incidents illustrate the fact that student disruptions sometimes escalate to the point where removal and even stronger measures are necessary.

Staff should be made aware of the full range of options under the law. Yet, the law is changing. In particular, many states have moved to ban corporal punishment, while a growing number of federal courts have turned to the Fourth Amendment when considering the use of force against students. This article analyzes the latest Fourth Amendment case law and standards for “seizures” in formulating a set of comprehensive guidelines to address a broad spectrum of student misbehavior and permissible staff responses, including, in limited instances, the use of force.

II. GENERAL LEGAL CONSIDERATIONS

Under both Virginia state law and federal constitutional law, the controlling standard for the use of force by staff against public school students appears to be “reasonableness.” Virginia law is very clear on the topic and the applicable standard.⁴ On the other hand, federal courts have wrestled with the issue, only recently coming to the conclusion that the Fourth Amendment, and not the Eighth or Fourteenth, applies to these situations. The United States Supreme Court has declared that “[t]he touchstone of the Fourth Amendment is reasonableness,”⁵ and so the limits on staff reactions are similar under state and federal law, although there are some minor distinctions and different points of emphasis.

Unfortunately for public schools, “reasonableness” is perhaps the most facially vague and amorphous standard possible. What is reasonable to one judge may not be reasonable to another, and so courts often disagree on the

3. Williamsburg-James City County Public Schools, *Policies and Procedures Manual – Procedures for the Removal of Students from the Classroom* (Jan. 8, 2002), available at <http://www.wjcc.k12.va.us/content/admin/schoolboard/PolicyManual/j-students/JGCA-R.pdf>.

4. VA. CODE ANN. §22.1-279.1 (2006).

5. United States v. Knights, 534 U.S. 112, 118 (2001).

standard's boundaries and definition.⁶

A. *The Fourth Amendment*

The Supreme Court has emphasized that “the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges.”⁷

Unsurprisingly, the Court initially hesitated to interfere with the operation of public schools, and generally deferred to “the control of state and local authorities.”⁸ In an early case on corporal punishment, the Court held that the Eighth Amendment’s prohibition on cruel and unusual punishment does not apply to public school teachers’ use of force to discipline students.⁹ Twelve years later, the Court said that the Fourteenth Amendment applies when there is a “use of excessive force that amounts to punishment.”¹⁰

Additionally, in several cases, the Supreme Court decided that public school teachers were government agents subject to the limits of the Fourth Amendment.¹¹ The Fourth Amendment declares that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”¹² The Court also held that challenges to the reasonableness of a search conducted by “government agents” fall under the Fourth Amendment’s reasonableness standard and not the Fourteenth Amendment’s protections.¹³ In another case, the Court ruled that a Fourth Amendment “seizure” occurs when state actors or other government agents intentionally use force to acquire “physical control” over their target.¹⁴

In another thread of cases, the Court said that while public school officials have “custodial” powers over students, the

6. See *infra* Part B.

7. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

8. *Goss v. Lopez*, 419 U.S. 565, 578 (1975) (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

9. *Ingraham v. Wright*, 430 U.S. 651, 671 (1977).

10. *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989).

11. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 828 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995); *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985).

12. U.S. CONST. amend. IV.

13. *Conn v. Gabbert*, 526 U.S. 286, 293 (1999).

14. *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989).

students are generally not in legal “custody” throughout the school day, despite compulsory attendance laws.¹⁵ The court reasoned that because students “may nevertheless attend private schools . . . the Fourth Amendment is not implicated. . . .”¹⁶ Therefore, when the Court later implied that the Fourth Amendment governs state actors’ intentional use of force against persons not in custody,¹⁷ one can infer that the Fourth Amendment reasonableness inquiry applies to staff use of force against students in non-punishment situations, such as detentions or restraints to prevent harm to teachers, other students, or themselves. Unfortunately, the Court “has never [directly] addressed whether the Fourth Amendment applies to force used against students.”¹⁸

Several lower federal courts, however, have stepped in to fill the void.¹⁹ As of June 2008, the Third,²⁰ Fourth,²¹ Fifth,²² Seventh,²³ Ninth,²⁴ Tenth,²⁵ and Eleventh²⁶ Circuit Courts of Appeal have applied the Fourth Amendment to staff use of force. Therefore, a majority of the federal appellate courts have directly embraced the application of the Fourth Amendment and its “reasonableness” standard to situations involving the use of force against students in public schools. Furthermore, district courts in the Second,²⁷ Sixth,²⁸ and Eighth²⁹ Circuits

15. See, e.g., *Vernonia*, 515 U.S. at 655.

16. Kathryn R. Urbonya, *Public School Officials’ Use of Physical Force as a Fourth Amendment Seizure: Protecting Students from the Constitutional Chasm Between the Fourth and Fourteenth Amendments*, 69 GEO. WASH. L. REV. 1, 53, 54 (2000) (“School officials . . . effect a Fourth Amendment ‘seizure’ when they use physical force to break up a fight or to stop one from happening. These actions are intentional and result in control over the student [under the *Brower* standard], who would otherwise be at liberty to leave.”).

