

Restraint and Seclusion in New Mexico Public Schools Working Group Report July 2024

Introduction

In spring 2023, Senate Memorial 68 was introduced, which proposed to create a working group to review the use of restraint and seclusion in public schools, and to issue a report with findings and recommendations for consideration by the Legislative Education Study Committee (LESC) and other legislative committees. Senate Memorial 68, <https://www.nmlegis.gov/Sessions/23%20Regular/memorials/senate/SM068.HTML>.

Although Senate Memorial 68 was not adopted or formally approved by the Senate, the New Mexico Developmental Disability Council (DDC) offered to organize a working group and to facilitate meetings to accomplish the purposes of the proposed Senate Memorial. DDC was committed to moving this work forward due to the use and impact on its constituents of restraint and seclusion in the public schools, including concern about the disproportionate number of students with disabilities who have been subjected to restraint and seclusion. DDC contracted with Debra Poulin¹ to organize the working group and to facilitate meetings to accomplish the purposes of the proposed Senate Memorial.

The Working Group

Senate Memorial 68 proposed a diverse working group including New Mexico Public Education Department (PED), Early Childhood Education and Care Department (ECECD), Children Youth and Families Department (CYFD), the LESG, legislators, school administrators and teachers, parents, advocacy organizations, and law enforcement.

In August 2023, DDC created and began facilitation of the working group. Possible representatives for the working group were identified and invited to participate as working group members. A wide range of individuals were invited, including from PED, ECECD, LESG, DDC, Disability Rights New Mexico (DRNM), Native American Disability Law Center (NADLC), Parents Reaching Out (PRO), the New Mexico School Boards Association, Parents, Teachers, and others.

Those who participated in the working group include:

Marit Andrews, LESG Senior Policy Analyst II
Roxanne Arthur, Advocate, Native American Disability Law Center
Sacheen Dana Begay, Education for Parents of Indigenous Children with Special Needs (EPICS), Family Liaison
Alexis DeLaCruz, Attorney, Native American Disability Law Center

Jenn Donelli, Executive Director, Parents Reaching Out
 Rebecca Flen, Special Student Services Director, Portales Municipal Schools
 Elizabeth Forster, Parent
 Gabrielle Heisey, Parent
 Christa Kulidge, Director of Exceptional Programs, Farmington Municipal Schools
 Miguel Lozano, PED Chief Counsel for Special Education
 Alice Liu McCoy, DDC Executive Director
 Laurel Nesbitt, DRNM, Senior Attorney
 Patricia Osbourn, UNM Center for Development and Disability, Division Director
 Amanda Owens, Parent and Teacher
 Tony Rubin, School Board Member, Wagon Mound Public Schools
 Christy Schneider, Parent
 Steven Starkovich, Deputy Superintendent, Alamogordo Public Schools
 Michelle Tregembo, DDC Special Education Ombud

The working group met monthly. At each meeting, the working group members identified issues that are of concern related to restraint and seclusion laws, rules, practices, and training and discussed possible solutions.

This report summarizes the work and conclusions of the working group and includes recommendations for consideration related to the use of restraint and seclusion in the public schools. The working group approached its task with a broad lens, reviewing current law, practices and implementation of the law, barriers to implementation, and needs of the community (families, students) and schools. There was robust discussion from working group members with experience and knowledge of restraint and seclusion use who had different roles and views. Through the meetings, the working group members learned more about each other's experience and perspective and were able to work collaboratively to create the recommendations in this report.

Legal Framework

There is no current federal law setting or requiring specific standards for restraint and seclusion in the public schools. The Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*, and its implementing regulations, do not address restraint and seclusion. Although there have been efforts to pass federal legislation setting standards for the use of restraint and seclusion in public schools, no such legislation has been passed to date.ⁱⁱ

Thus, each state must set the standard for restraint and seclusion in its public schools. New Mexico has done that through statute, New Mexico Statute Annotated (NMSA) § 22-5-4.12 (2021),ⁱⁱⁱ and through rule in the New Mexico Administrative Code (NMAC), at 6.11.2.10(E) NMAC.

In addition to the state statute and rule, PED has issued a Memorandum to New Mexico schools on two occasions, first in 2017 after NMSA 22-5-4.12 was enacted and again in July 2021 as students begin to return to school after the pandemic.^{iv} The Memorandum contained a general overview of the legal requirements related to restraint and seclusion.

It is important to note that although restraint and seclusion predominantly impacts students with disabilities, the law – neither the state law and rule, nor the proposed federal legislation, is limited to students with disabilities. The New Mexico statute and rule on restraint and seclusion apply to all students whether or not they have a disability.

