

# Recent Changes to the Law Regarding Seclusion and Restraint

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### A Word of Caution

No two legal matters are exactly alike. This material is designed to provide educators with information about recent changes to the State law and regulations pertaining to seclusion and restraints. This material does not cover every aspect of the law, and you are strongly encouraged to consult with your district's legal counsel regarding a specific case.

## **I. Overview**

This material is designed to provide educators with information about recent changes to the State law and regulations pertaining to seclusion and restraints. This material does not cover every aspect of the law, and you are strongly encouraged to consult with your district's legal counsel regarding a specific case.

## **II. Legislative History**

In 2010, the New Hampshire legislature adopted a comprehensive law, "Limiting the Use of Child Restraint Practices in Schools and Treatment Facilities." See RSA 126-U. The law was adopted in response to nationwide concerns regarding the use of restraints by schools and other facilities. See e.g., Letter to Dodd, 55 IDELR 20 (U.S. DOE Dec. 8, 2009) (requesting that Congress consider the following principles in the context of any legislation pertaining to restraint and seclusion: "Behavioral interventions must be consistent with the child's right to be treated with dignity and to be free from abuse, regardless of the child's educational needs or behavioral challenges; Every instance of physical restraint and seclusion should be appropriately monitored to ensure the safety of the child, other children, teachers, and other personnel; Teachers and other personnel should be trained regularly on the appropriate use of restraint and seclusion and the use of effective alternatives, such as positive behavioral interventions and supports; Parents should be informed of the policies on restraint and seclusion at their child's school or other educational setting, as well as applicable State or local laws; Parents should be notified promptly following the use of restraint or seclusion and any such use should be documented in writing; policies regarding the use of restraint and seclusion should be reviewed regularly and updated as appropriate; Legislation should apply to all children, not just children with disabilities; Legislation should promote the collection of data that would enable teachers, staff, and other educational personnel to understand and implement the preceding principles").

This year, the law underwent comprehensive amendments, which are discussed in these materials, below. The amendments take effect on September 30, 2014.<sup>1</sup>

## **III. The Law Pertaining to Restraint and Seclusion, RSA 126-U**

### **A. Definitions**

RSA 126-U:1 contains seven definitions, including the following:

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<sup>1</sup> Unless otherwise noted, all references to RSA 126-U in this material pertain to the statute, as amended by the Legislature in 2014. See N.H. General Court, Ch. 324 (effective Sept. 30, 2014).

- Child: “A person who has not reached the age of 18 years and who is not under adult criminal prosecution or sentence of actual incarceration resulting therefrom, either due to having reached the age of 17 years or due to the completion of proceedings for transfer to the adult criminal justice system under RSA 169-B:24, RSA 169-B:25, or RSA 169-B:26. ‘Child’ also includes a person in actual attendance at a school who is less than 22 years of age and who has not received a high school diploma.”
- Director: “Refers to the program director, school principal, or other official highest in rank and with authority over the activities of a school or facility” (emphasis added).
- Restraint: “Bodily physical restriction, mechanical devices, or any device that immobilizes a person or restricts the freedom of movement of the torso, head, arms, or legs. It includes mechanical restraint, physical restraint, and medication restraint used to control behavior in an emergency or any involuntary medication. It is limited to actions taken by persons who are school or facility staff members, contractors, or otherwise under the control or direction of a school or facility.”
  - Medication Restraint: “Occurs when a child is given medication involuntarily for the purpose of immediate control of the child’s behavior.”
  - Mechanical Restraint: “Occurs when a physical device or devices are used to restrict the movement of a child or the movement or normal function of a portion of his or her body.”
  - Physical Restraint: “Occurs when a manual method is used to restrict a child’s freedom of movement or normal access to his or her body.”
  - Restraint shall not include:
    - “Brief touching or holding to calm, comfort, encourage, or guide a child, so long as limitation of freedom of movement of the child does not occur.”
    - “The temporary holding of the hand, wrist, arm, shoulder, or back for the purpose of inducing a

child to stand, if necessary, and then walk to a safe location, so long as the child is in an upright position and moving toward a safe location.”

- “Physical devices, such as orthopedically prescribed appliances, surgical dressings and bandages, and supportive body bands, or other physical holding when necessary for routine physical examinations and tests or for orthopedic, surgical, and other similar medical treatment purposes, or when used to provide support for the achievement of functional body position or proper balance or to protect a person from falling out of bed, or to permit a child to participate in activities without the risk of physical harm.”
  - “The use of seatbelts, safety belts, or similar passenger restraints during the transportation of a child in a motor vehicle.”
  - “The use of force by a person to defend himself or herself or a third person from what the actor reasonably believes to be the eminent use of unlawful force by a child, when the actor uses a degree of such force which he or she reasonably believes to be necessary for such purpose and the actor does not immobilize a child or restrict the freedom of movement of the torso, head, arms, or legs of any child.”<sup>2</sup>
- **School:** “A school operated by a school district; a chartered public school governed by RSA 194-B; a public academy as defined in RSA 194:23, II; a non-public school subject to the approval authority of the State Board of Education under RSA 186:11, XXIX; a private or public provider of any component of a child’s individualized education program under RSA 186-C.”