17. *County of Sacramento v. Lewis*, 523 U.S. 833, 849 n.9 (1998).

18. Urbonya, *supra*, note 16 at 51.

19. See *Jones v. Witinski*, 931 F. Supp. 364, 366–67 (M.D. Pa. 1996) (stating that “[s]ome judges have expressed reservations about the continuing viability” of the Fourteenth Amendment standard for the use of force against students, “rejecting [its] application . . . in favor of the Fourth Amendment’s ‘objective reasonableness’ standard”).

20. *Shuman ex rel. Shertzer v. Penn Manor Sch. Dist.*, 422 F.3d 141, 148 (3d Cir. 2005).

21. *Wofford v. Evans*, 390 F.3d 318, 326 (4th Cir. 2004).

22. *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1079 (5th Cir. 1995).

23. *Wallace v. Batavia Sch. Dist.* 101, 68 F.3d 1010, 1013–14 (7th Cir. 1995).

24. *Doe v. Hawaii Dep’t of Educ.*, 334 F.3d 906, 909 (9th Cir. 2003).

25. *Edwards v. Rees*, 883 F.2d 882, 884 (10th Cir. 1989).

26. *Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295, 1304–05 (11th Cir. 2006).

27. *DeFelice ex rel. DeFelice v. Warner*, 511 F.Supp.2d 241, 248 (D. Conn. 2007);

have applied the Fourth Amendment “reasonableness” standard in similar situations. Without a clear Supreme Court decision on the topic, there are no nationally-binding rules, but the growing trend of case law is crystal clear: under current law, “reasonableness” should be the guiding principle for staff use of force against students.

B. The “Reasonableness” Standard

Courts have struggled to create a consistent Fourth Amendment framework for situations involving public school students. “The unique context of the public schools, in which officials exercise neither criminal law enforcement powers nor parental powers but rather ‘custodial’ and ‘tutelary’ powers . . . complicates the Fourth Amendment analysis of reasonableness.”³⁰ But the Court very recently reaffirmed that, in the Fourth Amendment context, “children assuredly do not shed their constitutional rights . . . at the schoolhouse gate, . . . [although] the nature of those rights is what is appropriate for children in school.”³¹

As the Supreme Court has recognized, the Fourth Amendment concept of “reasonableness” as applied to seizures “is not capable of precise definition or mechanical application” and requires case-by-case judgment.³² “Determining whether the force used to effect a particular seizure is ‘reasonable’ under the Fourth Amendment requires a careful balancing of ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interests at stake.”³³

1. “Reasonableness” factors

The Court indicated that it would consider the “totality of

Bisignano v. Harrison Cent. Sch. Dist., 113 F.Supp.2d 591, 597 (S.D.N.Y. 2000).

28. McKinley *ex rel.* Love v. Lott, No. 1:03-CV-269 Edgar, 2005 U.S. Dist. LEXIS 26866, *13–16 (E.D. Tenn. Oct. 27, 2005).

29. Samuels v. Indep. Sch. Dist. 279, No. 02-474, 2003 U.S. Dist. LEXIS 23481, *10–12 (D. Minn. Dec. 8, 2003).

30. Kathryn R. Urbonya, *Determining Reasonableness Under the Fourth Amendment: Physical Force to Control and Punish Students*, 10 CORNELL J. L. & PUB. POLY 397, 424 (2001).

31. *Morse v. Frederick*, 127 S. Ct. 2618, 2627–28 (2007) (citations omitted).

32. *Graham*, 490 U.S. at 396 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

33. *Id.* (quoting *U.S. v. Place*, 462 U.S. 696, 703 (1983)).

the circumstances” in determining whether a government actor’s use of force was reasonable.³⁴ The Court also suggested three (non-exclusive) factors that could be particularly relevant to this balancing test.³⁵ As applied to a public school setting, these factors would be: (1) the severity of the student’s disruption; (2) the danger presented by the student’s behavior; and (3) whether the student actively resisted the staff member’s authority.

Additionally, “[t]he ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable [staff member] on the scene, rather than with the 20/20 vision of hindsight.”³⁶ The specific staff member’s “underlying intent or motivation” would be irrelevant in this objective determination of reasonableness.³⁷

Under the Supreme Court’s precedent, staff apparently do not need to use the “least intrusive” or minimal amount of force to calm the situation. Any use of force must simply be reasonable under the circumstances.³⁸ Some schools, however, may want to encourage less intrusive means in order to limit potential lawsuits, even if they would not be held liable.

2. *Obligations to students*

Within the last decade, the Supreme Court also clarified that while “schoolchildren do not shed their constitutional rights when they enter the schoolhouse, Fourth Amendment rights . . . are different in public schools than elsewhere; the ‘reasonableness’ inquiry cannot disregard the schools’ custodial and tutelary responsibility for children.”³⁹ Likewise, the Court emphasized that “[w]ithout first . . . maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern.”⁴⁰ The

34. *Id.* (quoting *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985)).

