

Seclusion, Time-Out, and Restraint: Features of State Rules, Emerging Federal Law, and Commentary on Problem Areas

by

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A 2009 report of the General Accounting Office (GAO) brought to light the frequent nature of the use of seclusion and restraint of children in public schools, private schools, and treatment centers. See *Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers* (Report GAO-09-719T—May 19, 2009). The report noted that there were no federal regulations regarding use of seclusion and restraint in schools, and that 19 states had no laws or regulations addressing the topic. Of the states that address the topic, the laws differ in depth and scope. At least four states, however, not only have laws and regulations on the topic, but also collect and report information on seclusions and restraints.

The GAO report is likely to represent a triggering point for states to develop rules and regulations to address the use of seclusion and restraint. In addition, the Congress may speak on the issue, as a bill has been introduced that would govern the use of seclusion and restraint on a national level. The following is a review of the latest bill introduced in the Senate; a review of the status of Kansas, Iowa, and Nebraska on the issue; and some common aspects of states' rules on the topic.

Emerging Federal Legislation

Senate Bill 3895

Senator Chris Dodd, D-Conn, has been working toward federal legislation to limit the use of restraint and seclusion in public schools. The bills have had a complicated path, as a previous version of the bill, S. 2860, had to be rewritten to gain additional support. The House of Representatives passed a version of that bill as H.R. 4247. The new bill represents an attempt to iron out some controversies in the precursor bills that had stymied the progress of the law.

Policy Underpinnings—The bill is premised on the notion that “behavioral interventions for children must promote the right of all children to be treated with dignity,” free from “abuse,” and free from “any physical restraint or seclusion imposed for purposes of discipline or convenience.” In addition, the bill states that “school personnel have a right to work in a safe environment and should be provided training and support to prevent and trauma to themselves and others.” Section 2.

Purposes—To “prevent and reduce” the use of seclusion and restraint in schools, ensure that they are used only in emergency circumstances, and collect and analyze data on seclusion and restraint in US public schools. Section 3.

Definitions—Fairly common definitions of restraint, seclusion, and time-out (along the lines of those found in current state laws, as reviewed below).

Standard for Use of Restraint or Seclusion—“The student’s behavior poses and imminent danger of serious bodily injury...; and less restrictive interventions would be ineffective in stopping such imminent danger of serious bodily injury.” Section 102(a)(2).

PROBLEM AREA—Inescapably, the language requiring that less restrictive interventions be determined ineffective to stop the danger will lead to second-guessing after a restraint has taken place. Does the language mean that less restrictive options must be attempted and exhausted prior to restraint or seclusion? That may be a better formulation. The language, as is, appears to require a subjective determination that less restrictive options “would be” ineffective, and reasonable minds can differ on that point, particularly when not faced with a crisis circumstance.

PROBLEM AREA—S. 3895 refers to “serious bodily injury” as having the definition provided in 18 U.S.C. §1365(h), which is the same definition that has plagued the new special offense added to drugs and weapons in the discipline provisions of IDEA 2004. The federal provision defines “serious bodily injury” as:

bodily injury which involves-

- (A) a substantial risk of death;
- (B) extreme physical pain;
- (C) protracted and obvious disfigurement; or
- (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty;

Are school staffpersons supposed to assess, on a second’s notice, whether the risk of injury posed by the student would rise to this highest of

levels of assault? Does the Congress really intend to prohibit restraint/seclusion if the risk is simply that an employee will be struck forcefully in the face, but not to the point of risk of death, extreme pain, disfigurement, or impairment? That would seem squarely contrary to the policy section of the law, which emphasizes school employees' right to a safe environment.

Interplay with IEP—A significant controversy created by precursor bills was whether restraint or seclusion should be included in IEPs. Some disability groups argued that restraint and seclusion should never be in IEPs, as that would lend legitimacy to the practice, and the bill should seek to prevent the use of restraint and seclusion. S. 3895, however, allows restraint or seclusion to be included in IEPs if (1) use of restraint/seclusion would comply with the standards of the law, (2) there is a documented history in the preceding 2 years of behaviors that have created imminent danger of serious bodily injury, and (3) there has been a FBA and a BIP implemented by a “qualified team of professionals.” Section 102(a)(5).

Required “Debriefing”—An unusual aspect of the bill is its requirement that, after restraint or seclusion takes place, a debriefing must be held within 5 school days, at which the parent may attend, to discuss the incident. Section 102(a)(6).