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<sup>2</sup> Note that the State has also adopted the following law, which (when applicable) constitutes a defense to any criminal offense or civil action based on such conduct: “A teacher or other person entrusted with the care or supervision of a minor for special purposes is justified on the premises in using necessary force against any such minor, when the minor creates a disturbance, or refuses to leave the premises or when it is necessary for the maintenance of discipline.” RSA 627:6, II(a).

- Seclusion: “The involuntary placement of a child alone in a place where no other person is present and from which the particular child is unable to exit, either due to physical manipulation by a person, a lock, or other mechanical device or barrier. The term shall not include the voluntary separation of a child from a stressful environment for the purpose of allowing the child to regain self-control, when such separation is to an area which a child is able to leave. Seclusion does not include circumstances in which there is no physical barrier between the child and any other person and the child is physically able to leave the place. A circumstance may be considered seclusion even if a window or other device for visual observation is present, if the other elements of this definition are satisfied.”
- Serious Injury: “Any harm to the body which requires hospitalization or results in the fracture of any bone, non-superficial lacerations, injury to any internal organ, second- or third-degree burns, or any severe, permanent, or protracted loss of or impairment to the health or function of any part of the body.”

(Emphasis added).

## **B. Policy Requirements**

All schools are required to have a written policy and procedures for managing the behavior of children. The policy must:

- Describe how, and under which circumstances, seclusion or restraint is used;
- Be provided to the parent, guardian, or legal representative of each child at the school.

RSA 126-U:2

## **C. Restraint**

The use of restraint in schools is limited to physical restraint, and under limited circumstances involving transportation, mechanical restraint. RSA 126-U:6.

Restraints “shall not be imposed for longer than is necessary to protect the child or others from the substantial and imminent risk of serious bodily harm.” RSA 126-U:11, I. However, “no period of restraint of a child may exceed 15

minutes without the prior approval” of the principal or a supervisory employee designated by the principal to provide such approval. RSA 126-U:11, III (emphasis added).

“No period of restraint of a child may exceed 30 minutes unless a face-to-face assessment of the mental, emotional, and physical well-being of the child is conducted by the . . . school [principal] or by a supervisory employee designated by the [principal] who is trained to conduct such assessments.” RSA 126-U:11, IV. The assessment must “also include a determination of whether the restraint is being conducted safely and for a purpose authorized by [RSA 126-U]. Such assessments shall be repeated at least every 30 minutes during the period of restraint. Each such assessment shall be documented in writing and such records shall be retained by the . . . school as part of the written notification required in RSA 126-U:7.” Id. (The notification requirements are discussed below, in section E)

Children in restraint shall be the subject of continuous direct observation by personnel trained in the safe use of restraint. RSA 126-U:11, II.

#### **i. The use of mechanical restraint in school**

Schools may use a mechanical restraint during the transportation of children if case-specific circumstances dictate that such methods are necessary. RSA 126-U:12, I. Whenever a child is transported using mechanical restraints, the principal must document in writing the reasons for the use of mechanical restraint. The documentation is treated as a notification of restraint under RSA 126-U:7 (discussed below, in section E). RSA 126-U:12, III.

When a child is transported to a location outside a school, the principal shall ensure that all reasonable and appropriate measures consistent with public safety are made to transport or escort the child in a manner which:

- Prevents physical and psychological trauma;
- Respects the privacy of the child; and,
- Represents the least restrictive means necessary for the safety of the child.

RSA 126-U:12, II.

All restraint techniques, including mechanical restraint, should be administered by staff trained in the proper use of the restraint. The case of Susavage v. Bucks County Schools Intermediate Unit, 2002 WL 109615, 2002 US Dist. Lexis 1274 (E.D. Pa. Jan. 22, 2002), illustrates the importance of proper training.

In this case, the court held that the parent could proceed with a personal injury action against the school district for failure to adequately train staff in the use of a seat restraint system. The seat restraint system was improperly installed such that the child strangled on the school bus. The court noted that the IDEA defines “assistive technology services,” as including selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing or replacing assistive technology devices. The court noted that the services include training or technical assistance for professionals or other individuals who provide services to children with disabilities. On that basis, the court found that the school district had either actual or constructive notice of the need for training based on this federal requirement. The court reasoned that if deliberate indifference by the school district caused it to utilize a restraint that was unsafe for use on the child, a causal nexus would be established with regard to liability.

## ii. Limitations on the use of restraint

“Restraint shall only be used in a school . . . to ensure the immediate physical safety of persons when there is a substantial and imminent risk of serious bodily harm to the child or others. The determination of whether the use of restraint is justified under this section may be made with consideration of all relevant circumstances, including whether continued acts of violence by a child to inflict damage to property will create a substantial risk of serious bodily harm to the child or others. Restraint shall be used only by trained personnel using extreme caution when all other interventions have failed or have been deemed inappropriate.” RSA 126-U:5, I (emphasis added).