35. *Id.*

36. *Id.*

37. *Id.* at 397.

38. *Vernonia*, 515 U.S. at 656.

39. *Earls*, 536 U.S. at 829–30 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); *Vernonia*, 515 U.S. at 656).

40. *Id.* at 831 (quoting *T.L.O.*, 469 U.S. at 350 (Powell, J., concurring)).

Court also cautioned that “[s]ecuring order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults.”⁴¹ Because of these institutional considerations, in some situations schools may have more leeway than other state officials possess when dealing with private citizens.

On the other hand, scholars have pointed out that students’ interest in personal security may be even greater than their interest in privacy, also protected by the Fourth Amendment.⁴² However, schools can assert their own, equally important interests. Staff members’ “use of physical force is often necessary to restore order and protect others from harm,”⁴³ and therefore “the use of force to control is a key function of public school officials’ custodial powers as schools cannot accomplish their educational mission without effective physical control of their student population.”⁴⁴

3. *Balancing the use of force*

The Supreme Court has supplied a general framework for judging the use of force by balancing school and student interests. Several lower federal courts have combined these elements and directly determined the reasonableness of staff use of force against students.

For example, the Fourth Circuit recently held that seizures of students must be “reasonably related in scope to the circumstances which justified [it] in the first place.”⁴⁵ In particular, the court cited the school’s “need to protect those at school from bodily harm.”⁴⁶ The court also cautioned that staff “must have the leeway to maintain order on school premises and secure a safe environment in which learning can flourish. Over-constitutionalizing disciplinary procedures can undermine educators’ ability to best attain these goals.”⁴⁷ Although the court spoke of “disciplinary procedures” rather than mere restraints, the guiding principles are similar. The

41. *Id.*

42. *See, e.g., Urbonya, supra* note 30, at 447.

43. *Id.* at 448–49.

44. *Id.*

45. *Wofford v. Evans*, 390 F.3d 318 at 326–27 (citing *T.L.O.*, 469 U.S. at 341).

46. *Id.* at 327.

47. *Id.* at 321.

court emphasized the schools' interest in avoiding violence and bodily harm to both students and staff, and justified staff actions taken to avoid injury from offensive student actions, especially those involving illegal acts or resistance to staff authority.

Several other federal courts have applied the Fourth Amendment's reasonableness standard to staff use of force on students. In fifteen cases, the courts held that staff restraints were unreasonable in only three situations, each involving physical restraints in response to minor student disruptions that did not threaten serious physical injury.⁴⁸ Yet courts have also upheld staff use of restraints. For example, the Seventh Circuit considered a case where a teacher had grabbed a 16-year-old student's arm to pull her out of class after she took part in a loud verbal altercation with another student and refused to follow the teacher's directions to sit down and be quiet. The court found the teacher's actions reasonable under the Fourth Amendment.⁴⁹

While a number of federal cases deal with the use of various types of physical restraints, few cases directly analyze public schools' use of in-school suspension or other types of extended detention under the Fourth Amendment. School districts commonly utilize extended detentions, which differ from short investigatory or disciplinary detentions and from the use of restraints. Students who receive in-school suspension "are typically rebellious children who defy authority To maintain authority in the classroom, teachers . . . remove these students from class."⁵⁰ For example, in Williamsburg, the District described what amounts to extended detention as the removal of a student "from the classroom to an alternative setting in which the student will continue to receive an education and will be supervised by another staff member" as a result of "serious incidents that significantly disrupt the learning environment."⁵¹

48. *Gray v. Bostic*, 458 F.3d 1295, 1306 (11th Cir. 2006); *Doe v. Hawaii Dep't of Educ.*, 334 F.3d 906, 910 (9th Cir. 2003); *Samuels v. Indep. Sch. Dist.* 279, No. 02-474, 2003 U.S. Dist. LEXIS 23481, at *15 (D. Minn. Dec. 8, 2003).

49. *Wallace v. Batavia Sch. Dist.* 101, 68 F.3d 1010, 1015 (7th Cir. 1995).

50. Brent E. Troyan, Note, *The Silent Treatment: Perpetual In-School Suspension and the Education Rights of Students*, 81 TEX. L. REV. 1637, 1638 (2003).

51. *Policies and Procedures Manual - Procedures for the Removal of Students from the Classroom*, *supra* note 3.

Legally, the first question is whether extended detentions are “seizures” under the Fourth Amendment. The Fourth Circuit held that school staff seized a student by detaining her in the office for ninety minutes.⁵² Likewise, the Third Circuit found that staff seized a student by detaining him for four hours in a school conference room.⁵³ In another case, a federal district judge in Kansas ruled that staff seized two students by placing them in tiny in-school suspension closets.⁵⁴ Finally, a federal district judge in California agreed that staff seized a student when they detained him in the school office for three hours.⁵⁵ Having established that extended detentions are seizures, the crucial follow-up question is whether they are “reasonable” under the Fourth Amendment.

