

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Children, Families, and Elder Affairs Committee

BILL: SB 144

INTRODUCER: Senator Flores and others

SUBJECT: Seclusion and Restraint on Students with Disabilities

DATE: February 8, 2012

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Carrouth	deMarsh-Mathues	ED	Favorable
2.	Daniell	Farmer	CF	Pre-meeting
3.			BC	
4.				
5.				
6.				

I. Summary:

The bill amends Florida law providing Legislative intent relating to the use, prevention, and reduction of seclusion and restraint on students with disabilities. Additionally, the bill prescribes the use of restraint and seclusion. Specifically, the bill:

- Requires parents be provided a copy of emergency procedures, including procedures on the use of manual physical restraint, at the beginning of each school year;
- Requires that a medical evaluation be completed by a physician, nurse, or other qualified medical professional as soon as possible after a student has been restrained;
- Requires the use of manual physical restraint be restricted to only those school personnel who are certified in district-approved techniques;
- Prohibits the use of manual physical restraint except when an imminent risk of serious injury or death exists;
- Prohibits certain manual physical restraint techniques;
- Requires school districts to train and certify individuals in the use of manual physical restraint, and offer refresher certification courses;
- Requires incident report documentation to be submitted each week that the school is in session to certain persons, as well as to the Advocacy Center for Persons with Disabilities, Inc.;
- Requires certain information to be made available to the public on the Department of Education's website;
- Prohibits the use of seclusion; and
- Provides that time-out may only be used as part of a positive behavioral intervention plan and only when certain conditions are met.

This bill substantially amends section 1003.573, Florida Statutes.

II. Present Situation:

After reported incidences of restraint and seclusion techniques being used in schools throughout the country that resulted in injury or death to the student, the U.S. House of Representatives' Committee on Education and Labor requested a study from the Governmental Accountability Office (GAO) seeking verification of the reports.¹ Although the GAO report found that there were "hundreds of cases of alleged abuse and death" related to the use of restraints and seclusion, almost all of which involved children with disabilities, the GAO could not determine whether the allegations were widespread.² The GAO report did present four themes:

- Children with disabilities were sometimes restrained and secluded even when they did not appear to be physically aggressive and their parents did not give consent;
- Facedown or other restraints that block air to the lungs can be deadly;
- Teachers and staff in these cases were often not trained in the use of restraints and techniques; and
- Teachers and staff from these cases continue to be employed as educators.³

Currently, there are no federal laws that restrict the use of restraint and seclusion in public and private schools,⁴ and state laws are widely divergent. In 2009 and 2010, bills were introduced in the U.S. House of Representatives and Senate to regulate the use of restraint and seclusion in schools. The Keeping All Students Safe Act (Act) was proposed in the House of Representatives and would have created the first federal limitations on the use of restraint and seclusion in school.⁵ The Act would have established minimum standards that:

- Prohibited school personnel from managing any student by using any mechanical or chemical restraints, physical restraint or escort that restricts breathing, or aversive behavioral intervention that compromises student health and safety;
- Prohibited school personnel from using physical restraint or seclusion, unless such measures are required to eliminate an imminent danger of physical injury to the student or others;
- Required states to ensure that a sufficient number of school personnel received state-approved crisis intervention training and certification;
- Prohibited physical restraint or seclusion from being written into a student's individual education plan (IEP);⁶ and

¹ U.S. Gov't Accountability Office, *Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers*, Report GAO-09-719T (May 19, 2009), available at <http://www.gao.gov/new.items/d09719t.pdf> (last visited Feb. 6, 2012).

² *Id.* at Highlights of GAO-09-719T.

³ *Id.* at 7.

⁴ In contrast, the Children's Health Act of 2000 amended Title V of the Public Health Service Act to regulate the use of restraints and seclusions on residents of certain hospitals and health care facilities that receive federal funds, as well as on children in certain residential, non-medical, community-based facilities. *Id.* at 3.

