

**LEGISLATIVE EDUCATION STUDY COMMITTEE
BILL ANALYSIS**

Bill Number: HB 190

52nd Legislature, 2nd Session, 2016

Tracking Number: .202661.2

Short Title: School Use of Restraint & Seclusion

Sponsor(s): Representative James E. Smith and Senator Bill B. O’Neill

Analyst: Kevin Force

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FOR THE LEGISLATIVE EDUCATION STUDY COMMITTEE

Bill Summary:

HB 190 proposes a new section of the *Public School Code* to prohibit school districts and charter schools from using physical restraint and seclusion, except in emergency situations, and not as planned educational interventions or disciplinary measures; nor may they be included in individual education program documents or emergency plan documents for individual students. The bill requires any restraint and seclusion administered in emergency situations to be done by trained staff. Aversive interventions, chemical restraint, and mechanical restraint as defined in the bill are prohibited. HB 190 details parental notification criteria and requires school districts and charter schools to report all uses of restraint and seclusion used against students to the Public Education Department (PED) annually.

Fiscal Impact:

HB 190 does not contain an appropriation.

It is possible that school districts or charter schools will be required to provide training to staff on the appropriate use of restraint and seclusion, including evidence-based intervention training that provides for de-escalation and first aid instruction. Such training, if not already available at the school district or charter school, may result in additional cost to some school districts and charter schools to fully implement the bill.

At a Glance:

- HB 190 would ban all use of restraint and seclusion, except in emergencies, and only to the extent necessary to protect someone from harm, and only when another less intrusive nonphysical intervention has been tried and failed.
- The bill requires parents of students who have been subject to restraint or seclusion be notified within 24 hours, either in person or by phone, and by writing within five business days, including:

- an explanation for the reasons for the restraint or seclusion;
 - the location, manner and duration of the restraint or seclusion, and a description of the restraint used; and
 - the names of school personnel or others who were involved, or witnessed the event.
- HB 190 defines seclusion in such a way that in-school suspension, if it involves isolating students and restricting their movements, might be considered “seclusion” as defined in the bill.

Detailed Provisions:

HB 190 defines certain terms, including:

- “Aversive intervention,” which means any device or intervention intended to cause pain or discomfort, including tissue damage, physical illness or injury, electric shock, forced exercise, sleep, food or water deprivation, humiliation, water mist, noxious scents or tastes, skin agents, or overcorrection;
- “chemical restraint,” which means a medication, not a part of the student’s standard medical or psychiatric treatment, that is employed to control behavior or limit a student’s movement, but does not include restraints prescribed by a physician;
- “mechanical restraint,” which means a device or material attached to the student’s body to limit movement, or normal access to any portion of the student’s body, but does not include mechanical supports or protections;
- “protective devices,” which means helmets, goggles, gloves, and the like used by persons who are not disabled for work, sports, or transportation;
- “restraint,” which means chemical, mechanical, or physical restraint, unless otherwise modified; and
- “seclusion,” which means confinement in a room alone, from which a student is physically prevented from leaving.

The bill directs all school districts and charter schools to adopt policies and procedures for the use of restraint and seclusion, including provision for:

- a general prohibition on the use of restraint and seclusion, except for emergencies, provided that they are not used as planned interventions or as discipline;
- use in emergencies only as necessary to protect the student or others from harm;
- limitation to the use of the least amount of force necessary for such protection, and only when other, less intrusive interventions have failed;
- the strict prohibition of aversive, chemical, or mechanical restraints, prone physical restraints, or life-threatening restraints, even in emergencies; and
- a requirement that students who are placed in seclusion be continually visually monitored, in a room that meets all safety codes.

In other provisions, HB 190:

- stipulates that emergency situations no longer exist when:
 - a medical condition arises that puts the student at equal or greater risk of harm;
 - the student no longer poses an immediate danger; or
 - less restrictive interventions would suffice;

- requires the parent of a student subjected to restraint or seclusion be notified:
 - in person or by phone within 24 hours of any use of restraint or seclusion;
 - in writing within five business days;
 - of the location, duration, and manner of restraint or seclusion; and
 - of the names of school personnel or others who were involved, or who witnessed the events;
- requires school districts and charter schools to report to PED annually all uses of chemical, mechanical, or physical restraint, or seclusion, without identifying the student in question; and
- directs PED to publish school districts' and charter schools' annual reports on the PED website.