Restraint shall never be used explicitly or implicitly as punishment for the behavior of a child. RSA 126-U:5, II.

In addition, schools are prohibited from using or threatening to use any of the following restraint and behavior control techniques:

- “Any physical restraint or containment technique that:
  - Obstructs a child’s respiratory airway or impairs the child’s breathing or respiratory capacity or restricts the movement required for normal breathing;
  - Places pressure or weight on, or causes the compression of, the chest, lungs, sternum, diaphragm, back, or abdomen of a child;
  - Obstructs the circulation of blood;



- Involves pushing on or into the child’s mouth, nose, eyes, or any part of the face or involves covering the body or face with anything, including soft objects such as pillows, blankets, or washcloths; or
- Endangers a child’s life or significantly exacerbates a child’s medical condition.
- The intentional infliction of pain, including the use of pain inducement to obtain compliance.
- The intentional release of noxious, toxic, caustic, or otherwise unpleasant substances near a child for the purpose of controlling or modifying the behavior of or punishing a child.
- Any technique that unnecessarily subjects the child to ridicule, humiliation, or emotional trauma.”

RSA 126-U:4.

#### **D. Seclusion**

##### **i. The use of seclusion in school**

Seclusion “may only be used when a child’s behavior poses a substantial and imminent risk of physical harm to the child or others, and may only continue until that danger has dissipated.” RSA 126-U:5-a, I (emphasis added).

Seclusion may only be used “by trained personnel after other approaches to the control of behavior have been attempted and been unsuccessful, or are reasonably concluded to be unlikely to succeed based on the history of actual attempts to control the behavior of a particular child.” RSA 126-U:5-a, II (emphasis added).

“Each use of seclusion shall be directly and continuously visually and auditorially monitored by a person trained in the safe use of seclusion.” RSA 126-U:5-b, II.

##### **ii. Limitations on the use of seclusion**

Seclusion may not be used as a form of punishment or discipline, and it shall not be used in a manner that unnecessarily subjects the child to the risk of ridicule, humiliation, or emotional or physical harm. RSA 126-U:5-a, I, III.

**a. Conditions of seclusion**

Seclusion may only be imposed in rooms which:

- “Are of a size which is appropriate for the chronological and developmental age, size, and behavior of the children placed in them.”
- “Have a ceiling height that is comparable to the ceiling height of the other rooms in the building in which they are located.”
- “Are equipped with heating, cooling, ventilation, and lighting systems that are comparable to the systems that are in use in the other rooms of the building in which they are located.”
- “Are free of any object that poses a danger to the children being placed in the rooms.”
- “Have doors which are either not equipped with locks, or equipped with devices that automatically disengage the lock in case of an emergency. For the purposes of this subparagraph, an ‘emergency’ includes, but is not limited to:
  - The need to provide direct and immediate medical attention to a child;
  - Fire;
  - The need to remove a child to a safe location during a building lockdown; or
  - Other critical situations that may require immediate removal of a child from seclusion to a safe location.”
- “Are equipped with unbreakable observation windows or equivalent devices to allow the safe, direct, and uninterrupted observation of every part of the room.”

RSA 126-U:5-b, I.

**E. Notice and Record-Keeping Requirements**

**i. Verbal notice**

Unless prohibited by court order, schools are required to “make reasonable efforts to verbally notify the child’s parent or guardian and guardian”

ad litem whenever seclusion or restraint has been used on the child.” RSA 126-U:7, I (emphasis added). The notification must be “made as soon as practicable and in no event later than the time of the return of the child to the parent or guardian or the end of the business day, whichever is earlier. Notification shall be made in a manner calculated to give the parent or guardian actual notice of the incident at the earliest practicable time.” Id. (emphasis added).

**ii. Written notice to principal**

A written notification must be submitted to the principal or his/her designee by the school employee who used the seclusion or restraint, or if that employee is unavailable, the employee’s supervisor. The written notification must be submitted within 5 business days after the use of seclusion or restraint. RSA 126-U:7, II (emphasis added).

The written notification must contain the following information:

- The date, time, and duration of the use of seclusion or restraint.
- A description of the actions of the child before, during, and after the occurrence.
- A description of any other relevant events preceding the use of seclusion or restraint, including the justification or initiating the use of restraint.
- The names of the persons involved in the occurrence.
- A description of the actions of the facility or school employees involved before, during, and after the occurrence.
- A description of any interventions used prior to the use of the seclusion or restraint.
- A description of the seclusion or restraint used, including any holds used and the reason the hold was necessary.
- A description of any injuries sustained by, and any medical care administered to, the child, employees, or others before, during, or after the use of seclusion or restraint.
- A description of any property damage associated with the occurrence.

- A description of actions taken to address the emotional needs of the child during and following the incident.
- A description of future actions to be taken to control the child's problem behaviors.
- The name and position of the employee completing the notification.
- The anticipated date of the final report.

RSA 126-U:7, II.