Federal courts have uniformly condoned staff use of temporary detentions to maintain order and control of the educational environment in response to illegal acts. For example, the Fourth Circuit held that a “school official may detain a student if there is a reasonable basis for believing that the pupil has violated the law”⁵⁶ The court also noted that school officials’ use of a ninety-minute detention was reasonable given reports of a gun on school grounds.⁵⁷ In a similar case, the Third Circuit found a four-hour detention reasonable when necessary to investigate alleged illegal acts during a class.⁵⁸ Furthermore, the Tenth Circuit found that staff reasonably seized a student by removing the student from class and holding him in the office for twenty minutes to investigate a bomb threat.⁵⁹

At the trial court level, a federal judge in Tennessee ruled that a 16-year-old student had been reasonably seized under the Fourth Amendment when staff removed him from class and escorted him to the office because he smelled of marijuana.⁶⁰

52. *Wofford v. Evans*, 390 F.3d 318, 325 (4th Cir. 2004) (see also *Wofford v. Evans*, No. 7:02-CV-00762, 2003 WL 24254757 at *3 (W.D. Va. Sept. 8, 2003) (describing the facts of the case)).

53. *Shuman*, 422 F.3d at 147.

54. *Hayes v. Unified Sch. Dist.* 377, 669 F. Supp. 1519, 1528 (D. Kan. 1987), *rev’d on other grounds*, 877 F.2d 809 (10th Cir. 1989).

55. *Bravo v. Hsu*, 404 F. Supp. 2d 1195, 1202 (C.D. Cal. 2005).

56. *Wofford*, 390 F.3d at 326.

57. *Id.* at 321.

58. *Shuman*, 422 F.3d at 149.

59. *Edwards v. Rees*, 883 F.2d 882, 884 (10th Cir. 1989).

60. *McKinley ex rel. Love v. Lott*, 2005 US Dist. LEXIS 26866, at *16 (E.D. Tenn.

Likewise, a federal judge in California decided that a three-hour detention was reasonable given other students' allegations that the detained student possessed marijuana.⁶¹ Similarly, a federal judge in Pennsylvania found it reasonable for staff to escort a student to the office and temporarily detain him there after the student had picked up a chair and threatened a teacher.⁶² Generally, federal courts can be expected to look favorably upon detentions where allowing a student "to follow her normal school-day routine would . . . [pose an] unacceptable risk" of danger or disruption.⁶³

Courts also generally defer to staff decisions to place students in extended detention for more ordinary disruptions. When a school placed a sixth grade student in a supervised room for fifty minutes after the student misbehaved and repeatedly disobeyed staff, the Fifth Circuit ruled that the staff had seized the student under the Fourth Amendment, but stated that it was perfectly reasonable under the circumstances.⁶⁴ In another typical case involving a minor disruption, a federal judge in Minnesota agreed that staff seized a student when they escorted him to the school office, but ruled that the seizure was reasonable because the student had engaged in a loud argument with another student.⁶⁵ A federal judge in Kansas held that staff could reasonably place students in in-school suspension after the students argued with staff and threw snowballs.⁶⁶ However, another federal district court declared that the Kansas decision should be limited to its facts, and should not be considered a "blanket endorsement" of in-school suspension or extended detention in "time out rooms."⁶⁷ As with restraints, the reasonableness of extended detentions will still depend on the facts of the situation.

In the general Fourth Amendment context, the Supreme Court admitted that it "would hesitate to declare a police

Oct. 27, 2005).

61. *Bravo*, 404 F. Supp. 2d at 1203.

62. *Valentino C. v. Sch. Dist. of Philadelphia*, No. 01-2097, 2003 US Dist. LEXIS 1081, at *21 (E.D. Pa. Jan. 23, 2003).

63. *Wofford*, 390 F.3d at 327.

64. *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1079-1080 (5th Cir. 1995).

65. *Samuels v. Indep. Sch. Dist. 279*, No. 02-474, 2003 U.S. Dist. LEXIS 23481, at *9, *15 (D. Minn. Dec. 8, 2003).

66. *Hayes v. Unified Sch. Dist. 377*, 669 F. Supp. 1519, 1529 (D. Kan. 1987), *rev'd on other grounds*, 877 F.2d 809 (10th Cir. 1989).

67. *Rasmus v. Arizona*, 939 F. Supp. 709, 715 (D. Ariz. 1996).

practice of long standing 'unreasonable' [regarding the use of force] if doing so would severely hamper effective law enforcement."⁶⁸ Presumably, federal courts will utilize similar justifications in upholding common educational "seizures" like detentions and in-school suspensions, which are often viewed as necessary for effective staff control over the classroom environment, even if such tactics might be unreasonable outside the school setting.

