

Adopted Rule Abstract

1. **Agency:** Public Education Department
2. **Rule Citation:** 6.11.2 NMAC
3. **Rulemaking Action:** New Rule
4. **Register Issue and Date of Notice of Proposed Rulemaking:** Volume 29, Issue 5, March 13, 2018
5. **Register Issue and Date of Adoption:** Volume 29, Issue 12, June 26, 2018
6. **Effective Date:** July 1, 2018
7. **Specific Legal Authority:** Sections 22-1-2, 22-2-2, and 22-5-4.12 NMSA 1978, and 42 U.S.C. 11431, et. seq. (McKinney-Vento Homeless Assistance Act)
8. **Purpose of Rule:** Implement Section 22-5-4.12 NMSA 1978 by establishing requirements for the use of restraint and seclusion when disciplining students
9. **Link to Permanent Agency Rulemaking Record:**
http://statenm.force.com/public/SSP_RuleHearingSearchPublic

Summary of Adopted Rule

The June 26, 2018 issue of the *New Mexico Register* contained the final adoption of amendments to Part 2 of 6.11 NMAC, “Rights and Responsibilities of the Public Schools and Public School Students,” that implement restraint and seclusion requirements of Section 22-5-4.12 NMSA 1978, enacted by Laws 2017, Chapter 33. See **Attachment 1, Adopted Rule 6.11.2 NMAC, Restraint and Seclusion.**

Analysis

The adopted rule implements restraint and seclusion provisions of Section 22-5-4.12 NMSA 1978. Newly defined terms include “mechanical restraint,” “physical restraint,” “restraint,” “seclusion,” and “student experiencing homelessness.” All these terms except for “students experiencing homelessness” are also included in Section 22-5-4.12 NMSA 1978; they duplicate statutory versions of the definitions, which Section 14-4-5.7 NMSA 1978 of the State Rules Act discourages. The definition for “students experiencing homelessness” incorporates by reference the definition for “homeless children and youth” from the federal McKinney-Vento Homelessness Assistance Act. (See **Attachment 2, Federal McKinney-Vento Act Definition of “Homeless Children and Youth.”**)

Programmatic provisions of the rule require schools to establish rules and procedures for the use of restraint and seclusion techniques, which must require

appropriate training of school personnel. Restraint and seclusion is permitted only when less restrictive measures appear insufficient to mitigate potential harm, and when a student is restrained or secluded, they must be visually monitored at all times by a trained school employee. School districts and charter schools must develop and implement an annual training for targeted school personnel on positive behavioral interventions and the use of restraint and seclusion.

Paragraph B of Section 22-5-4.12 NMSA 1978 also directed schools to establish policies and procedures for restraint and seclusion techniques, to be added to school safety plans. According to subparagraph 3 of Section 6.11.2.10(E) of the adopted rule, these additional policies and procedures must be drafted by a planning team that includes at least one special education expert, and must not be specific to any individual student. Currently, school safety plans, outlined under Paragraph D of Section 6.12.6.8 NMAC, must include at least an introduction, school policies and procedures, prevention measures, and a school emergency operation plan. School safety planning teams must include an administrator, an educator, and a special education expert, and may include a counselor or social worker and a school resource officer or security staff. School safety plans must be submitted to the Public Education Department (PED) every three years, as scheduled by PED.

School employees must establish recording and documentation procedures that include provision of written or oral notice to a restrained or secluded student's parent or guardian on the day that the incident occurred, and must include information about a triggering event or person, the behavior and its precursors, and the type and duration of restraint and seclusion used. Reporting procedures must include assurances of secure storage and access to records pursuant the federal Family Educational Rights and Privacy Act (FERPA).

McKinney-Vento Homelessness Assistance Act

Subsection H of 6.11.2.10 NMAC includes provisions specific to the administration of requirements of the federal McKinney-Vento Homelessness Assistance Act. Removing homeless students from class is only permitted as a last resort. Public schools must develop discipline policies that provide professional development opportunities for educators and administrators that foster an awareness of the types of behaviors homeless students may exhibit because of their difficult living situations, and provide supports to address these sorts of behaviors through the student assistance team. These policies and procedures must reflect how homelessness affects these students by requiring staff to consult with the student, family, and appropriate staff before disciplining the student, and employ alternatives to out-of-school suspension or expulsion whenever possible. The policies and procedures will require schools to connect students with appropriate mental health assistance, if necessary. Finally, public schools will be required to review discipline records of homeless students to identify patterns in disciplinary actions that may indicate unfair bias against students, though such review must be in compliance with FERPA.

