

**LEGISLATIVE EDUCATION STUDY COMMITTEE
BILL ANALYSIS**

Bill Number: CS/SB 283

52nd Legislature, 1st Session, 2015

Tracking Number: 200874.1

Short Title: School Use of Restraint & Seclusion

Sponsor(s): Senators Bill B. O'Neill and John Arthur Smith

Analyst: Kevin Force

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SENATE JUDICIARY COMMITTEE SUBSTITUTE FOR SENATE BILL 283

Bill Summary:

CS/SB 283 proposes to create a new section of the *Public School Code* regulating the use of restraint and seclusion. Specifically, CS/SB 283:

- defines certain terms, including:
 - “aversive intervention,” which means any device, intervention or procedure intended to cause pain or discomfort, including such things as pain, tissue damage, illness, electric shock, isolation, forced exercise, humiliation, and deprivation of food, water, or sleep;
 - “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 medical restraint prescribed by a doctor as a health-related protective measure;
 - “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;
 - “mechanical support,” which means a device used to achieve proper body position, designed by a physical therapist and approved by a physician, or designed by an occupational therapist, such as braces, standers and gait belts, but not including protective devices;
 - “physical escort,” which means brief, gentle touching of the hand, wrist, arm, shoulder, waist, hip, or back to guide a student to a safe location;
 - “physical restraint,” which means the use of physical force, without device or material, that restricts the free movement of all or part of a student’s body, but does not include “physical escort”;
 - “prone restraint,” which means restraint of a student in a face-down position;
 - “protective devices,” which means helmets, goggles, gloves, and the like used by persons who are not disabled for work, sports, or transportation, with the understanding that atypical use of such a device must be prescribed by a physician;
 - “restraint,” which means chemical, mechanical, or physical restraint, unless otherwise modified;
 - “seclusion,” which means confinement in a room alone, from which a student is physically prevented from leaving, but does not include “time out”; and

- “time out,” which means a behavior management technique that may allow a student to voluntarily separate from a group for the purpose of calming, so long as there is no restriction on the student’s return to the group, including time out in a location from which the student may not voluntarily rejoin their group.

CS/SB 283 also:

- directs all school districts and charter schools to adopt policies and procedures for the use of restraint and seclusion, including at least provision for:
 - prohibitions on the use of aversive interventions, chemical and mechanical restraint;
 - general prohibitions on the use of seclusion or restraint, except in emergencies, with the understanding that restraint and seclusion shall not be:
 - planned educational interventions;
 - included in the individual education programs for individual students;
 - included in emergency plans for individual students except as needed to document when they are prohibited even in emergencies; or
 - used as discipline;
 - use in emergencies only as necessary to protect the student or others from harm, and only by staff trained in evidence-based crisis intervention that includes de-escalation and first aid;
 - 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 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; and
- 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.

In its other provisions, CS/SB 283:

- requires that 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 in, or who witnessed the events;
- requires school districts and charter schools annually to report to the Public Education Department (PED) all uses of chemical, mechanical, or physical restraint or seclusion, without identifying the student in question;

- permits PED to accept reports required by other sections of law, so long as the requirements of this provision are met; and
- directs PED to publish school districts' and charter schools' annual reports on the PED website.

Fiscal Impact:

CS/SB 283 does not contain an appropriation.

Fiscal Issues:

The PED analysis of the original bill, as amended, notes that the requirements proposed by CS/SB 283 would entail time and resources that cannot readily be quantified, leading to equally indeterminate costs, as PED would be obliged to:

- inform school districts and state charter schools of the new provisions, and clarify their relationship to the provisions of the *Individuals with Disabilities Education Act* (IDEA);
- create and disseminate to school districts and charter schools a system for the mandated annual reports; and
- update the Student Teacher Accountability Reporting System (STARS) or create a new system for the required reports.

In its analysis of the original bill, as amended, the Administrative Office of the Courts (AOC) indicates that:

- there will be minimal administrative costs incurred to update and distribute statutory changes; and
- additional fiscal impact on the judiciary would be proportional to the enforcement of the new law and any civil actions for damages brought for the failure to provide the required written notice to parents.

Technical Issues:

Subsections 1(B)(9)(a) and (b) refer to “the student” and “the student’s” medical condition, without a definition of “student” referring exclusively to the student undergoing seclusion or restraint, and suggests that greater specificity within the body of the section may be helpful.

As noted in the PED analysis, while Section 1, Paragraphs (B)(2) and (3) prohibit the use of chemical or mechanical restraint, Paragraph (B)(5) contemplates the use of “restraint and seclusion” (without further specificity) in emergency situations under certain circumstances, rendering it unclear as to whether chemical or mechanical restraints also might be implicated in these situations. The use of chemical restraints even in emergencies may run afoul of IDEA.¹

¹ Please see 20 U.S.C. 1412(a)(25)(A) and (B), “Prohibition on Mandatory Medication,” which disallows state agencies and local education agencies from requiring disabled students to obtain a prescription for a controlled substance.