III. SUGGESTED POLICY

The table below sets forth a model policy for the use of force to restrain and detain public school students in troublesome situations. A detailed section-by-section explanation follows the policy, which is only intended to serve as a guide to stimulate policymakers.

A.General Scope:

This school district authorizes staff members to apply reasonable force through restraints and detentions to bring disruptive students under control and otherwise resolve disturbances and dangerous situations in the school. Reasonableness will depend on staff perception of danger at the time of the incident. Staff may never use restraints for the purpose of inflicting pain or otherwise punishing students. This policy does not apply to situations involving special education or disabled students.

B.Definitions

1.Corporal punishment: Corporal punishment entails the unlawful infliction of, or causing the infliction of, physical pain on a student as a means of discipline. Corporal punishment does not include physical pain, injury, or discomfort caused by the use of reasonable physical contact or other actions designed to maintain order and control, quell a disturbance which threatens damage to property or physical injury to persons, or obtain possession of dangerous objects or controlled

68. *Tennessee v. Garner*, 471 U.S. 1, 19 (1985).

substances and related paraphernalia.

2. *Staff*: Staff includes all teachers, principals, and other school employees based in the public schools.
3. *Student Disruptions – Level 1 (D1)*: The essential defining element of Level 1 disruptions is their physically nonviolent and non-threatening nature. The most common example involves verbal disturbances from minor insubordination to yelling and using profanity which poses no immediate threat of serious property damage or personal injury. This category also embraces acting-out behavior, from making faces to causing minor property damage, including pencil-breaking and other attention-getting conduct.
4. *Student Disruptions – Level 2 (D2)*: Level 2 disruptions include intermediate disturbances involving:
 - a. substantial property destruction which has independent financial consequences but does not pose a risk of serious personal injury;
 - b. minor physical horseplay that does not pose a risk of serious personal injury;
 - c. suspicion of possession of dangerous items or controlled substances and related paraphernalia; or
 - d. refusals to submit to staff verbal control methods or temporary exclusion (R1).
5. *Student Disruptions – Level 3 (D3)*: Level 3 disruptions are limited to student behavior that causes or is imminently likely to cause serious personal harm to the student, staff, or others.
6. *Staff Reactions – Level 1 (R1)*: Level 1 reactions include both minor restraints and detentions. Level 1 restraints consist of verbal control techniques. Verbal control involves staff members' use of plain language, voice tone and volume to elicit compliance and cooperation from the student. Common examples of verbal control include orders to sit down or be quiet. Level 1 detentions involve temporary exclusion from the classroom, for up to one hour. Staff may order or escort a student out of class to an area with supervisory staff, where the student is not receiving

instruction and has an opportunity to regain self-control. Common examples of temporary exclusion include lunch detention and “time out” detention in the school office or another designated room.

7. Staff Reactions – Level 2 (R2): Level 2 reactions consist of intermediate restraints and detentions. Level 2 restraints encompass the use of a variety of touch control techniques to force compliance from a student without causing harm. For example, staff may utilize a firm grip on a student’s arm or a gentle prod to move the student in a desired direction, or physically separate students in hostile situations. Level 2 detentions involve extended seclusion from the classroom, for periods over one hour. Staff may place students in a supervised room and prevent them from leaving for a substantial period of time, to provide a more controlled environment for learning and prevent the student from further disrupting the regular classroom. Common examples of extended seclusion include in-school suspension and lengthy detention.

8. Staff Reactions – Level 3 (R3): Level 3 reactions are limited to restrictive bodily restraints, which involve forceful physical interventions or holds by trained school officials intended to lead to complete power over a student’s movements in order to prevent the student from engaging in behavior that risks serious personal injury. Staff use of full restraints may result in lesser injuries, but the intentional infliction of physical pain or harm to a student is corporal punishment and is absolutely unlawful under all circumstances.

C. Procedures

1. General Policy for Staff Reactions:

- a. This policy prohibits staff from applying corporal punishment.
- b. As a general guideline, staff may not use restraints or detentions in response to student misconduct if the level of their reaction is higher than the level of the student’s disruption. There are no minimum reaction levels, so staff are free to respond to

disruptive students by applying lower-level reactions, if they deem it reasonable under the circumstances:

<u>Student Disruption Level</u>	<u>Appropriate Staff Reaction Levels</u>
D1	R1
D2	R1 or R2
D3	R1 or R2 or R3

2.Presumption of Unreasonableness for Certain Staff Reactions:

Staff reactions at any level are generally unreasonable if they involve:

- a.detaining a student in a room where the student would not be able to leave if supervising staff became incapacitated;
- b.depriving a student of necessities, including:
 - i. medication
 - ii. proper ventilation or illumination;
 - iii. food or liquid when customarily served; or
 - iv. occasional use of restroom facilities;
- c.throwing, punching, kicking, burning, shocking, violently shaking, or cutting a student;
- d.interfering with a student’s breathing or speaking; or
- e.threatening a student with a deadly weapon.