Changes from the Rule as Proposed

The adopted rule included several changes from the rule as proposed, the first of which was the inclusion of a requirement that any review of discipline records for homeless students must be in compliance with FERPA.

Two other changes were made, possibly in response to comments from LESC staff. First, the proposed rule would have permitted PED to delay or withhold the state equalization guarantee (SEG) distribution from a school district that includes a school that fails to comply with requirements for school safety plans. LESC staff noted in both the staff brief on the proposed rule and in a public comment to the rule that that provision was outside PED's statutory authority, as nothing in the authorizing statute, Section 22-5-4.12 NMSA 1978 contemplates any withholding or delay of a school district's SEG distribution. Finally, the proposed rule only placed the burden of developing and implementing annual training for targeted school personnel on positive behavioral interventions and the use of restraint and seclusion on school districts. LESC staff noted this requirement should be established for charter schools as well as local school districts; the final rule expanded that requirement to include charter schools.

This is an amendment to 6.11.2 NMAC, Sections 3, 7, and 10, effective 7/1/2018

6.11.2.3 STATUTORY AUTHORITY: This rule is adopted pursuant to Sections 22-2-1, 22-2-2, and 22-5-4.12 NMSA 1978 and 42 U.S.C. 11431 et seq., the McKinney-Vento Homelessness Assistance Act. [8/15/1997; 6.11.2.3 NMAC - Rn, 6 NMAC 1.4.3, 11/30/2000; A, 11/13/2009; A, 7/1/2018]

6.11.2.7 DEFINITIONS:

- A.** "**Administrative authority**" means the local school district superintendent, a principal or a person authorized by either to act officially in a matter involving school discipline or the maintenance of order. The term may include school security officers, but only to the extent of their authority as established under written local school board policies.
- B.** "**Criminal acts**" are acts defined as criminal under federal and state law, and any applicable municipal or county criminal ordinances.
- C.** "**Delinquent acts**" are acts so defined in Subsection A of Section 32A-2-3 NMSA 1978 of the Delinquency Act.
- D.** "**Detention**" means requiring a student to remain inside or otherwise restricting his or her liberty at times when other students are free for recess or to leave school.
- E.** "**Disciplinarian**" means a person or group authorized to impose punishment after the facts have been determined by a hearing authority.
- F.** "**Disruptive conduct**" means willful conduct which:
- (1) materially and in fact disrupts or interferes with the operation of the public schools or the orderly conduct of any public school activity, including individual classes; or
 - (2) leads an administrative authority reasonably to forecast that such disruption or interference is likely to occur unless preventive action is taken.
- G.** "**Expulsion**" means the removal of a student from school either permanently or for an indefinite time exceeding 10 school days or a locally established lesser period.
- H.** "**Gang related activity**" is disruptive conduct.
- I.** "**Hearing authority**" means a person or group designated to hear evidence and determine the facts of a case at the required formal hearing.
- J.** "**Immediate removal**" means the removal of a student from school for one school day or less under emergency conditions and without a prior hearing.
- K.** "**In-school suspension**" means suspending a student from one or more regular classes while requiring the student to spend the time in a designated area at the same school or elsewhere.
- L.** "**Legal limits**" include the requirements of the federal and state constitutions and governing statutes, standards and regulations, and also include the fundamental common-law requirement that rules of student conduct be reasonable exercises of the schools' authority in pursuance of legitimate educational and related functions. There are special limitations arising from constitutional guarantees of protected free speech and expression which must be balanced against the schools need to foster an educational atmosphere free from undue disruptions to appropriate discipline.
- M.** "**Long-term suspension**" means the removal of a student from school for a specified time exceeding either 10 school days or any lesser period a local school board may set as a limit on temporary suspension.
- N.** "**Mechanical restraint**" means the use of any device or material attached or adjacent to the student's body that restricts freedom of movement or normal access to any portion of the student's body and that the student cannot easily remove, but "**mechanical restraint**" does not include mechanical supports or protective devices.
- ~~[N:]~~ **Q.** "**Parent**" means the natural parent, a guardian or other person or entity having custody and control of a student who is subject to the Compulsory School Attendance Law, Section 22-12-1 et seq. NMSA 1978, or the student if ~~[(s)he]~~ the student is not subject to compulsory attendance.
- P.** "**Physical restraint**" means 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.
- ~~[Q:]~~ **Q.** "**Public school**" means the campus of and any building, facility, vehicle or other item of property owned, operated, controlled by or in the possession of a local school district. For purposes of student discipline, the term also includes any non-school premises being used for school-sponsored activities.
- ~~[P:]~~ **R.** "**Refusal to cooperate with school personnel**" means a student's willful refusal to obey the lawful instructions or orders of school personnel whose responsibilities include supervision of students.
- ~~[Q:]~~ **S.** "**Refusal to identify self**" means a person's willful refusal, upon request from school personnel known or identified as such to the person, to identify himself or herself accurately.
- ~~[R:]~~ **T.** "**Restraint**" when not otherwise modified means mechanical or physical restraint.
- ~~[R:]~~ **U.** "**Review authority**" is a person or group authorized by the local board to review a disciplinarian's final decision to impose a long-term suspension or expulsion.
- V.** "**Seclusion**" means the involuntary confinement of a student alone in a room from which egress is prevented. "**Seclusion**" does

