

LESC bill analyses are available on the New Mexico Legislature website (www.nmlegis.gov). Bill analyses are prepared by LESC staff for standing education committees of the New Mexico Legislature. LESC does not assume any responsibility for the accuracy of these reports if they are used for other purposes.

LEGISLATIVE EDUCATION STUDY COMMITTEE
BILL ANALYSIS
53rd Legislature, 2nd Session, 2018

Bill Number	<u>HB341/HRCS</u>	Sponsor	<u>HRC</u>
Tracking Number	<u>.210530.1</u>	Committee Referrals	<u>HRC/HJC</u>
Short Title	<u>Michael's Law & School Care & Restraints</u>		
Analyst	<u>Force</u>	Original Date	<u>2/13/18</u>
		Last Updated	<u></u>

BILL SUMMARY

Synopsis of Bill

House Rules and Order of Business Committee Substitute for House Bill 341 (HB341/HRCS) provides for the protection of students in need of accommodation, limits school use of restraint and seclusion, and gives notice to parents and guardians of students subjected to restraint and seclusion. Additionally, all school districts and charter schools must develop first-response policies and procedures for students who commit first offenses as defined by their school code of conduct. The bill provides for limitations on restraint and seclusion, forbidding restraint except when the student presents a threat of serious physical harm and less restrictive measures seem insufficient to mitigate danger.

FISCAL IMPACT

HB341/HRCS contains no appropriation. However, House Appropriations and Finance Committee (HAFC) Substitute for House Bills 2 and 3 increases the at-risk index in the state equalization guarantee distribution from 0.106 to 0.13 for purposes of calculating at-risk program units, which will result in an estimated additional \$22.5 million to support at-risk students.

The New Mexico Public Schools Insurance Authority (NMPSIA), in its analysis of a similar bill from the 2017 regular legislative session, estimates at least six claims per fiscal year for improper restraint and seclusion, resulting in approximately \$1.8 million in court and settlement costs.

Provision for training of school and law enforcement personnel, the development of student support plans, first response policies and procedures, and plans of action may impose additional, indeterminate costs upon school districts and charter schools. NMPSIA indicated, however, in the aforementioned analysis, that the required training would be a significant factor in the provision of a defense in the case of a parent or student pursuing a tort claim against a school for an injury allegedly caused by restraint or seclusion.

SUBSTANTIVE ISSUES

HB341/HRCS provides for the protection of students in need of accommodation, limits school use of restraint and seclusion, and gives notice to parents and guardians of students subjected to restraint and seclusion.

All school districts and charter schools are required to adopt “student support plans,” designed to protect students in need of accommodation.

All school districts and charter schools must develop first-response policies and procedures for students who commit first offenses as defined by their school code of conduct. After a student’s first offense, the student and their parent or guardian, school administrators, teachers, and service providers must develop a written prevention plan of action, to include reports on crisis interventions and goals for the student’s well-being. Schools are only permitted to summon state and local law enforcement as a last resort, and school law enforcement must defer to the student’s social worker or mental health care provider before undertaking any action relating to the student.

The bill provides for limitations on restraint and seclusion, forbidding restraint except when the student presents a threat of serious physical harm and less restrictive measures seem insufficient to mitigate danger. HB341/HRCS requires the development of reporting and documentation procedures for the use of restraint or seclusion, and mandates notice to a restrained or secluded student’s parent or guardian within 24 hours of the restraint and seclusion.

The bill requires school districts and charter schools to provide annual reports to the Public Education Department (PED) regarding the use of restraint and seclusion.

HB341/HRCS includes newly defined terms, including “adverse childhood event”; “aversive interventions”; “child parent,” “developmental disability”; “First responder”; “mechanical” and “physical restraint”; “restraint”; “present danger,” “seclusion;” “student in need of accommodation”; and “support screenings.”