**iii. Written notice to parents**

Unless prohibited by court order, the principal or his/her designee shall, within 2 business days of receipt of the written notification, "send or transmit by first class mail or electronic transmission to the child's parent or guardian and the guardian ad litem the information contained in the notification." RSA 126-U:7, III.

The notice shall be retained by the school in accordance with rules adopted by the Board of Education.

**iv. Notification of injury or death**

In cases involving serious injury or death to a child subject to restraint or seclusion, the school shall, in addition to the notification provisions set forth above, notify the Commissioner of the Department of Education, the Attorney General, and the Disabilities Rights Center. The notice shall include the written notification referenced in Section III, E(b), above. The Department of Education is required to notify schools of this responsibility, and provide contact information for the persons to be notified. RSA 126-U:10, II.

**v. Notification of Intentional Physical Contact with a Child**

**a. Verbal notice**

Whenever a school has "intentional physical contact with a child which is in response to a child's aggression, misconduct, or disruptive behavior, a representative of the school . . . shall make reasonable efforts to promptly notify the child's parent or guardian. Such notification shall be made no later than the time of the return of the child to the parent or guardian or the end of the business day, whichever is earlier. Notification shall be made in a manner calculated to give the parent or guardian actual notice of the incident at the earliest practicable time. RSA 126-U:7, IV.

**b. Written notice**

Within 5 business days of the occurrence, the school must “prepare a written description of the incident.” The description shall include at least the following information:

- The date and time of the incident.
- A brief description of the actions of the child before, during, and after the occurrence.
- The names of the persons involved in the occurrence.
- A brief description of the actions of the facility or school employees involved before, during, and after the occurrence.
- A description of any injuries sustained by, and any medical care administered to the child, employees, or others before, during, or after the incident.

RSA 126-U:7, V.

**c. Exceptions to the notice requirements**

These notification requirements do not apply when:

- When a child is escorted from an area by way of holding the hand, wrist, arm, shoulder, or back to induce the child to walk to a safe location. However, if the child is actively combative, assaultive, or self-injurious while being escorted, the above notification requirements shall apply.
- When actions are taken such as separating children from each other, inducing a child to stand, or otherwise physically preparing a child to be escorted.
- When the contact with the child is incidental or minor, such as for the purpose of gaining a misbehaving child’s attention. However, blocking of a blow, forcible release from a grasp, or other significant and intentional physical contact with a disruptive or assaultive child shall be subject to the notice requirements.
- When an incident constitutes a restraint or seclusion and is otherwise subject to those notice requirements.

RSA 126-U:7, VI (emphasis added).

## **F. Requirements Pertaining to Children with Disabilities**

When restraint or seclusion is used for the first time on a child identified under the Individuals with Disabilities Education Act (IDEA) or Section 504, the school must “review the IEP or Section 504 Plan and make such adjustments as are indicated to eliminate or reduce the future use of restraint or seclusion.” RSA 126-U:14 (emphasis added). Parents of a child with an IDEA or Section 504 disability may request such a review at any time following an instance of restraint or seclusion and “such request shall be granted if there have been multiple instances of restraint or seclusion since the last review.” Id.

Note: New Hampshire has a State regulation that requires districts to schedule IEP Team meetings within 21 days of the date the district received a written request for a Team meeting. If the district does not wish to convene a meeting, it must provide the parent with a written prior notice detailing why it refuses to convene the IEP Team. Ed 1109.06(c).

### **i. State Regulations**

As part of the rules pertaining to the Education of Children with Disabilities, the State Board has adopted rules pertaining to the use of restraints on a child with a disability. See e.g. Ed 1113.04. These rules recently underwent revision, and were amended effective May 15, 2014. As amended, the State rules provide that:

- “Positive behavioral interventions based on the results of a behavioral assessment shall serve as the foundation of any program used to address the behavioral needs of students.”
- “An LEA, other public agency, private provider of special education or other non-LEA program shall not employ any of the following aversive and deprivation behavioral interventions:<sup>3</sup>
  - Any procedure intended to cause physical pain;
  - Aversive mists, noxious odors, and unpleasant tastes applied by spray or other means to cause an aversive physical sensation;

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<sup>3</sup> An “aversive behavioral intervention” is defined as “those procedures that subject a child with a disability to physical or psychological harm or unsupervised confinement or that deprive the child of basic necessities such as nutrition, clothing, communication, or contact with parents, so as to endanger the child’s physical, mental, or emotional health.” Ed 1102.01(m).

- Any non-medical mechanical restraint that physically restricts a student’s movement;
  - Contingent food/drink programs;
  - Electrical stimulation;
  - Placement of a child in an unsupervised or unobserved room from which the child cannot exit without assistance; and
  - Physical restraint, unless in response to a threat of imminent, serious, physical harm pursuant to RSA 126-U.
- All crisis or emergency intervention procedures shall be included in the student’s IEP and shall comply with Ed 1113.04 and RSA 126-U:5.”

Ed 1113.04; Ed 1113.05; see also Ed 1114.07; Ed 1114.08.

The State Department of Education has repealed Ed 1113.06 and Ed 1114.09, which had previously permitted the use of “Aversive Behavioral Interventions, when authorized in writing by a physician and an IEP Team.