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not mean the use of a voluntary behavior management technique, including a timeout location, as part of a student's education plan, individual safety plan, behavioral plan or individualized education program that involves the student's separation from a larger group for purposes of calming.

~~[S:]~~ **W.** "**Sexual harassment**", regarding students, means unwelcome or unwanted conduct of a sexual nature (verbal, non-verbal or physical) when:

- (1) submission to such conduct is made either explicitly or implicitly a term or condition of the advancement of a student in school programs or activities;
- (2) submission to or rejection of such conduct by a student is used as the basis for decisions/opportunities affecting the student;
- (3) such conduct substantially interferes with a student's learning or creates an intimidating, hostile or offensive learning environment.

~~[T:]~~ **X.** "**School personnel**" means all members of the staff, faculty and administration employed by the local school board. The term includes school security officers, school bus drivers and their aides, and also authorized agents of the schools, such as volunteers or chaperons, whose responsibilities include supervision of students.

~~[U:]~~ **Y.** "**Student**" means a person who is enrolled in one or more classes at a public school or a person who was a student during the previous school year and is participating in a school sponsored activity connected with his or her prior status as a student.

Z. "**Student experiencing homelessness**" means children and youth as defined by Section 725(2) of the federal McKinney-Vento Act.

~~[V:]~~ **AA.** "**Temporary suspension**" means the removal of a student from school for a specified period of 10 school days or less after a rudimentary hearing.

~~[W:]~~ **BB.** "**Weapon**" as set forth in Section 22-5-4.7 NMSA 1978 means:

- (1) any firearm that is designed to, may readily be converted to or will expel a projectile by the action of an explosion; and
- (2) any destructive device that is an explosive or incendiary device, bomb, grenade, rocket having a propellant charge of more than four ounces, missile having an explosive or incendiary charge of more than one-quarter-ounce, mine or similar device.

[8/15/1997; 6.11.2.7 NMAC - Rn, 6 NMAC 1.4.7, 11/30/2000; A, 7/1/2018]

6.11.2.10 ENFORCING RULES OF CONDUCT:

A. Enforcing attendance requirements. Formal enforcement action under the Compulsory School Attendance Law, supra, and the Family Services Act, Section 32A-3A-1 et seq. NMSA 1978 shall be initiated whenever a student's absences indicate that the law is being violated. An administrative authority who has reason to believe a student is violating local school board attendance policies may take whatever further disciplinary action is deemed appropriate under local policies.