Special Education

The working group acknowledged the general applicability of the New Mexico restraint and seclusion statute and rule, while also addressing the generally recognized concern that students with disabilities, as well as students of color, are disproportionately subjected to those practices. In January 2019, the U.S. Department of education announced an initiative to address the possible inappropriate use of restraint and seclusion in public schools as applied to students with disabilities. In 2020, the U.S. Department of Education published a report, 2017-2018 Civil Rights Data Collection, The Use of Restraint and Seclusion on Children’s with Disabilities in K-12 Schools,^v reporting on data from the 2017-2018 school year. According to that report, 80% of students subjected to physical restraint in public schools and 77% of students subjected to seclusion were students with disabilities served under the Individuals with Disabilities Education Act. (IDEA). Other data from the US Department of Education reveals that students with disabilities who are served by IDEA are treated far more harshly than their peers without disabilities. Students with disabilities are twice as likely to receive an out of school suspension as students without disabilities and make up 25 percent of students arrested and referred to law enforcement.

There is no provision in New Mexico statutes or rules on special education that specifically address the use of restraint or seclusion separately for students with disabilities. The New Mexico Special Education Rule does not address restraint or seclusion. *See* 6.31.2 NMAC. Reports from Parents and Advocate working group members indicated concern about the overuse of restraint and seclusion and its inclusion as a planned intervention in IEPs and related documents. They also raised concern about the need for improved behavior intervention and support practices to eliminate the need for de-escalation, restraint, or seclusion, and the lack of knowledge of Parents of limitations on the use of restraint or seclusion, including as planned intervention.

Findings and Recommendations:

1. The use of restraint and seclusion practices in schools is an important health and safety issue for New Mexico students, families, and schools.

Students can be harmed, both physically and emotionally, by the use of restraint and seclusion in the schools. There is the concern about the standards for restraint and seclusion and their implementation. There are schools that have diligently implemented existing state law and rules but find aspects challenging due to a need for clarification in the law and rules, better guidance about acceptable practices, and training. Without these supports, school personnel become more amenable to stress and burnout.

Recommendations:

- a. Set a goal, supported by data, to reduce and eliminate the use of restraint and seclusion in the public schools.
- b. Ensure development, based on research and the input of diverse representatives, of standards, guidance, and training to (1) improve behavior supports for students so that de-escalation techniques are not needed and (2) improve knowledge of de-escalation techniques.
- c. Examine other states' laws and rules related to restraint and seclusion and determine best practices in considering changes to New Mexico's statute and rule.

2. New Mexico does not have data on restraint and seclusion in the public schools.

New Mexico currently has no reliable data on the use of restraint and seclusion in the schools. Data is needed to understand the use of restraint and seclusion in New Mexico. It is also needed to determine the effectiveness of the state standards in reducing and eliminating these practices and for the state to monitor the use of restraint and seclusion.

In September 2020, the New Mexico Public Education Department (PED) amended state rules to include reporting by schools to the PED on specific information related to restraint and seclusion. *See* 6.11.2.10(E)(6)(c) NMAC. Prior to this, state law and rules contained no reporting requirement.

PED cannot provide reliable data on restraint and seclusion, including data that aligns with the established reporting requirements. PED has not been able, though its Student Teacher Accountability Reporting System (STARS), to capture accurate data. Restraint and seclusion is set up to be reported as "school discipline" in STARS; however,

restraint or seclusion should not be used as “school discipline” and schools are confused about how and when to report. This leads to a failure to report incidents of restraint and seclusion and is indicative of a need for better guidance from PED and training for school staff. Although PED is transitioning to a new system referred to as NOVA, it is unclear whether this will resolve the issues preventing the collection of reliable data.

Recommendations:

- a. Provide PED with any needed technological and staff resources to collect data on restraint and seclusion in schools, including adequate resources to provide training and support to schools required to report that data.
- b. Ensure that PED’s data system does not require restraint and seclusion to be reported as “school discipline” and that schools are adequately trained on the reporting of restraint and seclusion.
- c. Ensure that PED publicly publishes collected non-identifying data on restraint and seclusion on PED website at regular, set intervals.

3. Additional oversight and monitoring from PED of the use of restraint and seclusion in school is needed, including from the Office of Special Education for students with disabilities.

There is no oversight by PED to ensure that schools are following state law and rule requirements for restraint and seclusion. There is no specific oversight of the use of restraint and seclusion with students with disabilities. In the past, the Special Education Division of PED disclaimed responsibility for implementation and monitoring of restraint and seclusion laws and rules, contending they were “general education” laws and rules. State special education rules do not explicitly address restraint and seclusion but only refer to “other departmental rules, standards, and guidance as a part of considerations relating to a free appropriate public education.” The lack of PED oversight of the implementation of the restraint and seclusion laws and rules for both general and special education purposes is a significant gap that leaves the state without information needed to support the schools and students in ensuring consistency and fidelity in implementation.