⁵ H.R. 4247 (111th Congress, 2d Session) (2010), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4247rfs.txt.pdf (last visited Feb. 6, 2012).

⁶ An IEP is developed by parents and school personnel and often includes instructions related to the use of strategies to support the student, such as behavioral interventions like the use of seclusion and restraints. U.S. Gov't Accountability Office, *supra* note 1, at 3.

- Required schools to establish procedures to notify parents in a timely manner if physical restraint or seclusion is imposed on their child.⁷

The Act passed the House of Representatives but was never heard in the Senate Committee on Health, Education, Labor, and Pensions.⁸

As of December 2010, 23 states had adopted specific laws regulating the use of restraint and seclusion in schools and 10 other states had created policies or guidance materials to discuss how restraint and seclusion may be used.⁹

The Individuals with Disabilities Education Act (IDEA) is a federal law providing for the education of children with disabilities.¹⁰ The IDEA provides federal funds to help state and local education agencies meet their obligation to educate students with disabilities. To be eligible to receive these federal funds, states must comply with numerous requirements, including:

- States and school districts must make available a free appropriate public education to all children with disabilities;
- Each child receiving services must have an IEP spelling out the specific special education and related services to be provided to meet the child's needs; and
- "To the maximum extent appropriate," children with disabilities must be educated with children who are not disabled.¹¹

The IDEA provides that when the behavior of a child with a disability impedes the child's learning or the learning of others, the IEP team must consider "the use of positive behavioral interventions and supports, and other strategies, to address that behavior."¹² Nothing in the IDEA specifically addresses the use of seclusion and restraints; however, the federal Department of Education has noted that state law may address whether restraints may be used, and the "critical inquiry is whether the use of such restraints or techniques can be implemented consisted with the child's IEP and the requirement that the IEP Teams consider the use of positive behavioral interventions."¹³

Section 1003.573, F.S., establishes policies and procedures related to seclusion and restraint of students with disabilities in Florida. These policies and procedures include documentation and reporting, monitoring, school district responsibilities, and prohibited practices. Changes to the law were made in 2011¹⁴ to provide greater oversight of seclusion and restraint practices.¹⁵ These

⁷ H.R. 4247, *supra* note 5.

⁸ See Govtrack.us, *H.R. 4247: Keeping All Students Safe Act*, <http://www.govtrack.us/congress/bill.xpd?bill=h111-4247> (last visited Feb. 6, 2012).

⁹ Daniel Stewart, *How Do the States Regulate Restraint and Seclusion in Public Schools? A Survey of the Strengths and Weaknesses in State Laws*, 34 *HAMLIN L. REV.* 531, 535-36 (2011).

¹⁰ 20 U.S.C. s. 1400 et seq.

¹¹ Nancy Lee Jones and Jody Feder, Congressional Research Serv., *The Use of Seclusion and Restraint in Public Schools: The Legal Issues*, 4 (April 14, 2009), available at http://www.spannj.org/information/CRS_Report_on_Legal_Issues_in_Seclusion_&_Restraints.pdf (last visited Feb. 6, 2012).

¹² *Id.* at 5 (citing 20 U.S.C. s. 1414(d)(3)(B)).

¹³ *Id.* (quoting Letter to Anonymous, 50 IDELR 228 (OSEP Mar. 17, 2008)).

¹⁴ Chapter 2011-175, Laws of Fla.

changes included, in part:

- Reporting the age, ethnicity, grade, and disability of the student secluded or restrained;
- A description of the restraint, based on terms established by the Department of Education (DOE or department);
- Establishment of standards for documenting, reporting, and monitoring the use of seclusion and restraint;¹⁶
- More detailed incident reporting by the school districts;
- Training programs for personnel on the use of seclusion and restraint; and
- School district plans to reduce the use of seclusion and restraint, including the use of schoolwide positive behavior supports.¹⁷

School districts began reporting incidents of restraint and seclusion at the beginning of the 2010-2011 school year. Since the inception of the reporting system, there have been 10,323 incidents of restraint reported and 4,637 incidents of seclusion reported.¹⁸