Childhood Trauma. According to the National Association of School Psychologists (NASP), children can experience many different sorts of trauma, which can be significant risk factors for poor health, academic failure, and poor quality of life. The Adverse Childhood Experience Study (ACES) examines the prevalence and impact of such childhood trauma by tracking more than 17 thousand children. The most commonly experience childhood traumas, in order of prevalence are: physical abuse (28 percent), residence in households with substance abuse (27 percent), emotional neglect (25 percent), parental separation or divorce (24 percent), sexual abuse (21 percent), family members with mental illness (20 percent), and witnessing domestic violence (13 percent). At least 66 percent of ACES participants reported at least one such trauma, with 20 percent reporting three or more. Trauma’s potential impact on education include: developmental delays; higher dropout, suspension and expulsion rates; lower academic achievement; higher rates of special education referrals; and adverse effects on concentration and memory.

Children spend a significant portion of their childhood in school under the care and guidance of school personnel. Therefore, NASP contends, schools have a responsibility to help children feel supported and safe. Effective trauma prevention and interventions need to be closely connected to supportive mental health services. The school climate needs to balance student behavioral expectations with compassionate and trusting relationships between students and adults. All school staff members should be aware of the warning signs of serious emotional trauma and how

to respond to these children thoughtfully. With many communities experiencing high levels of trauma, entire school systems should be knowledgeable about the potential impacts of trauma and ensure that school is an environment where students feel safe disclosing traumatic experiences.

Restraint and Seclusion. Attention to issues of physical restraint and seclusion of students has 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 U.S. 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.”

In 2009, U.S. 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 restraint 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 September 2010, PED concluded their report on behalf of the restraint and seclusion work group, and issued guidance on the topic, which noted 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 or guardian;
- A mental health professional should be a member of the IEP team if physical restraint is being considered as an intervention;
- Physical restraint may be performed by trained personnel only, and only in emergency situations; and
- Although no case law directly pertinent to the issue of restraint and seclusion existed in New Mexico at this time, 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, suggesting that the lack of clear policy governing such practices might pose a risk of liability to the public schools.

The U.S. Department of Education issued a “Dear Colleague” letter in December 2016, noting the ways in which application of restraint and seclusion may lead to disparate impact discrimination against students who have special needs, possibly violating Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act of 1990. The Office for Civil Rights indicates that students with disabilities are restrained and secluded at higher rates than students without disabilities; during the 2013-2014 school year, for example, students with disabilities served by the Individuals with Disabilities Education Act represented only 12 percent of public school students nationally, but 64 percent of students subjected to restraint and seclusion.

ADMINISTRATIVE IMPLICATIONS

The bill requires school districts and charter schools to train school personnel and local and state law enforcement in addressing situations involving students in need of accommodations. This requirement may necessitate some kind of formal understanding between law enforcement and the local school district or charter school. It is unclear whether law enforcement may provide evidence of similar training to satisfy this requirement.

It is unclear how many personnel at school districts and charter schools have the training needed to deal with students in need of accommodation, or to intervene in situations where a student might need to be restrained or secluded. Providing such training may place burdens on school districts and charter schools, both fiscally and in terms of personnel-hours needed to deliver and receive the training. While the bill permits untrained personnel to restrain or seclude students in emergency situations when trained personnel are unavailable, the provision of such training may affect the disposition of any tortious claims brought against a school district or charter school for improper use of restraint or seclusion.

OTHER SIGNIFICANT ISSUES

In the 2017 legislative session, Laws 2017, Chapter 33 amended the Public School Code to enact Section 22-5-4.12 NMSA 1978, which includes many provisions identical to the restraint and seclusion requirements of HB341/HRCS, though with some differences, creating conflict with the existing section. HB341/HRCS includes several additional definitions, though the defined terms included in both the bill and current law are identical. There are differences in the sections granting immunity to certain parties, with HB341/HRCS including security aides and school police officers where Section 22-5-4.12 NMSA 1978 does not. Current law, however, includes an exemption for schools located in juvenile detention centers and state-operated juvenile facilities, while the bill does not.