3.Limitations on Level 3 Restraints:

- a.Staff should receive training before administering Level 3 restraints.
- b.If possible, staff should seek to administer Level 3 restraints in the presence of an adult witness.
- c.Staff administering Level 3 restraints should discontinue them as soon as possible, or if the student exhibits signs of significant physical distress.

4.Aggravating and Mitigating Factors For Restraints:

- a.Factors which tend to make staff restraints more unreasonable include:

- i. the size and age of the student (younger and/or smaller); or
 - ii. injury to the student *beyond* temporary marks or momentary minor pain.
- b. Factors which tend to make staff restraints more reasonable include:
- i. the size and age of the student (older and/or larger); or
 - ii. previous unsuccessful staff attempts to use other methods of resolving the situation before resorting to restraints.

A. *Scope of the Policy*

The model policy attempts to quantify and compare different degrees of disruptive student actions (as represented by the “D” scale) and staff reactions (represented by the “R” scale), from the most basic stages of non-threatening verbal disturbances and verbal controls to the most extreme stages of serious physical threats and bodily restraints.⁶⁹

It is impossible to predict the intensity of future student disruptions. Therefore, the policy incorporates a broad range of staff reactions. A policy mandating warnings first, followed by orders, temporary exclusion, guiding touches, extended seclusion, and physical restraint, or a policy ignoring the possible necessity of any of the previous reactions would not work. Students do not always escalate their disruptive acts on a smooth, predictable course. While staff gain clarity from having a set of fairly predictable responses, they should be able to choose from a range of appropriate reactions using a variety of levels of force, depending on the situation and the student’s apparent threat level.

The policy also specifies certain staff reactions that are nearly always unreasonable because they would be cruel or excessive whatever the circumstances of the student disruption. Staff may not resort to these reactions without some special, compelling justification. Next, the policy sets

69. See David Frisby, *Education Practices Commission Responses to Excessive Force: Establishing Criteria to Define Reasonable Force*, 36(1) FLA. J. EDUC. RES. (1996) available at http://www.coedu.usf.edu/fjer/1996/1996_Frisby.htm (discussing useful sample scales for the use of force in schools).

several guidelines for staff use of restrictive bodily restraints, which includes the most serious and dangerous reactions allowed under the policy. Finally, the last part of the policy recognizes some degree of ambiguity or “gray areas” between the broad levels shown by the D and R scales. Staff should take account of exceptional individual factors that may make an otherwise-reasonable reaction unacceptable or an otherwise-unreasonable reaction acceptable under the policy.

B. Definitions

As the example community of this article is Williamsburg, Virginia, the model policy defines “corporal punishment” to closely track the Virginia use-of-force statute, which prohibits the practice.⁷⁰ Like many others, Virginia’s law specifically outlaws the use of force on students to inflict pain, but allows staff to use a reasonable level of force under the circumstances to maintain order and control of the educational environment.⁷¹ In applying a “reasonableness” standard, the definition closely tracks recent federal court standards for Fourth Amendment seizures, as will be noted later. Thus, the definition of corporal punishment is convenient to the extent that limits on the use of force are very similar to constitutional limits.

Policymakers might believe that use-of-force standards apply only to teachers, but the law (and therefore this policy) is not specific to teachers, applying equally to principals, secretaries, resource officers, and other school personnel. This model policy’s definition of “staff” thus covers a broad range of school employees who could foreseeably face scenarios where they might have to choose whether (and to what degree) they should use force against disruptive students in order to best control and calm a situation.

The scale for disruptive student acts (the “D-Scale”) and its analogue, the staff reactions scale (“R-Scale”) also appear in the definitions section, and these together form the heart of the model policy.⁷² This scheme should guide staff facing disruptive

70. VA. CODE ANN. § 22.1-279.1 (2008).

71. *Id.*

72. The specific definitions were generated using suggestions from multiple sources. *See* WASH. REV. CODE § 9A.16.100 (2008) (detailing well-developed state law regarding the use of unreasonable force in schools); *see also infra* Part IV (listing state and federal court interpretations of reasonable force); 603 MASS. CODE REGS. 46.04–46.05 (2008) (giving in-depth rules for the application of physical restraints); Virginia

than allowed under the general guidelines. However, staff may never attempt to discipline students by intentionally inflicting pain.

D. Presumptions of Unreasonableness

The policy follows suggestions from the Virginia Department of Education⁷³ and several other jurisdictions⁷⁴ that some staff reactions should be presumed unreasonable because they will very rarely, if ever, be reasonably necessary to control a situation. Staff members should not need to place students alone in a room where they would be unable to leave if supervising staff became incapacitated, deprive students of medication or proper ventilation, throw, punch, kick, burn, shock, violently shake or cut students, interfere with a student's breathing, or threaten students with a deadly weapon. Staff employing such reactions would probably violate criminal laws regarding assault and corporal punishment or a number of health and safety regulations (such as fire codes) and could create potentially dangerous if not life-threatening situations, which would almost certainly lead to considerable litigation. On the other hand, depriving students of proper illumination, food or drinks when customarily served, or occasional use of restroom facilities will usually be unreasonable because these reactions seem cruel or unnecessary for regaining order and control in most situations.