Section 1003.573, F.S., does not provide a definition for “seclusion.” The department’s Technical Assistance Paper regarding the documentation, reporting, and monitoring requirements for the use of seclusion uses the definition of “seclusion” provided by the U.S. Department of Education’s Office of Civil Rights (OCR). The OCR defines seclusion as “the involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving. It does not include a time-out, which is a behavior management technique that is part of an approved program, involves the monitored separation of the student in a non-locked setting, and is implemented for the purposes of calming.”¹⁹ Currently, OCR requires DOE to report all instances of seclusion and restraint for all students, not just those with disabilities.²⁰

III. Effect of Proposed Changes:

This bill amends s. 1003.573, F.S., relating to the use of restraint and seclusion on students with disabilities.

¹⁵ School districts are required to revise previously submitted policies and procedures regarding restraint and seclusion and submit them to the Department of Education (DOE or department) by January 31, 2012. The department is currently reviewing updated policies and procedures as they are received. E-mail correspondence from DOE to Senate professional staff of the Committee on Education Pre-K – 12 (Jan. 24, 2012) (on file with the Senate Committee on Education Pre-K – 12).

¹⁶ The department was required to provide standards for documenting, reporting, and monitoring to the school districts by October 1, 2011. These standards were disseminated at the Administrators’ Management Meeting in September 2011. Fla. Dep’t of Education, *2012 Agency Legislative Bill Analysis, SB 144* (Sept. 23, 2011) (on file with the Senate Committee on Children, Families, and Elder Affairs).

¹⁷ The department published a Technical Assistance Paper in 2011 to provide guidance regarding the use, documenting, reporting, and monitoring of restraint and seclusion with students with disabilities in school districts. See Fla. Dep’t of Education, *Technical Assistance Paper: Guidelines for the Use, Documentation, Reporting, and Monitoring of Restraint and Seclusion with Students with Disabilities* (2011-165) (Oct. 14, 2011), available at <http://info.fldoe.org/docushare/dsweb/Get/Document-6212/dps-2011-165.pdf> (last visited Feb. 6, 2012) [hereinafter *Technical Assistance Paper*].

¹⁸ Fla. Dep’t of Education, *supra* note 16.

¹⁹ *Technical Assistance Paper*, *supra* note 17, at 5.

²⁰ *Id.*

The bill provides that manual physical restraint may only be used when there is an imminent risk of serious injury or death²¹ to the student or others, and the restraint may only be used with the degree of force necessary to protect the student or others and for only the period of time necessary to eliminate the imminent risk of serious injury or death.

The bill defines “manual physical restraint” as the use of physical restraint techniques that involve physical force applied by a teacher or other staff member to restrict the movement of all or part of a student’s body.

The use of manual physical restraint is restricted to school personnel who are certified in district-approved techniques. School personnel who may have received training elsewhere must still be certified in the specific district-approved techniques and may not apply the techniques or procedures acquired elsewhere. According to the Department of Education (DOE or department), this may prohibit the use of physical restraint during an emergency situation by personnel who are not certified.²²

The bill provides a list of manual physical restraint techniques that are prohibited. For example:

- Prone and supine restraint.
- Pain inducement to obtain compliance.
- Bone locks.
- Hyperextension of joints.
- Peer restraint.
- Mechanical restraint.²³
- Pressure or weight on the chest, lungs, sternum, diaphragm, back, or abdomen, causing chest compression.
- Straddling or sitting on any part of the body or any maneuver that places pressure, weight, or leverage on the neck or throat, or any artery, or on the back of the student’s head or neck or that otherwise obstructs or restricts the circulation of blood or obstructs an airway.
- Any type of choking, including hand chokes, and any type of neck or head hold.
- Any technique that involves pushing anything on or into the student’s mouth, nose, eyes, or any part of the face or that involves covering the face or body with anything, including soft objects such as pillows or washcloths.
- Any maneuver that involves punching, hitting, poking, pinching, or shoving.
- Any type of mat or blanket restraint.
- Water or lemon sprays.