SB341/HRCS	Section 22-5-4.12 NMSA 1978
<p>Section 2. Definitions:</p> <ol style="list-style-type: none"> 1. <i>Adverse childhood event</i> 2. <i>Aversive intervention</i> 3. <i>Child parent</i> 4. <i>Developmental disability</i> 5. <i>First responder</i> 6. <i>Mechanical restraint</i> 7. <i>Physical restraint</i> 8. <i>Restraint</i> 9. <i>Seclusion</i> 10. <i>Student in need of accommodation</i> 11. <i>Support screenings</i> 	<p>Subsection I (definitions):</p> <ol style="list-style-type: none"> 1. First responder 2. Mechanical restraint 3. Physical restraint 4. Restraint 5. Seclusion
<p>Section 4. Use of restraint and seclusion – techniques – requirements:</p> <p>Subsection G. The provisions of this section shall not be interpreted as addressing the conduct of <i>security aides, school police officers</i>, law enforcement or first responders.</p>	<p>Subsection G. The provisions of this section shall not be interpreted as addressing the conduct of law enforcement or first responders.</p>
	<p>Subsection H. <i>The provisions of this section do not apply to any school located within a juvenile detention center or a state-operated juvenile facility.</i></p>

In its analysis of a substantially similar bill, the Children, Youth and Families Department (CYFD) indicates notes several additional issues:

Subparagraph 3(B)(4) requires a delay in referrals to juvenile justice, but does not specify how long that delay should be. It also requires a determination of whether intervention could deter escalation or repetition of the offense, but does not identify the party responsible for making this determination.

Section 3(D) requires documents be turned over to the parent that pertain to the student's assessment, screening, or intervention, yet if these records include mental and behavioral health records of children 14 years of age and older, there is a potential conflict with the Children's Mental Health and Developmental Disability Act.

Section 3(F) requires that evidence from Protective Services' involvement shall be included in a student's prevention plan of action. It is unclear how this interacts with the confidentiality provisions the Children's Abuse and Neglect Act, or who would have access to the plan.

Section 3(L) prohibits schools from referring a child 13 years of age or younger to juvenile justice with no limiting or modifying language to account for either violent delinquent acts or present and ongoing danger. The majority of students that meet the definition of habitually truant, required to be referred to CYFD, are under the age of 13 and as such the age restriction under this bill conflicts with the Compulsory School Attendance Law for truancy. Early intervention strategies and opportunities would not be available to the youth that fall in this category.

Section 3(M) requires consultation with CYFD on the creation of a student's "prevention plan" but does not define in what way. If there has been no referral to CYFD, Juvenile Justice or Protective Services, CYFD would have no legal authority to interact with the child or the child's family at that point.

The bill does not indicate who is to provide training to law enforcement and school personnel safeguarding the students in need of accommodations, nor does it provide an alternative to the consequences of students who are under 13 years of age and who have committed a criminal offense.

TECHNICAL ISSUES

Section 3(A)(6) requires student support plans to include provision for the "experiential realities of students in need of accommodation and how they affect their interactions with others." It is uncertain what is meant by "experiential realities" or how they might be provided for in student support plans.

Section 3(K) requires a transition monitoring plan be developed and provided to the student, the parent or guardian, and the student's service provider "at the time of discharge." It is unclear what is meant by "discharge," an undefined term, or from what the student is being discharged.

Section 3(N) requires schools use state or local law enforcement only as a last resort, but provides for no exceptions in emergency situations.

RELATED BILLS

HB297/HECS, School Attendance Interventions, which proposes to repeal the Compulsory School Attendance Law and replace it with the Attendance for Success Act.

SB233, Michael's Law & School Care & Restraints, which is substantially similar to HB341/HRCS, and contains many of the same requirements and provisions.

SOURCES OF INFORMATION

- LESC Files
- NMPSIA
- CYFD

RKF/rab