Substantive Issues:

According to Wrightslaw, as of January 12, 2014:²

- only 19 states, by law, protected all children equally from both restraint and seclusion;³
- three states had statutes or regulations providing some safeguards for all children and others only for children with disabilities;
- ten states, including New Mexico, have only voluntary guidance or policies that impose no mandates or legal obligation;
- twenty states have laws requiring notification to parents of both restraint and seclusion, but only 12 of them require notification by the same or next day for both restraint and seclusion;
- 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.

Several points that PED raised in its analysis of the original SB 283, as amended, apply to CS/SB 283 as well:

- while CS/SB 283 defines many pertinent terms, it does not do so for “life-threatening restraint,” or “emergency situation”;
- the bill prohibits the use of restraint and seclusion as a planned intervention in a student’s Individualized Education Plan (IEP) or emergency plan documents, which exceeds federal requirements that encourage the use of positive behavioral interventions and support (PBIS), but does not prohibit the use of restraint for students with disabilities;
- students who fall under the provisions of IDEA must have an IEP, and they may need an Individualized Health Plan (IHP), as well, which would include healthcare interventions specific and appropriate to the student’s condition that may include forms of restraint that would be barred by the provisions of the bill;
- IDEA requires a student’s IEP team to consider PBIS to address potentially disruptive behavior;
- PED historically has interpreted the PBIS requirement as directing a student’s IEP team to develop a Behavioral Intervention Plan (BIP) that may require intervention such as physical restraint when a student exhibits violent or dangerous behavior;
- although the bill requires reporting that shall not identify a student who was restrained or secluded, some aggregate information in these reports may allow for extrapolation of a

² 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>.

³ Alabama, Colorado, Georgia, Illinois, Indian, Iowa, Kansas, Kentucky, Massachusetts, Maryland, Maine, North Carolina, Ohio, Oregon, Rhode Island, Vermont, West Virginia, Wisconsin, and Wyoming.

student's identity, due to small "n" size or demographic information, in potential contravention of IDEA;⁴ and

- the department has published a technical assistance manual⁵ focused on PBIS and BIPs for students, noting that the utilization of such Response to Intervention (RtI) is a requirement of PED rule.⁶

The Children, Youth and Families Department (CYFD) notes that the requirement that a student's parent be notified of the use of restraint or seclusion within 24 hours may be too long for appropriate notice to a parent of potentially dangerous behavior; and that delaying notification, without immediate assessment and intervention, may result in continued danger to the student or others.

According to the Human Services Department (HSD):

- it is unclear how parents receive information about the potential use of restraint or seclusion;
- CS/SB 283 lacks provision for contacting the parent or authorities prior to the use of restraint or seclusion;
- the bill does not require PED to provide staff training or to establish protocols for identification of who has authority to restrain or seclude a student;
- there do not appear to be any protections afforded for staff who take responsibility for the restraint or seclusion of a student;
- the reporting requirements, while useful, do not go far enough to adequately monitor the issue; and
- CS/SB 283 would benefit from additional protections for students, to ensure that a student's age, developmental needs, gender issues, ethnicity, and history of abuse are considered before the implementation of any restraint or seclusion.

Addressing the original bill, as amended, the AOC notes that:

- while the bill does include requirements for the parent of a restrained or secluded student to be notified of the use of such measures, these requirements:
 - do not include requirements to document the use of restraint or seclusion on each individual child; and
 - do not require PED to maintain records of deaths or other complications arising from the use of restraint or seclusion; and
- the bill does not address potential trauma that may be caused or triggered by the use of these measures, including referral to aftercare or psychological treatment; and

⁴ Please see 34 CFR §300.602(b)(3), "[T]he State must not report to the public or the Secretary any information on performance that would result in the disclosure of personally identifiable information about individual children, or where the available data are insufficient to yield statistically reliable information."

⁵ Please see *Response to Intervention Framework 2014*, at: http://ped.state.nm.us/ped/RtI_index.html.

⁶ Section 6.29.1.9(D) NMAC

Background:

As explained in a staff report to the Legislative Education Study Committee (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.”⁷

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 Secretary of Public Education at the time 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 the LESG, 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. PED had, however, issued guidance on the topic, which clarified that:

- the use of physical restraint should be approved by the student’s IEP team, documented in the student’s BIP, 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.

The report also noted, that although there had been no case law pertinent to the issue of seclusion and restraint 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

⁷ 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>.

operation of the school, suggesting that the lack of clear policy governing such practices might pose a risk of liability to the public schools.

Committee Referrals:

SEC/SJC

Related Bills:

HB 53aa *No Compelled Medication Use for Students*