These staff reactions are only *presumed* unreasonable, however; no hard rules (other than the bar on corporal punishment) totally bind staff. Applying the holding of two Fourth Amendment cases involving the police search of a home to a school context, if a staff member can show he or she faced "exigent circumstances"⁷⁵ with a "compelling necessity for immediate action,"⁷⁶ an otherwise unreasonable use of force may be justifiable. For example, a staff member may need to temporarily hold an out-of-control student in an unlighted room at a field trip location, or might have to throw, punch, or kick a larger, violent student in self-defense. Yet such reactions should definitely be the exception rather than the rule.

73. *VDE*, *supra* note 72.

74. See WASH. REV. CODE § 9A.16.100 (2008); V.I. CODE ANN. tit. 14 § 507 (2008).

75. *Groh v. Ramirez*, 540 U.S. 551, 559 (2004).

76. *United States v. Wiggins*, 192 F. Supp. 2d 493, 498 (E.D. Va. 2002).

E. Limitations on Restraints

When staff members use physical restraints, they face greater potential dangers;⁷⁷ hence these reactions are the most prone to litigation. Furthermore, courts have often found that the restraints used by school officials are unreasonable (see Part V), although lesser levels of force would also be unreasonable under some circumstances. Therefore, all staff members should receive training before attempting to administer physical restraints.

If they are untrained, staff should seek help from trained individuals, such as police, resource officers, or disciplinary officials. In the same vein, any staff member applying physical restraints should try to do so in the presence of an adult witness, who could both help monitor the situation and assist with any future litigation. Finally, staff administering physical restraints should only do so for as long as it appears necessary, to prevent serious injuries to the student.

F. Aggravating and Mitigating Factors

Several factors may serve to aggravate or mitigate a reasonableness finding. For example, the size and age of the student can work as either an aggravating or a mitigating factor. It can become a mitigating factor when, as previously mentioned, the student is larger and older. The larger and older a student is, the more reasonable most uses of force become, because such students are often more difficult to control when disruptive. This can work in the staff member's favor when weighing the reasonableness of a reaction. Another mitigating factor for staff would be prior, unsuccessful

77. In Kalamazoo, Michigan, a 15-year old student died after being restrained for an hour and a half, in a prone position, by four staff members who ignored his apparent need for medical attention. His family recently settled a \$25 million lawsuit against the school for \$1.3 million. Lynn Turner, *Settlement in Parchment Student Death*, Kalamazoo Gazette (Kalamazoo, Mich.), June 9, 2006. In response, local legislators proposed an extensive bill in the Michigan legislature stating, among other provisions, that "physical restraint shall only be used on a pupil in an emergency to control unpredictable, spontaneous behavior by that pupil that poses a clear and present danger of serious physical harm to that pupil or others in the school community and cannot be immediately prevented by a response less restrictive than the temporary application of physical restraint." H.B. 4255, 2005 Leg. (Mich. 2005). The bill also mandated training all staff in the use of restraints, required restraints to end as soon as practicable and a medical professional's approval for any restraints lasting over 30 minutes. *Id.*

attempts to resolve the situation without the use of force, which tends to show that force was then necessary and reasonable. A lack of tangible injuries to the student (beyond temporary marks and minor pain) will also be a factor in the staff member's favor. However, these factors are only mitigating and will not by themselves lead to a finding of reasonableness.

Likewise, some aggravating factors may indicate, though inconclusively, that a staff reaction amounted to an unreasonable use of force. These include restraints involving younger or smaller students whose disruptive acts could be controlled without serious force. Although unstated in the policy, male staff members using force on female students could also face more scrutiny in the current atmosphere of prevalent sexual harassment claims. Student injuries will also be relevant. Adjudicators may also look more closely at cases involving special education or disabled students who may be more readily harmed by the use of force (yet whose actions are also more unpredictable and likely to require restraints). Because of the legal complexities, schools may wish to apply separate policies regarding the use of force on these students.

IV. CONCLUSION

School staff are all too often faced with the challenge of disruptive or dangerous students. Appropriate responses are necessary to protect school staff and students, maintain a safe learning environment, and avoid possible litigation. The United States Supreme Court has not explicitly determined that staff responses to such students should be limited by the Fourth Amendment, but federal circuit courts' decisions have indicated that the Fourth Amendment's "reasonableness" clause is the applicable standard in these situations.

The courts have concluded that reasonableness is determined on a case-by-case basis, where the student's Fourth Amendment interests are weighed against the school's interests. This standard is applied in the context of what is appropriate for students. Courts have also indicated that these cases should be viewed from the perspective of a reasonable staff member in the heat of the moment rather than through the lens of 20/20 hindsight.