B. Search and seizure: School property assigned to a student and a student's person or property while under the authority of the public schools are subject to search, and items found are subject to seizure, in accordance with the requirements below.

- (1) Notice of search policy. Students shall be given reasonable notice, through distribution of written policies or otherwise, of each school's policy on searches at the beginning of each school year or upon admission for students entering during the school year.
- (2) Who may search. Certified school personnel, school security personnel and school bus drivers are "authorized persons" to conduct searches when a search is permissible as set forth below. An authorized person who is conducting a search may request the assistance of some other person(s), who upon consent become(s) an authorized person for the purpose of that search only.
- (3) When search permissible. Unless local school board policy provides otherwise, an authorized person may conduct a search when ~~[(s)he]~~ the authorized person has a reasonable suspicion that a crime or other breach of disciplinary rules is occurring or has occurred. An administrative authority may direct or conduct a search under the same conditions and also when ~~[(s)he]~~ the administrative authority has reasonable cause to believe that a search is necessary to help maintain school discipline.
- (4) Conduct of searches; witnesses. The following requirements govern the conduct of permissible searches by authorized persons.

(a) School property, including lockers and school buses, may be searched with or without students present unless a local school board or administrative authority provides otherwise. When students are not present for locker searches, another authorized person shall serve as a witness whenever possible. Locks furnished by students should not be destroyed unless a student refuses to open one or circumstances otherwise render such action necessary in the judgment of the administrative authority.

(b) Student vehicles when on campus or otherwise under school control and students' personal effects which are not within their immediate physical possession may be searched in accordance with the requirements for locker searches.

(c) Physical searches of a student's person may be conducted only by an authorized person who is of the same sex as the student, and except when circumstances render it impossible may be conducted only in the presence of another authorized person of the same sex. The extent of the search must be reasonably related to the infraction, and the search must not be excessively intrusive in light of the student's age and sex, and the nature of the infraction.

(5) Seizure of items: Illegal items, legal items which threaten the safety or security of others and items which are used to disrupt or interfere with the educational process may be seized by authorized persons. Seized items shall be released to appropriate authorities or a student's parent or returned to the student when and if the administrative authority deems appropriate.

(6) Notification of law enforcement authorities: Unless a local school board policy provides otherwise, an administrative authority shall have discretion to notify the local children's court attorney, district attorney or other law enforcement officers when a search discloses illegally possessed contraband material or evidence of some other crime or delinquent act.

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C. Basis for disciplinary action: A student may appropriately be disciplined by administrative authorities in the following circumstances:

- (1) for committing any act which endangers the health or safety of students, school personnel or others for whose safety the public school is responsible, or for conduct which reasonably appears to threaten such dangers if not restrained, regardless of whether an established rule of conduct has been violated;
- (2) for violating valid rules of student conduct established by the local school board or by an administrative authority to whom the board has delegated rulemaking authority, when the student knew or should have known of the rule in question or that the conduct was prohibited; or
- (3) for committing acts prohibited by this rule, when the student knew or should have known that the conduct was prohibited.

D. Selection of disciplinary sanctions: Within legal limits as defined in Subsection L of 6.11.2.7 NMAC above, local school boards have discretion to determine the appropriate sanction(s) to be imposed for violations of rules of student conduct, or to authorize appropriate administrative authorities to make such determinations.

- (1) School discipline and criminal charges: Appropriate disciplinary actions may be taken against students regardless of whether criminal charges are also filed in connection with an incident.
- (2) Nondiscriminatory enforcement: Local school boards and administrative authorities shall not enforce school rules or impose disciplinary punishments in a manner which discriminates against any student on the basis of race, religion, color, national origin, ancestry, sex, or disability, except to the extent otherwise permitted or required by law or regulation. This statement shall not be construed as requiring identical treatment of students for violation of the same rule; it shall be read as prohibiting differential treatment which is based on race, religion, color, national origin, ancestry, sex, or disability rather than on other differences in individual cases or students.

E. Restraint and seclusion: In accordance with Section 22-5-4.12 NMSA 1978, each school shall follow requirements for the use of restraint and seclusion techniques.