PROBLEM AREA—While having staff meet to discuss and incident and how it was handled could be beneficial, adding the parent to the session will mean that staff may not feel free to fully discuss the incident and the staff's response in a meaningful way. These sessions will likely turn into a blame-placing forum where staff may be grilled about an incident, and may actually feel like talking about the incident could place them in danger of legal liability. Thus, the very structure of the debriefings seems to minimize any potential effectiveness they might otherwise have. Moreover, although the bill states the topics to be addressed at a debriefing (documentation of circumstances leading to the incident, planning to prevent reoccurrence, and planning to revise the FBA/BIP), there is no real way to prevent a parent from using the meeting to advance potential litigation-oriented aims.

Exceptions to Restraint and Seclusion—The bill would make clear that time-out is not seclusion, and that proper use of positioning devices, therapeutic aids, safety devices, transportation harnesses/seat belts, adaptive devices, and handcuffs (by school resource officers in the “lawful exercise of law enforcement duties”), are not considered “restraint.”

PROBLEM AREA—Here, child and disability advocacy groups will likely strenuously oppose the sanctioning of handcuffing of students by school resource officers in the lawful exercise of law enforcement duties. They

will see the standard as allowing schools to transfer to the increasingly uses school resource officers the ability to restrain a student under more vague and lesser standards than those required for school staff to restrain students.

Private Schools—The bill would not generally apply to private schools. But, private schools where IDEA students are placed either by IEP teams in agreement with parents, or by means of court orders following IDEA actions, would be required to comply.

Data Collection—States would be required to collect, maintain, organize, and disaggregate data on restraint and seclusion in each state.

State Laws on Restraint and Seclusion

Iowa

No state law on restraint or seclusion, but a ban on corporal punishment

State regulations require training on positive behavior interventions and supports, alternatives to seclusion and restraint, and crisis prevention/de-escalation

Seclusion and restraint to be used only when “reasonable”—“reasonable and necessary force, not designed or intended to cause pain” in order to:

- Prevent an act that threatens physical harm
- To obtain possession of a weapon or dangerous objects
- For self-defense or defense of others
- For protection of property
- To remove a disruptive student
- To prevent self-infliction of harm
- To protect safety of others

Seclusion and restraint “shall not be used as discipline for minor infractions,” and other techniques must be attempted, if reasonable

Staff training required

Standards for determining when use of seclusion and restraint is reasonable—In determining “reasonableness of force,” following factors apply:

- Size and physical, mental, and psychological condition of student
- Nature of misconduct

Instrumentality used in applying physical force
Extent and nature of resulting injury
Motivation of employee using physical force

Reasonable force remains “reasonable” even if student is injured although not reasonably foreseeable or due to acts of others or student

Standards for seclusion (“confinement of a student in a time-out room or some other enclosure, whether within or outside the classroom, from which the student’s egress is restricted”):

Enclosure area of reasonable dimensions
Sufficient light and ventilation
Comfortable temperature
Bathroom breaks
Period must be reasonable (given age, size, condition)
Adequate supervision
No material restraints
If locked, must comply with building codes (and other requirements)

Notice to parents the day of incident (attempted), written documentation to parents, annual notice to parents of rules and policies, data collection

Ban on inherently risky practices, such as prone restraint, and allowance for use of hands for students who use sign language or augmentative communication devices

Kansas

Kansas Seclusion/Restraint Guidelines (as of 2007)

Reporting requirements

Staff training

Restraint not to be used for discipline, punishment, or staff convenience

No mechanical restraints

Standard for restraint—Danger of imminent risk of harm to self or others and only as a last resort to protect safety of all involved

Kansas School-Wide Positive Behavior Support (SWPBS)

In-depth KDE Guidance (www.ksde.org/Default.aspx?tabid=3119)

Seclusion possible only if on IEP or BIP
Less restrictive strategies must be attempted first
Location of seclusion rooms must be stated in IEP
Max periods of seclusion must be in IEP
Max seclusion times per day must be in IEP
Calls for IEP review of seclusion data
No seclusion if health provider indicates condition that precludes it
Staff training
Adequate supervision
Addresses locks on seclusion rooms
Parental notification
Reports to KDE
Physical restraint proportionate to circumstances
Staff training
Consistent with nationally-recognized programs

Nebraska

Corporal punishment ban

Restraint/seclusion policies developed by each district

Technical assistance project through University of Nebraska-Lincoln grant to provide guidance to districts in developing restraint/seclusion policies

Common Features of State Laws

- **Key Definitions**

“Restraint”—Commonly defined as the use of physical force or a device to “significantly” restrict free movement of the student’s body or its parts.