Recommendations:

- a. Ensure that PED regularly monitors the use of restraint and seclusion in the schools to determine whether and how it is being used and to provide guidance, technical assistance, and training to eliminate the use of restraint and seclusion.

- b. Given that most restraint and seclusion incidents involve students with disabilities, the PED OSEO assigns at least one 1 FTE to monitor and provide technical assistance to schools who are restraining or secluding students with disabilities.
- c. Ensure that PED develops state special education rules that clearly address the use of restraint and seclusion of students with disabilities.

4. School board policies and procedures for restraint and seclusion need to be reviewed by PED and be more readily available to parents.

PED's oversight of development of school board policies on restraint and seclusion is limited to review of assurance in School Safety Plan. *See* 6.11.2.10(E)(2) NMAC. Although schools are required by current law and rules to develop a school board policy for restraint and seclusion, the only requirement for that policy is that the agency provide assurance in the School Safety Plan that such a policy exists. It is not possible to obtain through PED a copy of a school district's policy as PED does not consider this to be a public document. In some instances, when parents have tried to obtain the school board policy and procedures, the school was unable to provide the policy and procedures.

Parents and other community members are not able to obtain school board policies and are not informed of their children's rights related to restraint and seclusion. Many parents do not know that the state has restraint and seclusion laws and rules, and that they and their children have rights under these laws and rules. Some teachers, including special education teachers, do not appear to have knowledge of the requirements for and limitations on restraint and seclusion or do not share that information with parents.

Recommendations:

- a. As part of improved monitoring, ensure that PED reviews each school's board-approved restraint and seclusion policy and procedures to ensure that the policy and procedures are consistent with state law and rules.
- b. Ensure that each school post its restraint and seclusion policy on its public website and report posting to PED.
- c. Ensure that PED develops a state rule requiring schools to provide written notice to parents explaining the state restraint and seclusion requirements or at a minimum, requiring inclusion of this policy in the school's student handbook.

5. Practice and implementation of restraint and seclusion requirements is different around the state.

There are schools in New Mexico that are knowledgeable about the state requirements for restraint and seclusion and making efforts at implementation. Their goals are to reduce and eliminate the use of restraint and seclusion and develop other behavioral supports for students, and also ensure a safe environment for all. These schools are good role models.

However, not all schools and their staff are following the requirements for restraint and seclusion. Many school staff, including special education staff, do not seem knowledgeable about the requirements. Data collection would allow PED and others to see trends in the frequency of the use of restraint and seclusion and identify those schools that might need further support in understanding or implementing the requirements. At this point, there is no known data about restraint or seclusion use in the schools. The information about the lack of implementation noted below comes from reports in the working group.

- Notice/documentation. Some schools are not providing the required parental notice for restraint or seclusion use. Working group members reported that in some schools, parents are not provided with any notice of restraint or seclusion being used on their child. Some parents of students with disabilities cannot obtain that information from their child. Parents who have received written documentation have reported that it does not contain the required information.

State rules require oral or written notice to parents on the day of a restraint or seclusion incident or no later than 24 hours after the incident. 6.11.2.10(E)(6)(a) NMAC. State rules also require that no later than 2 days after an incident, the parent is provided with written documentation that includes information about the incident (persons, locations, or activities that may have triggered the behavior and specific information about the behaviors, precursors, type of restraint or seclusion technique used, and the duration of its use).

6.11.2.10(E)(6)(b) NMAC. There is no state template for this notice or documentation.

- Prone restraint. Some schools continue to use the dangerous technique of prone restraint. Prone restraint is a method where a person's face and frontal part of his or her body is placed in a downward position touching any surface for any amount of time. Working group members reported that prone restraint is still being used in New Mexico schools. State rules require that the "restraint or seclusion techniques shall not impede the Student's ability to breathe or speak..." per 6.11.2.10(E)(1)(c) NMAC. PED, in a guidance memo, advised that this definition includes prone restraint.

- Lack of Follow-up. Some schools are not following the process for review of incidents of restraint and seclusion. 6.11.2.10(E)(5) NMAC. This includes both an internal review by teams after the use of restraint or seclusion with a single student two times in a thirty-day period as well as an annual review and analysis by schools of all incidents of restraint and seclusion. These review processes are important to the reduction or elimination of restraint and seclusion, and to the identification of training needs.