(1) Schools shall establish and review annually policies and procedures, as approved by the local school board or governing body, for the use of restraint and seclusion techniques. Such policies and procedures shall require and describe appropriate training for school personnel and shall include requirements in relation to the use of restraint and seclusion techniques.

(a) A school may permit the use of restraint and seclusion techniques on any student pursuant to the requirements in Section 22-5-4.12 NMSA 1978.

(b) Less restrictive interventions, including positive behavioral intervention supports or other comparable behavior management techniques, shall be implemented prior to the use of restraint and seclusion techniques.

(c) If a restraint or seclusion technique is used on a student, trained and authorized school employees shall maintain continuous visual observation and monitoring of the student while the restraint or seclusion technique is in use, pursuant to the requirements in Section 22-5-4.12 NMSA 1978.

(2) Districts or charter schools shall develop and implement an annual training for designated school personnel regarding positive behavioral intervention supports or comparable behavior management techniques and the use of restraint and seclusion techniques. In the event that new designated school personnel are employed within the school after the provision of the annual training, the principal of the school, or a person authorized to act officially in a matter involving school discipline or the maintenance of order within the school, shall ensure that a training is provided to new designated school personnel within 60 days of employment.

(3) Schools shall update school safety plans.

(a) A school safety plan pursuant to requirements of Paragraph (7) of Subsection D of 6.12.6.8 NMAC shall include additional minimum requirements.

(i) The school safety plan shall not be specific to any individual student.

(ii) The school safety planning team shall include at least one of each of the following: administrator, educator, and special education expert and may include a counselor or social worker, nurse, and school resource officer or security staff.

(b) A school safety plan pursuant to requirements of Paragraph 7 of Subsection D of 6.12.6.8 NMAC shall be submitted to the department on a triennial basis, on a schedule as determined by the department. Notice of school safety plan submittal will be provided by the department to local education agencies 90 days prior to the due date.

(4) Schools shall establish reporting and documentation procedures pursuant to the requirements listed in Section 22-5-4.12 NMSA 1978. In addition, schools shall provide written or oral assurance of secure storage and access to written documentation in accordance with 20 U.S.C. § 1232g; 34 CFR Part 99, Family Educational Rights and Privacy Act, as well as any other applicable federal or state laws or rules governing the privacy of such documents.

(5) Exemptions to the requirements prescribed in Subsection E of 6.11.2.10 NMAC shall be pursuant to Subsections G and H of Section 22-5-4.12 NMSA 1978.

~~[E:] E. Corporal punishment: [Corporal punishment shall not be utilized as a means of enforcing rules of conduct in public schools.] Corporal punishment shall be prohibited by each local school board and each governing body of a charter school pursuant to Subsection B of Section 22-5-4.3 NMSA 1978. Restraint or seclusion techniques used in compliance with Subsection E of 6.11.2.10 NMAC shall not be deemed to be corporal punishment.~~

~~[F:] G. Detention, suspension and expulsion: Where detention, suspension or expulsion is determined to be the appropriate penalty, it may be imposed only in accordance with procedures that provide at least the minimum safeguards prescribed in 6.11.2.12 NMAC, below. Suspensions or expulsions of students with disabilities shall be subject to the further requirements of Subsection [G] I of 6.11.2.10 NMAC and 6.11.2.11 NMAC below.~~

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H. Discipline of students experiencing homelessness: Removing students experiencing homelessness from school shall be used only as a last resort, pursuant to the requirements in 42 U.S.C. 11431 et seq., the McKinney-Vento Homelessness Assistance Act.

(1) Public schools shall develop discipline policies and procedures that are reviewed at least annually and align with local school board or governing body policies. Policies and procedures shall:

(a) through professional development activities, create an awareness among educators and administrators of the types of behaviors that students experiencing homelessness may exhibit due to homelessness and provide strategies and supports to address the behaviors through the student assistance team process in accordance with Subsection D of 6.29.1.9 NMAC;

(b) take into account the issues related to a student's homelessness by talking with the student and applicable staff and families prior to taking disciplinary action;

(c) consult with school behavior response teams or other applicable personnel to assign appropriate discipline related to the behavior;

(d) implement discipline alternatives to out of school suspensions or expulsions or classroom removals, if possible; and

(e) connect students with mental health services as needed.