States and schools may wish to clarify physical contact that would not be considered restraint (i.e., hand-holding, incidental contact in escorting a student, application of positioning devices, safety harnesses for transportation, harnesses for wheelchair-bound students, etc...).

“Seclusion”—Usually defined as locking students in a locked box, closet, or room less than a certain amount in area, including situations where a staffperson blocks the door shut when unlocked.

A key definition for states to address and expand. Questions to answer include the following: is clearing a classroom to the point that only the student in question remains a “seclusion”? If a

staffperson takes a student to another room and remains with them, in an attempt to de-escalate the episode, is this a “seclusion”?

Some states set norms for locking mechanisms, usually requiring that a person manually hold the locking mechanism for it to lock, or that the device be integrated with fire alarm systems.

“*Time-out*”—Usually defined as separating student from peers for limited period in unlocked settings and without physically preventing the student from leaving, to provide the student an opportunity to regain self-control.

- **Application to law enforcement officers**—Generally, state legislatures have added a provision clarifying that the limitations do not apply to “peace officers” or probation, detention, or correction personnel.

- **Preliminary provisions:**

Some legislatures set forth a **policy directive to treat all students with respect and dignity**, or use similar general policy language. Some legislatures distinguish between use of seclusion and restraint for disabled and non-disabled students, others apply the same limitations to all students.

Some states simply prohibit the use of “seclusion” by any school employee, volunteer, or independent contractor. See Texas Education Code §37.0021(c).

Various states call for the State Education Agency (SEA) to promulgate rules for seclusion, time-out, and restraint. Generally, the legislatures instruct the SEAs to make sure that the rules are consistent with professionally accepted practices and relevant health and safety standards. In addition, in some states the rules must address staff training on these interventions.

- **Remedy for students**—What happens if a school performs a restraint in violation of this section? An act in violation of state law may lead to a finding by an IDEA hearing officer that the school has used inappropriate behavioral interventions, and potentially, that the school has denied a FAPE and thus must provide compensatory education (perhaps counseling, staff training, etc...). In addition, use of restraint contrary to state law that causes injury could lead to money damages liability under civil rights laws.

- **Basic Provisions**

1. Restraint can only be used in an “**emergency**.”

2. “Emergency” usually means **threat of either imminent serious physical harm (to self or others) or serious property destruction.**

PROBLEM AREA (weapons)—Is the possession of a weapon enough to restrain? What if the student brandishes a weapon? What if he brandishes scissors in a threatening fashion? What if they are kiddie scissors? What about a pencil? What if the student is about to throw a rock at a group of kids?

PROBLEM AREA (property)—What is “serious property destruction”? What if he already broke the laptop—can he be restrained *after* having broken it? What if the student is about to throw a rock at the school?

PROBLEM AREA (imminent)—Defined in dictionaries as “about to occur, impending.” The degree to which a behavior poses a threat that is “imminent” is inherently a subjective judgment call. The balance to be struck is one where staff act in time to prevent injury, but not prematurely where the threat is not truly imminent.

3. **Only allows use of “reasonable force”** necessary to address emergency.

PROBLEM AREA (force)—The force necessary to address emergency will depend on the size and strength of the student, the degree to which the student is agitated, the degree to which the student resists, the relative skill of the staff member(s), the severity of the risk, and other case-by-case factors.

4. Restraint must stop when emergency no longer exists.
5. Restraint shall protect health and safety of student and others.
6. Must not deprive student of basic human needs (e.g., air, by questionable methods such as prone restraints).

PROBLEM AREA (risk of suffocation)—Staff training is crucial to ensuring that a student will not suffer a risk of suffocation during a restraint. Some states prohibit the use of “prone” types of restraints that can lead to compression suffocation. See GAO Report.

- Rules generally also apply to public **charter schools**, although most states rules do not apply to private school settings (the rule there,

presumably, is “buyer beware”). In some states, the rules apply to any programs or facilities that receive state funding.

- **Legal issue—Is restraint a form of corporal punishment?**

Normally, employees of public schools enjoy the usually broad immunity from liability granted to public schools by State laws. But, Legislatures also waives that basic immunity in certain areas. Professional employees are not personally liable for any act within the scope of the job duties that involves exercise of judgment or discretion, **but may lose their legal immunity in situations of inappropriate restraint**, depending on State law.

Judgment or discretion—Use of restraint certainly involves “exercise of judgment or discretion,” and is within the scope of job duties for many educators. States may want to address the scope of immunity for employees’ good-faith efforts to address emergency situations where careful measured judgment may not be possible, in light of the necessary timeframes for prevention of injury.