### **G. Adoption of Rules**

The State Board of Education is required to adopt rules relative to:

- Periodic, regular review by the Department of Education of records maintained by schools relative to the use of seclusion and restraint.
- A process for the Department of Education’s receipt of complaints and its conduct of investigations of improper use of seclusion and restraint in schools. The process shall provide for:
  - Investigation of complaints regarding any violation of this chapter, regardless of whether injury results.
  - Investigation by persons not affiliated with the school district which is the subject of the complaint.

- Resolution of complaints and completion of investigations within 30 days, with provision for limited extensions for good cause.
- Protection of children before and after completion of the investigation.
- Appropriate remedial measures to address physical and other injuries, protect against retaliation, and reduce the incidents of violations of [RSA 126-U].

RSA 126-U:8, I.

Rulemaking, including amendments to existing rules, must commence no later than 60 days after the effective date of the amendments to RSA 126-U. N.H. Session Laws, Ch. 324 (2014).

Each November, the State Board is also required to provide an annual report to the Chairpersons of the Education Committees of the New Hampshire Senate and House of Representatives pertaining to the use of seclusion and restraint in schools. The annual report must include the number and location of reported incidents and status of any outstanding investigations. RSA 126-U:8, II.

#### **i. Recent amendments to the State regulations**

The State Board of Education has recently adopted rules authorizing the filing of a complaint pertaining to a child restraint. See Ed 1200 (effective May 15, 2014).

These rules allow “an organization or individual” to file a signed, written complaint with the Department of Education, pertaining to the use of an improper restraint that resulted in serious injury. Ed 1201.01. An “improper restraint” is defined as “any restraint prohibited by RSA 126-U.” Ed 1201.01(a). Serious injury is defined by referencing the definition in RSA 126-U:1, VI (listed above).

The complaint must be filed within 180 days of the date the parent discovered the event, and must include the following information:

- A statement that a school has violated RSA 126-U alleging improper restraint resulting in serious injury in school;
- The facts on which the statement is based;
- The signature and contact information for the complainant; and,



- Regarding each specific incident:
  - The name of the child;
  - The name of the school the child is attending;
  - The date of the incident; and
  - A description of the incident and nature of the restraint of the child.

Ed 1201.01(e). A copy of the school’s report of the use of a restraint and any follow-up investigation available, completed at the local level, must be included with the complaint. Ed 1201.01(g).

If the complaint fails to allege facts of a serious injury that would constitute a violation of RSA 126-U, the Commissioner of Education shall dismiss the complaint without conducting an investigation and refer it to the local school district pursuant to RSA 126-U:7. Ed 1201.01(h).

If the complaint is not dismissed, the Commissioner of Education must assign an employee of the department or an independent investigator to:

- “Investigate the complaint, including conducting an on-site investigation and consider the following:
  - Supporting documentation of the incident consistent with RSA 126-U:7;
  - Personal injury reports;
  - Affidavits from witnesses of the incident;
  - Policies and procedures of agency regarding disciplinary action and use of restraints procedure adopted by agency [sic];
  - Interviews of parents, administrators, teachers, child and others when necessary; and
  - Other relevant information; and
- Issue a written report with recommendations to the commissioner to include a chronological summary of the relevant events.”

Ed 1201.02(b).

The Commissioner must issue a written decision that addresses each allegation in the complaint, and contains findings of fact. Ed 1201.02(c). The decision will be sent to the school and the Superintendent, as well as the student's parent/guardian, or the adult student. Ed 1201.02(e)-(f).

If the Commissioner finds that the school or district has failed to comply with RSA 126-U, the decision "shall address the required action by the school district to correct the noncompliance. The commissioner shall also order the department to take actions such as, but not limited to frequent, regular reviews of records of restraint and or random, unannounced onsite visits to the school. The commissioner shall also refer the matter to the division of program support, bureau of credentialing, for consideration of further action when matters of educator misconduct are alleged." Ed 1201.02(d).

The Commissioner's decision may be appealed to the State Board of Education. Ed 1201.02(g).

#### **IV. Liability for the Improper Use of Restraint and Seclusion**

The improper use of restraint may constitute a criminal offense, if it rises to the level of a reckless conduct or an assault. See RSA 631:1-RSA 631:3. In the event of a criminal charge, a teacher or person otherwise entrusted with the care or supervision of a minor for special purposes is justified in using necessary force against the minor when the minor creates a disturbance, or refuses to leave the premises or when it is necessary for the maintenance of discipline. RSA 627:6, II. When applicable, this statute serves as a defense to a criminal charge.

The improper use of restraint or seclusion may also result in a civil claim for damages. For example, in Ronnie Lee S. v. Mingo County Board of Education, 500 S.E.2d 292, 27 IDELR 202 (W.VA. 1997) a West Virginia Appeals Court ruled that a state law claim for damages arising from the alleged improper use of a restraining device on an autistic student could proceed forward despite the fact that the parties had entered into a written settlement agreement as to their administrative IDEA claims.