Substantive Issues:

According to Wrightslaw, as of July 25, 2015:¹

- 25 states, by law, protected all children from both restraint and seclusion, while 35 states have protections for children with disabilities;²
- nine states, including New Mexico, have only voluntary guidance or policies that impose no mandates or legal obligation;
- 26 states have laws requiring notification to parents of both restraint and seclusion, while 36 require notification of parents of students with disabilities;
- 21 states require notification by the same or next day for both restraint and seclusion, while 28 require such timely notification for children with disabilities;
- Civil Rights Data Collection shows that children with disabilities and children of color are disproportionately affected by restraint and seclusion;
- children with disabilities may be unable to communicate their situation or distress, leading to potentially greater harm; and
- while many policies, regulations, and laws require that seclusion and restraint are employed as last resorts to last only as long as the emergency situation that trigger them, staff members often skip less restrictive measures.

Encouraging news was offered by Wallethub,³ where a recent study ranked New Mexico the third best state in the nation for school safety, as determined by three categories:

- bullying incidents;
- youth incarcerations; and
- percentage of students who report being threatened or injured on school property.

¹ Wrightslaw is an online resource for special education law that provides current information about issues pertaining to special education advocacy and jurisprudence. See: *How Safe is the Schoolhouse? An Analysis of State Seclusion and Restraint Laws and Policies*. Butler, January 20, 2014, at:

<http://www.autcom.org/pdf/HowSafeSchoolhouse.pdf>.

² Alabama, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Maryland, Maine, North Carolina, Ohio, Oregon, Rhode Island, Vermont, West Virginia, Wisconsin, and Wyoming.

³ 2015's States with the Best and Worst School Systems, Richie Bernardo, July 30, 2015, at:

<https://wallethub.com/edu/states-with-the-best-schools/5335/>.

New Mexico had a low rate of incarceration for youth, giving the state a rank of 20, and a very low bullying-incidents rank of 2, leading to the state's high overall rank.

Background:

As explained in a staff report to LESC during the 2009 interim, attention to issues of physical restraint and seclusion of students had risen across the United States through published accounts of alleged abuse, which prompted an investigation by the Government Accountability Office (GAO) at the request of the US House Education and Labor Committee. The GAO report, published May 19, 2009, found "no federal laws restricting the use of seclusion and restraint in public and private schools and widely divergent laws at the state level."⁴

In 2009, US Education Secretary Arne Duncan sent a letter to all chief state school officers encouraging them to review their state's current policies and guidelines regarding the use of restraints and seclusion in schools, and if necessary, to develop or revise their policies and guidelines. In compliance with Secretary Duncan's request and in response to the requests of various advocacy groups, PED convened a work group to consider legislation or rulemaking on the subject of restraint and seclusion of children in New Mexico public schools.

In a memo to a number of education associations and advocacy groups dated November 16, 2009, the New Mexico Secretary of Public Education directed the work group to:

- make recommendations regarding the scope and nature of the use of restraint and seclusion with respect to children in public schools;
- study the best ways to address the use of restraint and seclusion with respect to children in public schools including surveying practices and methods used in other states where laws or rules have been adopted;
- consider the issue of liability that might be placed upon school employees, school districts, and the state when making any recommendations; and
- make recommendations for legislation and/or rulemaking regarding the use of restraint and seclusion on children in public schools.

In September of 2010, PED submitted a report on behalf of the Restraint and Seclusion Work Group to the governor and LESC, which indicated that, while law addressing the issue of seclusion and restraint exists in the *Children's Code* (albeit inapplicable to school settings), the *Public School Code* lacked any such provisions. However, PED issued guidance on the topic, which clarified that:

- the use of physical restraint should be approved by the student's Individualized Education Program (IEP) team, documented in the student's Behavior Intervention Plan, and have the expressed written agreement of the parent;
- a mental health professional should be a member of the IEP team if physical restraint is being considered as an intervention; and
- physical restraint may be performed by trained personnel only, and only in emergency situations.

⁴ Please see *Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers*, US GAO, GAO-09-719T, May 19, 2009, at: <http://www.gao.gov/new.items/d09719t.pdf>.

The report also noted that, although there had been no case law pertinent to the issue of restraint and seclusion in New Mexico, a New Mexico Supreme Court case held that a school district's failure to follow through on safety policies for at-risk students was an act of negligence in the operation of the school, suggesting that the lack of clear policy governing such practices might pose a risk of liability to the public schools.

Related Bills:

SB 26 *Additional School Health Center Services*