PROBLEM AREA (liberty interests)—Restraint definitely involves application of force to manage and/or prevent a misbehavior. Moreover, it involves a greater degree of intrusion into constitutional liberty interests than paddling, which is clearly corporal punishment. Thus, physical restraint might be considered to be a form of corporal punishment such that employees may lose their legal immunity.

PROBLEM AREA (scope of immunity rule)—Is restraint a form of “discipline” or an emergency health and safety measure? On the one hand, the existence of an emergency would indicate the presence of a health and safety concern, but on the other, the use of restraint *is* intended to manage and/or prevent serious student misbehavior, which sounds like discipline. In addition, a restraint is likely to have the effect of a negative consequence or punishment, from a behavior modification perspective.

PROBLEM AREA (negligence and excessive force)—If a staff member uses excessive force in a restraint that injures a child, and restraint is determined to be within the meaning of “discipline” then it seems that personal liability is possible. What if a staff member applies a restraint hold incorrectly, or in contravention of their training, and thereby injures a child? Again, such action may be considered “negligence resulting in bodily injury” such that the employee would lose immunity.

- **Restraint staff training requirements**

One of the key areas for states or schools to address is the issue of staff training on restraint. Effective training tends to include strategies and techniques for de-escalation, alternatives to restraint, prevention of restraint, and proper and safe restraint techniques.

Should schools create “core teams” of trained staff for purposes of restraint?

Should there be periodic re-training requirements?

Should staff who are forced to restrain a child be required to attend restraint training?

Training should consist of current professionally accepted practices and standards, based on research-based practices.

- **Restraint Notice and Documentation Requirements**

1. Notice to campus administrator (with method and timeline);
2. Good-faith attempt at verbal parent notice (with timeline);
3. Written parent notice must be in mail or otherwise provided within 1 day;
4. Documentation must go into sp. ed. eligibility folder in a timely manner so the information is available to the IEP team for developing or revising a behavior intervention plan (BIP).

- **Suggested contents of restraint notice to parents**

1. Name of student,
2. Name of staff members administering restraint,
3. Date and time restraint began and ended,
4. Location of restraint,
5. Nature of restraint,
6. Behavior preceding restraint (antecedent circumstances),
7. Behavior that prompted restraint,
8. Efforts to de-escalate and alternatives attempted,
9. Information documenting parent contact and notice.

The above could be a “blueprint” for a restraint notice form that should be used to both document the use of restraint and to notify the parent.

- **Certain acts that might *not* constitute “restraint”**

1. **Physical contact or use of adaptive equipment involved in promoting proper body positioning and physical functioning** (e.g., PT, OT, adaptive PE, body positioning, range-of-motion exercises, etc...).
2. **“Limited physical contact with a student to promote safety,”** such as in holding a student’s hand, preventing a student from running into street, or to teach a skill or provide comfort, or limited contact to redirect attention, provide guidance to a location, or to calm a student.

PROBLEM AREA—In what kinds of situations should school staff restrain a student that is about to run out of the classroom? Off of school property? In this decision, the age of the student, as well as the student’s mental and adaptive behavior capacity are critical.

3. Limited physical contact or use of equipment **to prevent ongoing repetitive self-injurious behaviors** (e.g., certain students with severe MR or autism).

The rules could include the expectation that use of such contact or equipment would be part of the IEP and discussed as part of the IEP development process.

4. Seat belts and safety equipment used to secure students during **transportation** (e.g., special harnesses).

- **Staff training on time-out**

Similar timelines to restraint training.

Training should be a part of a program providing a full continuum of positive behavioral intervention strategies.

Training should address the impact of time-out on the student’s ability to participate and progress in the regular curriculum and/or IEP goals.

Training should consist of current professionally accepted practices and standards.

- **Documentation of time-out**

To be decided by IEP team as part of IEP or BIP.

IEP team must use data to judge effectiveness of intervention.

- **Use of time-out**

Time-out should be implemented in ways that promote student health and safety and reflect that the priority is for the student to return to instruction as soon as feasible.

Discussion Points

- Are there rules in your state or school district for use of seclusion, restraint, or time-out?
- Have staff had occasion to use seclusion, restraint, or time-out?
- Has the school talked to its insurance carrier about coverage in case of a claim involving seclusion or restraint, or of injury involving a restraint?
- Has the school engaged in discussions with legal counsel on the topic?
- Has the school considered a set of district policies while the State considers addressing the topic in law?