Recommendations:

- a. Consider PED templates for restraint and seclusion notices, documentation, and reviews for use by schools, at least as guidance.
- b. Amend the statute and rules to clearly define “prone restraint” and to create clear provisions banning prone restraint.
- c. Improve PED monitoring of restraint and seclusion, *supra* at pp. 4-5.
- d. Improve training opportunities and support for schools, *infra* at pp.8-9.

6. More training is needed on de-escalation, restraint, and seclusion.

Trained school personnel are critical to implementation of the current restraint and seclusion law and rules. All working group members agreed that more training for school personnel is essential.

Both the statute and rules permit restraint or seclusion to be used only by “school employees who are trained in de-escalation strategies, positive behavioral intervention supports, and the safe and effective use of restraint or seclusion techniques, unless an emergency does not allow sufficient time to summon trained employees.”
6.11.2.10(E)(1)(b) NMAC.

There is no state standard for the training that schools must provide. PED does not provide training or recommend any specific training. Under current state rule, schools are required to develop policies and procedures for use of restraint and seclusion techniques that, among other things, describe training for school personnel.
6.11.2.10(E)(3) NMAC. State rule requires only that training shall be provided “for designated school personnel” on “de-escalation strategies, positive behavioral intervention supports, or other comparable behavior management techniques and the use of restraint or seclusion techniques.” 6.11.2.10(E)(3)(a) NMAC. Concern was expressed that schools had to individually secure the expertise needed to make an informed decision about what training to provide.

Concern was also expressed by several members that for students with disabilities, once de-escalation was needed, it was too late. The issues need to be addressed proactively as part of front end and student's IEP with positive behavioral supports and services. There are other approaches to behavior support that could be considered, specifically for students with disabilities, that could lead to elimination of the need for restraint and seclusion.

State rules require that "designated school personnel" must attend training or demonstrate competency at least every two years. 6.11.2.10(E)(3)(a) NMAC. For new designated school personnel, training or competency demonstration is to be provided within 60 days of being designated. 6.11.2.10(E)(3)(b) NMAC.

There was support among working group members to expand the pool of school personnel who are trained beyond special education personnel. There was concern that regular education teachers, educational assistants, administrators, and other school staff (cafeteria, bus drivers) may need fundamental training. It is also important to ensure that school resource officers and school security guards are included in this training requirement.

Barriers to increased training exist in terms of funding for training and the time and capacity of school personnel to receive and absorb more training. There is no state funding specifically for this training. There is limited IDEA funding for this training, depending on the yearly allocation and how funds are used.

Recommendations:

- a. Determine whether a state standard for training should be required, developed, recommended, and/or funded by PED.
- b. Amend the statute and/or rules to clarify and possibly expand the scope of school personnel who are required to have training.
- c. Explore options for providing funding for schools to ensure ability to provide training to more school personnel.
- d. Determine whether funds for training can be accessed through Medicaid without negatively impacting a student's other services and if so, provide training to schools on how to access Medicaid funds for this purpose.

7. The existing statute and rules on restraint and seclusion would benefit from amendment.

The existing law and rules contain many of the elements needed for restraint and seclusion requirements that, if implemented with fidelity, provides a good foundation

for ensuring that restraint and seclusion are not overused, or used in a dangerous and harmful way. However, there continues to be recognized need for improvement in the existing law and rules. In addition to the areas mentioned above in 5b and 6b, there are other elements of the existing statute and rules that would benefit from amendment.

Improved definitions are one area of need. As one working group member said, "strong definition of the terms is one key to empowering school to navigate situations appropriately as they arise."

One area of concern is the undefined use of the term "physical escort." Currently, the statute and rule define physical restraint as "the use of physical force without the use of any device or material that restricts the free movement of all or a portion of a student's body, but 'physical restraint' does not include physical escort." N.M.S.A. § 22-5-4.12(I); 6.11.2.7(V) NMAC. There is no definition of physical escort. Schools are confused about what this means and concerned about liability. Other working group members were concerned that the definition of physical restraint needed improvement.

A second concern is chemical restraint which is not addressed in our current law or rules. Chemical restraints are not commonly used in schools. Most working group members supported a definition for and a ban on chemical restraints.

A third concern is the definition for mechanical restraint. The definition is not clear enough and lacks information about devices that are used in conformance with medical treatment provider instructions or restraints like seat belts used in transporting students.

A fourth area of concern was elopement. This is a serious safety concern for students, parents, and schools. Parents do not want their child to elope into a dangerous situation. Schools are afraid to restrain children when they are eloping. A definition for elopement, along with a standard for determining when restraint is appropriate in this situation, could be helpful.