##### **A. Constitutional Violations**

The use of a "time-out" may constitute seclusion, and the improper use of a "time-out" or seclusion may violate the Fourth Amendment. See Rasmus v. State of Arizona, 939 F. Supp. 709, 24 IDELR 824 (D. Ariz. 1996). In that case, the a student with ADHD and an emotional disability was assigned to a "time out

room” by a teacher’s aide for about ten minutes. The room was a small, lighted, unfurnished, converted closet which would be locked from the exterior and was used for disciplinary purposes. While in the room, the student could hear and speak to those outside, and the teacher could observe the student through a one-way peephole.

Parents filed suit against the district alleging, among other things, that the use of the “time-out room” constituted an unreasonable seizure in violation of the Fourth Amendment. The court held that the parent’s claim could proceed because there was a genuine issue of fact as to whether the seizure was justified at its inception and reasonable in scope. The court noted that the use of the time-out room constituted a “seizure” because the student “felt he had no choice when [the teacher] ordered him to enter the room; he had seen [the teacher] physically seize other students and throw them into the room when they refused to enter on their own,” and he entered the room on his own to avoid such treatment.

The court noted that a seizure is “reasonable in scope when the measures adopted are reasonably related to the objectives of the [seizure] and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” When determining whether a seizure is “reasonable in scope,” the court noted that it would look to the following factors:

- The nature of the misconduct;
- Location of the time-out room;
- Size of the time-out room;
- Interior of the time-out room;
- Safety considerations;
- Amount of isolation;
- Amount of time spent in time-out room;
- How time is spent during the time-out (i.e., are the student’s doing classwork);
- District policy.

Id.; but see Muskrat v. Deer Creek Pub. Schs., 715 F.3d 775, 61 IDELR 1 (10th Cir. April 23, 2013) (holding that the use of a timeout room did not amount to a violation of the child’s constitutional rights where the placement followed an incident in which the child “overturned chairs and knocked items from tables.”

The court noted that the room did not have a lock, and the child was not placed in the time out room for more than 4 minutes).

In a similar case, Payne v. Peninsula Sch. Dist., 61 IDELR 279 (W.D. Wash. Aug. 30, 2013) the court denied the school district's and teacher's motions for summary judgment pertaining to the use of a time out room.

Facts: Student was diagnosed with oral motor apraxia and autism and was assigned to a transition program for students with special needs. His teacher used a "safe room" about the size of a closet to contain students who became over stimulated.

In September 2003, parents met with the student's teacher to discuss the use of the safe room. Teacher suggested that she use the room to control student's disruptive behavior. Parents initially objected, but ultimately agreed that the teacher could use the room on the condition that it not be used for punishment, that the door remain open, and that someone remain in the room to supervise student.

Parents alleged that the teacher did not use the room as agreed, but instead locked the student in the room, unsupervised and for indeterminate periods of time, to "punish" or "break" the student of his bad behavior. Parents alleged that the room was "dark and poorly ventilated, and that [teacher] often locked the door or wedged it shut with a chair and covered the window with black construction paper.

The district and the teacher claimed that the room was well-lit and properly ventilated, and that the room was used to calm down aggressive and over-stimulated students and students were only placed in the room for a few minutes at a time.

Parents allege that when the student was in the safe room, he would remove his clothes and urinate or defecate. Parents complained to teacher about the use of the room, but she continued to use it on Student.

Shortly after starting school, student began exhibiting behaviors such as chewing holes in his clothes and experiencing night terrors. These behaviors increased as the school year progressed.

In January 2004, the district removed the door from the safe room. At the end of the school year, parents began home schooling student. They also engaged in mediation with the district, and agreed that the student would transfer to another elementary school within the district for the 2004-05 school year.

In 2005, the parents sued the teacher and the district, alleging, among other things, violations of their son's constitutional rights. The defendants filed a motion for summary judgment, which the parents opposed.

Held: for the parents. The court noted that the student had a constitutional right to be free from unreasonable seizures, and that in the school context, a seizure violates the Fourth Amendment when it "is objectively unreasonable under the circumstances, taking into account educational objectives as well as particularities of the student such as age and sex." In this case, viewing the evidence in the light most favorable to the parent, "the evidence establishes that [teacher] locked a seven year old autistic child in a small enclosed, dark room for indeterminate periods of time, and that she did so for an improper purpose. A jury could find that he urinated and defecated in the room, and that the use and condition of the room violated his constitutional rights."

## **B. IDEA/Section 504**

As the following cases illustrate, the improper use of restraint may also violate the Individuals with Disabilities Education Act (IDEA) or Section 504 of the Rehabilitation Act.

In Cecil County Pub. Schs., 54 IDELR 238 (Md. SEA Feb. 1, 2010), the Maryland State Educational Agency investigated a complaint pertaining to the failure to properly document restraints. The student who was the subject of the complaint was 7 years old, and had an other health impairment (due to a diagnosis of ADHD).