However, when a staff member is faced with a disruptive or

dangerous student, it may be difficult to determine what an appropriate and reasonable response would be. Therefore, school districts should adopt policies to help staff remain within appropriate boundaries. Such policies should include clear guidelines to determine the scope of an appropriate response to a disruptive student. It is difficult to predict the intensity of a disruption, so staff members need a broad range of appropriate responses which can be employed depending on the level of disruption.

Additionally, as courts have indicated, reasonableness depends upon a totality of the circumstances. Therefore, staff members need training and options in how to respond appropriately to disruptions. As school districts adopt such policies, fewer students will have their rights violated, fewer staff members and students will be injured in disruptive situations, there will be less litigation, and ultimately, it will foster a safer learning environment in the nation's schools.

V. APPENDIX

Federal Court Decisions on Fourth Amendment Reasonableness of Student Seizures

Case	Description of the Litigated Situation	Student Disruption Level	Staff Reaction Level	Court's Ruling on the Seizure
Stockton v. City of Freeport, 147 F. Supp. 2d. 642 (S.D. Tex. 2001).	High school students seized, handcuffed, and detained until parents arrived after staff found threatening letter at school three days after Columbine school shootings.	D3	R3	Reasonable
Milligan v. City of Slidell, 226 F.3d 652 (5th Cir. 2000).	Staff detained high school students in principal's office for fifteen minutes to prevent looming fight.	D3	R1	Reasonable

Valentino C. v. Sch. Dist. of Phila., No. 01-2097, 2003 U.S. Dist. LEXIS 1081 (E.D. Penn. 2003).	Staff escorted a middle school student to the office after student picked up chair and threatened teacher.	D3	R1	Reasonable
Gray v. Bostic, 458 F.3d 1295 (11th Cir. 2006).	Staff handcuffed 9-year-old student painfully after she argued with a teacher and stated a non-serious threat toward the teacher, without posing any serious risk of harm.	D2	R3	Unreasonable
Doe v. Haw. Dep't of Educ., 334 F.3d 906 (9th Cir. 2003).	Staff taped 8-year-old student to a tree after student horsed around and refused to stand still, but posed no threat to others.	D2	R3	Unreasonable

Wofford v. Evans, 390 F.3d 318 (4th Cir. 2004).	Staff detained and questioned 10-year-old in office for ninety minutes after reports of a gun on school grounds.	D2	R2	Reasonable
Shuman v. Penn Manor Sch. Dist., 422 F.3d 141 (3d Cir. 2005).	Staff detained high school student in conference room for four hours, allowing the student to leave for lunch/drinks, during investigation of alleged illegal activity.	D2	R2	Reasonable
Wallace by Wallace v. Batavia Sch. Dist., 68 F.3d 1010 (7th Cir. 1995).	Staff grabbed 16-year-old student's arm to pull her out of class after she took part in loud verbal altercation, refusing to sit or be quiet.	D2	R2	Reasonable

Bravo v. Hsu, 404 F. Supp. 2d 1195 (C.D. Cal. 2005).	Staff detained 8 th grade student for three hours in the office after other students claimed she used and possessed marijuana.	D2	R2	Reasonable
Hayes v. Unified Sch. Dist., 669 F.Supp. 1519 (D. Kan. 1987).	Staff placed two middle school students in supervised in-school suspension after throwing snowballs and challenging staff authority.	D2	R2	Reasonable
Hassan v. Lubbock Indep. Sch. Dist., 55 F.3d 1075 (5th Cir. 1995).	Staff placed sixth grade student in supervised room for fifty minutes after misbehaving and repeatedly disobeying staff.	D2	R1	Reasonable

Edwards v. Rees, 883 F.2d 882 (10th Cir. 1989).	Staff removed junior high school student from class, held student in office for twenty minutes for investigation of a bomb threat.	D2	R1	Reasonable
McKinley v. Lott, No. 1:03-cv-269 Edgar, 2005 US Dist. LEXIS 26866 (E.D. Tenn. 2005).	Staff removed 16-year-old student who smelled of marijuana from class and escorted the student to the office.	D2	R1	Reasonable
Samuels v. Indep. Sch. Dist. 279, No. 02-474, 2003 US Dist. LEXIS 23481 (D. Minn. 2003).	Staff ordered handcuffing of ninth grade student after loud verbal altercation with another student.	D1	R3	Unreasonable
(Same as above)	Staff escorted above student to office.	D1	R1	Reasonable

Mislin v. City of Tonawanda Sch. Dist., No. 02-CV-273S, 2007 US Dist. LEXIS 23199 (W.D. N.Y. 2007).	Staff removed high school student from class and required him to sit in school office for twenty minutes to discuss his involvement in reported incidents of racial harassment.	D1	R1	Reasonable
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