(2) Public schools shall review school discipline records and data of students experiencing homelessness in order to identify any patterns in disciplinary actions that indicate an unfair bias against the students. The collection and review of such records shall be in compliance with the Family Educational Rights and Privacy Act, as well as any other applicable federal or state laws or rules governing the privacy of such documents.

[G-] L. Discipline of students with disabilities: Students with disabilities are not immune from school disciplinary processes, nor are they entitled to remain in a particular educational program when their behavior substantially impairs the education of other children in the program. However, the public schools are required by state law and regulations to meet the individual educational needs of students with disabilities to the extent that current educational expertise permits. Public school personnel may consider any unique circumstances on a case-by-case basis when determining whether a change of placement, consistent with the other requirements of 6.11.2.11 NMAC, is appropriate for a student with a disability who violates a code of conduct as provided in 34 CFR Sec. 300.530.

(1) Long-term suspensions or expulsions of students with disabilities shall be governed by the procedures set forth in 6.11.2.11 NMAC below.

(2) Temporary suspensions of students with disabilities may be imposed in accordance with the normal procedures prescribed in Subsection D of 6.11.2.12 NMAC below, provided that the student is returned to the same educational placement after the temporary suspension and unless a temporary suspension is prohibited under the provisions of ~~[Subsection G, Paragraph (3) of 6.11.2.10 NMAC]~~ Paragraph (3) of Subsection I of 6.11.2.10 NMAC below.

(3) Program prescriptions. A student with a disability's individualized education program (IEP), under the Individuals with Disabilities Education Improvement Act of 2004 (IDEA), need not affirmatively authorize disciplinary actions which are not otherwise in conflict with this rule. However, the IEP team may prescribe or prohibit specified disciplinary measures for an individual student with a disability by including appropriate provisions in the student's IEP. Administrative authorities shall adhere to any such provisions contained in a student with a disability's IEP, except that an IEP team may not prohibit the initiation of proceedings for long-term suspension or expulsion which are conducted in accordance with this rule.

(4) Immediate removal. Immediate removal of students with disabilities may be done in accordance with the procedures of Subsection C of 6.11.2.12 NMAC below.

(5) A student who has not been determined to be eligible for special education and related services under 6.31.2 NMAC and who has engaged in behavior that violated a code of student conduct may assert any of the protections provided for in this subsection if the conditions set forth in 34 CFR Sec. 300.534 have been met.

(6) Referral to and action by law enforcement and judicial authorities.

(a) Nothing in these rules of conduct prohibits an administrative authority from reporting a crime committed by a student with a disability to appropriate authorities or prevents state law enforcement and judicial authorities from exercising their responsibilities with regard to the application of federal and state law to crimes committed by a student with a disability.

(b) Transmittal of records.

(i) An administrative authority reporting a crime committed by a student with a disability must ensure that copies of the special education and disciplinary records of the student are transmitted, for consideration by the appropriate authorities, to whom the administrative authority reports the crime.

(ii) An administrative authority reporting a crime under this section may transmit copies of the student's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act.

[08/15/1997; 6.11.2.10 NMAC - Rn, 6 NMAC 1.4.10, 11/30/2000; A, 6/29/2007; A, 11/13/2009; A, 10/31/2011; A, 7/1/2018]

**Federal McKinney-Vento Act
Definition of “Homeless Children and Youth”**

ATTACHMENT 2

Section 725.

For purposes of this subtitle

(1) The terms enroll' and enrollment' include attending classes and participating fully in school activities.

(2) The term homeless children and youths' —

(A) means individuals who lack a fixed, regular, and adequate nighttime residence (within the meaning of section 103(a)(1)); and

(B) includes —

(i) children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement;

(ii) children and youths who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings (within the meaning of section 103(a)(2)(C));

(iii) children and youths who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and

(iv) migratory children (as such term is defined in section 1309 of the Elementary and Secondary Education Act of 1965) who qualify as homeless for the purposes of this subtitle because the children are living in circumstances described in clauses (i) through (iii).