In April 2009, the student was involved in a physical altercation with another student, attempted to run from the playground area, and then ran towards a "woods/drainage area." A teacher pursued the student and "restrained him" from continuing to run away. Student was safely returned to school. This incident was documented in the student's behavior log.

Later that same month, the student again ran from the playground area, and staff documented in his behavior log that it was necessary to restrain the student. There was no documentation or indication that the parent received notice of the use of restraint.

The Student's IEP Team met on May 5, 2009 and revised the student's behavioral intervention plan to permit the use of physical restraint to keep student and those around him safe. Staff documented the use of physical restraint on May 4, 5, 6, 8, 15, and 19, 2009. Restraint logs were drafted for each incident, but the parent was not informed of the use of restraint. In addition, the documentation failed to specify which staff implemented the restraint and which staff monitored the implementation, nor was there any documentation that the staff who had implemented the restraint had been properly trained.

In Maryland, the use of physical restraint is prohibited unless there is an emergency situation and the restraint is necessary to protect the student or another individual from imminent, serious, physical harm, after other less intrusive, nonphysical interventions have failed or been deemed inappropriate. Staff utilizing physical restraint must be trained in the appropriate use of the restraint. Whenever physical restraint is used, staff are required to document that: 1) other less intrusive interventions have failed or been deemed inappropriate; 2) the precipitating event immediately preceding the behavior that prompted the use of the restraint; 3) the behavior that prompted the use of the restraint; 4) the names of the school personnel who observed the behavior that prompted the use of restraint; and 5) the names and signatures of the staff members implementing and monitoring the use of restraint. The documentation must also include a description of the restraint technique, including: 1) the type of restraint utilized; 2) the length of time in restraint; 3) the student's behavior and reaction during the restraint; and 4) the name and signature of the administrator informed of the use of restraint. Parents must also be provided with oral or written notification of the restraint.

Finding: for the parent. With the exception of the first incident in April, which was found to be an "escort" rather than a "restraint," the district failed to comply with the requirements pertaining to documenting restraints and informing parents of the use of restraint. The district was required to provide the State with documentation that it notifies parents each time restraint is used with a student, that personnel are trained in the proper use of restraint, and will provide the State with a plan to ensure that the "violations do not recur."

In South Lyon (MI) Community Schs., 55 IDELR 108 (OCR May 11, 2010), the Office for Civil Rights investigated a complaint that the district discriminated against a student in violation of his disability when staff members "repeatedly and unnecessarily restrained him," and that the district failed to train staff in the proper use of restraint techniques.

Facts: At the start of the 2009-10 school year, the student was a 7 year old who had been identified under the IDEA as having an emotional impairment. His IEP had a behavior intervention plan that referenced positive behavioral rewards to encourage positive behaviors, as well as access to a "vacation" area in the resource room to calm down, as well as access to a sensory area. The plan also "provided that, if necessary, only the resource room teacher . . . would use a basket hold to restrain the student for 'physical aggression.'" At the time the plan was drafted, the resource room teacher was the only individual working with student who had been trained in restraint. He was placed in his neighborhood elementary school, with resource room support (for between 5-10 hours per week).

Throughout the school year, the student was periodically restrained by his resource room teacher, his 1:1 paraeducator, or the resource room paraeducator. All of these staff members had received training on restraint prior to the start of the 2009-10 school year.

The District had adopted policies pertaining to the use of restraint that were consistent with State law.

Finding: for the district. OCR found that all staff who administered restraints had been properly trained prior to engaging in a restraint. OCR also found that the use of restraint was consistent with District policies and State laws pertaining to the use of restraint, and that prior to using restraint the staff attempted positive behavioral interventions or other de-escalation strategies. The district properly documented each incident of restraint and informed the parent of the same. Thus, there was no indication that the district had denied the student a FAPE by inappropriately restraining him, or otherwise discriminated against the student on the basis of disability.

Finally, in Bellflower Unified School District, 54 IDELR 66 (Ca. SEA Jan. 26, 2010), the California State Educational Agency (SEA) found that

Facts: Student is a 5 year old who is eligible under the IDEA due to a speech-language impairment and also due to “autistic-like behaviors.” During the 2008-09 school year, student attended a preschool program for 5 days per week. In March 2009, his teacher went on medical leave, and the district provided two long-term substitutes to fill in for the teacher.

Parent alleged that one long-term substitute teacher used aversive behavioral interventions on April 30, 2009, when she restrained student in a chair with soft ties due to Student’s aggressive behaviors on the playground during recess. The teacher removed the student from the playground because he was hitting his classmates and because she believed that he posed a threat to his classmates. The teacher “sat Student in a corner chair in the classroom, and . . . loosely tied Student in the chair because he would not remain seated.” Mother entered the room after the student was restrained. The teacher returned to the playground, leaving the student restrained in the chair. After 5 minutes, mother released the student from the chair and left school with him. Thereafter, student did not attend school on the days that the long-term substitute was teaching.

The chair that the teacher used was “to be used only for postural support for students who had trouble sitting upright by themselves. However, the District did not train any of its special education staff . . . regarding the proper use of the chair,” and the substitute teacher did not know that she could not use the chair to discipline student.