A fifth area of concern for some working members was the fact that current law does not require a meeting and review with the parents after each restraint or seclusion incident. Currently, the law and rule provide that for a student with a disability who is served under the IDEA and who has been restrained or secluded two or more times in a thirty-day period, the student's IEP team must meet within 2 weeks of each subsequent incident. The purpose is to provide recommendations for avoiding the future use of restraint and seclusion. N.M.S.A. § 22-5-4.12(I); 6.11.2.10(E)(5) NMAC. Parents and Advocates express concern that there is too much delay in this requirement and that parents, under the IDEA and state special education law, have the right to request an IEP meeting at any time.

Finally, there was concern about the definition of seclusion. One concern was the distinction between students who voluntarily chose to be in a quiet or calming space versus involuntary seclusion alone in a room or area from which they are not allowed to leave. In 2003, PED issued a Memorandum concerning the "Use of Time-Out Rooms as a Behavioral Intervention."^{vi} This Memorandum predates the enactment of New Mexico's statute and rule on restraint and seclusion. The guidance in the 2003 PED Memorandum about the "use of Time-Out Rooms" is more complete than that which has been provided for seclusion. The Memorandum also contains input for the New Mexico State Fire Marshall's Office concerning safety requirements. Currently, seclusion is defined as "the involuntary confinement of a student alone in a room from which egress is prevented." 6.31.2.7(X) NMAC. This may conflict with legal requirements related to egress from a room or building. Working group members felt a need to clarify seclusion and time out.

Recommendations:

- a. Amend the statute to define physical escort, as distinguished from physical restraint.
- b. Amend the statute and rules to clearly define "prone restraint," and to ban the use of prone restraint.
- c. Amend the statute to define and ban chemical restraint.
- d. Amend the statute to more clearly define mechanical restraint and to ban its use.
- e. Consider amending the statute and/or rule or providing PED Guidance to define elopement and the acceptable responses to elopement.
- f. Consider amending that statute or rule to define "de-escalation" and to clarify that de-escalation does not supplant the individualized requirements of a student's IEP.
- g. Amend the rule to remove restraint and seclusion from "Enforcing Rules of Conduct" section of the state rules, 6.11.2.10 NMAC and place it in a more appropriate section to the rules to clarify that restraint and seclusion are not a form of discipline.
- h. Consider amending the statute and rule to confirm that parents of students with disabilities have the right to request an IEP team meeting after every incident of restraint or seclusion.

- i. Amend the statute and rule to ensure that requirements for seclusion comply with other state and local safety requirements, specifically related to preventing egress of a student from a room.
- j. Amend the statute and rule to clarify and distinguish seclusion from time out and to set appropriate standards for their use.
- k. Ensure that PED provides current guidance related to seclusion and time-out, including but not limited to whether time out is an acceptable intervention, and if so, how it is distinguished from seclusion.

ⁱ Debra Poulin, Esq., is an attorney who has extensive experience in special education law. She has practiced special education law as a private attorney, a legal director of a state protection and advocacy agency, Chief Counsel for Special Education at PED, and Education Rights Attorney at CYFD's Office of Children's Rights.

ⁱⁱ See [https://www.congress.gov/bill/117th-congress/senate-bill/1858/all-info#:~:text=%2F26%2F2021\)-,Keeping%20All%20Students%20Safe%20Act,programs%20that%20receive%20federal%20funding](https://www.congress.gov/bill/117th-congress/senate-bill/1858/all-info#:~:text=%2F26%2F2021)-,Keeping%20All%20Students%20Safe%20Act,programs%20that%20receive%20federal%20funding).

ⁱⁱⁱ NMSA § 22-5-4.12 was first enacted in 2017. Several amendments of the statute have been attempted, including:

- School Restraint & Seclusion Reporting, HB 354, 2020, <https://www.nmlegis.gov/Sessions/20%20Regular/bills/house/HB0354.pdf>
- School Use of Restraint, SB 319, 2021, <https://www.nmlegis.gov/Sessions/21%20Regular/bills/senate/SB0319.pdf>
- School Student Restraint or Isolation, SB 387, 2023, <https://www.nmlegis.gov/Sessions/23%20Regular/bills/senate/SB0387.pdf>

^{iv} https://webnew.ped.state.nm.us/wp-content/uploads/2021/09/Restraint_and_Seclusion_Memo_7_29_21.pdf

^v <https://www2.ed.gov/about/offices/list/ocr/docs/restraint-and-seclusion.pdf>

^{vi} <https://webnew.ped.state.nm.us/wp-content/uploads/2018/01/Use-of-Time-Out-Rooms-as-a-Behavioral-Intervention.pdf>