At the conclusion of the school year, the parent unilaterally placed the student in a home-based ABA program. Parent then requested due process, seeking reimbursement for the cost of the program and compensatory services.

Finding: for the parent. The SEA found that the teacher restrained the student, and that the restraint constituted an aversive behavioral intervention, which is prohibited as a technique for modifying a student's behavior. As a result, the teacher's conduct denied the student a FAPE. "Because [the teacher] had removed Student from the playground, he was not an imminent threat to hurt himself or others. Therefore, he should not have been restrained in the classroom."

The SEA went on to note that the student was not harmed by the violation, since he was only restrained for 5 minutes and following the incident, he attended class without fear or anxiety.

However, the failure to properly train the teacher on the use of restraint techniques, and the fact that the teacher indicated that she "did not know how to handle Student's continued aggressive behavior" established that the district substantively denied a FAPE because it did not address student's behaviors in his IEP, or properly train staff. As a result, the District was required to provide the student with compensatory services in the form of a home-based ABA program for 25 hours per week for 11 months.

### **C. Other claims**

In Vargas v. Special Education Services, Inc., 62 IDELR 182 (Ct. Super. Ct., Nov. 19, 2013), the Connecticut Superior Court held that a parent could proceed with a claim alleging intentional infliction of emotional distress and assault and battery stemming from a restraint.

Facts: Parent's son, a student identified under the IDEA, was restrained in a time-out room. Parent alleged that during the restraint, the student was subjected to a high-level of force, resulting in the partial severing of his ear, and being knocked unconscious. Parent filed suit, alleging, among other things, assault and battery and intentional infliction of emotional distress. The defendants moved to strike those claims.

Held: for the parent. As to the assault and battery claim, the court noted that "a civil assault is the intentional causing of imminent apprehension of harmful or offensive contact in another,"<sup>4</sup> and that a battery requires: (a) action intending

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<sup>4</sup> In New Hampshire, a civil assault claim "requires that (1) the defendant ... intended to cause harmful or offensive contact to the plaintiff, and (2) the plaintiff must have been put in imminent apprehension of such contact." Rand v. Town of Exeter, 976 F. Supp. 2d 65, 75 (D.N.H. 2013) (quotations and citations omitted).



to cause harmful or offensive contact with a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results.<sup>5</sup> Here, the parent alleged that the defendants “physically restrained [student] in such a manner and with such force so as to result in a blow to the right side of the plaintiff’s head, which partially severed [his] right ear,” and that the student was rendered unconscious by the actions of the defendants. Parent also alleged that the student suffered “serious and painful injuries to his head, ear, neck, and back.” The court concluded that the allegations were sufficient to state a claim for assault and battery, and that based on the alleged severity of the incident, it was reasonable to infer that the defendants “exhibited a reckless disregard of consequences.”

The court also denied the motion to strike the parent’s intentional infliction of emotional distress claim. The court noted that the plaintiff must establish: 1) that the defendants intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; 2) that the conduct was extreme and outrageous; 3) that the defendants’ conduct was the cause of the plaintiff’s distress; and 4) that the emotional distress sustained by the plaintiff was severe.<sup>6</sup> The court found that the parent had alleged sufficient facts to support a claim that the defendants had intentionally inflicted emotional distress upon her son. The court noted that “the actions of the defendants as alleged are more than mere insults or displays of bad manners, and a reasonable fact finder could find them extreme and outrageous.”

## **V. Steps Toward Reducing Risk with Restraint and Seclusion**

There are four fundamental steps to be taken by any district to reduce its risks in the area of restraint and seclusion. They are as follows:

- The district should provide certificated training in the area of passive restraint and should have individuals designated to provide the necessary restraint and/or seclusion;

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<sup>5</sup> In New Hampshire, “A defendant may be held liable for battery if ‘(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results.” Rand v. Town of Exeter, 976 F. Supp. 2d 65, 75-76 (D.N.H. 2013) (citations omitted).

<sup>6</sup> In New Hampshire, the standard for an intentional infliction of emotional distress is as follows: “a plaintiff must allege that a defendant ‘by extreme and outrageous conduct, intentionally or recklessly cause[d] severe emotional distress to another.’ ‘In determining whether conduct is extreme and outrageous, it is not enough that a person has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by malice.’ Rather, ‘[l]iability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” Tessier v. Rockefeller, 162 N.H. 324, 341, 33 A.3d 1118, 1131 (2011) (quotations omitted).

- Restraint and seclusion should only be utilized by trained personnel, and as a last resort;
- The techniques should be generally accepted in the education community and must be consistent with State law, regulations and District policy; and
- The length of the seclusion or restraint must not exceed the amount of time necessary to protect the child or others from the substantial and imminent risk of serious bodily harm.

In addition, it is important to remember that positive behavioral interventions should be the foundation for any behavioral plan, and positive behavioral interventions should be utilized prior to restraint or seclusion, unless, based on the specific circumstances, they have been deemed inappropriate. RSA 126-U:5, I.

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