²¹ The bill defines “imminent risk of serious injury or death” as the impending risk of significant injury, such as a laceration, bone fracture, substantial hematoma, or other injury to internal organs, or death.

²² Fla. Dep’t of Education, *supra* note 16.

²³ “Mechanical restraint” is defined in the bill as the use of a physical device that restricts a student’s movement or restricts the normal function of a student’s body. The term includes the use of straps, belts, tie-downs, calming blankets, and chairs with straps. The term does not include medical protective equipment, restraints necessary for ongoing medical treatment in the educational setting, devices used to support functional body position or proper balance, or equipment used for safety during transportation.

The bill requires that the school²⁴ have any student who has been manually physically restrained be medically evaluated by a physician, nurse, or other qualified medical professional as soon as possible. The results of the medical evaluation must be included in the incident report that a school must file within 24 hours after a student is released from a restraint.

Under the bill, each school district must report its training and certification procedures to DOE. Training requirements for initial certification in the use of manual physical restraint include:

- Deescalation procedures.
- Information regarding the risks associated with manual physical restraint and procedures for assessing individual situations and students.
- The actual use of specific techniques that range from the least to most restrictive.
- Techniques for implementing manual physical restraint with multiple staff members working as a team.
- Techniques for assisting a student to reenter the instructional environment.
- Instruction in the district's documentation and reporting requirements.
- Procedures to identify and deal with possible medical emergencies that may arise during the use of manual physical restraint.
- Cardiopulmonary resuscitation (CPR).²⁵

The school districts must provide refresher certification training courses at least annually. The district must maintain a record that includes the name and position of the person certified, the date of the most recent certification, an indication of whether it was initial certification or refresher certification, and whether the individual successfully completed the certification.²⁶ Additionally, school district policies must address whether certain employees working in specific settings (such as school bus drivers, job coaches, cafeteria workers, etc.) must be certified in manual physical restraint techniques.

If a student is manually physically restrained more than twice during a school year, the school must review the student's functional behavioral assessment and positive behavioral intervention plan. The bill does not specify what is to be done after the school reviews these plans.

The use of seclusion is prohibited under the bill; however, school personnel may place a student in time-out, as long as the following conditions are met:

- The time-out is part of a positive behavioral intervention plan developed from a functional behavioral assessment and referenced in the student's individual education plan.
- There is documentation that the time-out was preceded by the use of other positive behavioral supports that were not effective.

²⁴ The bill does not specify whose responsibility it is at the school to ensure that a student is medically evaluated after being manually physically restrained.

²⁵ According to the department, CPR training is not a typical requirement for someone trained in physical restraint. Accordingly, school districts may incur expenses in order to implement CPR training. Fla. Dep't of Education, *supra* note 16.

²⁶ The bill does not require a competency test after the training and certification. Accordingly, it is unclear how it will be determined if the individual successfully completed the certification and achieved proficiency.

- The time-out takes place in a classroom or in another environment where class educational activities are taking place.
- The student is not physically prevented from leaving the time-out area.
- The student is observed on a constant basis by an adult for the duration of the time-out.
- The time-out area and process are free of any action that is likely to embarrass or humiliate the student.

The bill provides definitions for “seclusion”²⁷ and “time-out;”²⁸ however, the definitions provided for in the bill do not align to current definitions used by DOE, which are the definitions published by the OCR.²⁹

The bill also provides that time-out may not be used for a period that exceeds one minute for each year of a student’s age. According to DOE, some of the specified conditions may be difficult to adhere to, such as only using time-out for one minute for each year of the student’s age.³⁰

The bill requires each school district to provide a copy of its policies on all emergency procedures, including the use of manual physical restraints, to each student’s parent or guardian at the beginning of each school year. The parent or guardian must sign a form indicating he or she received and read the policies.

The bill requires that certain documentation be provided weekly (rather than monthly) to the principal, the district Exceptional Student Education director, and the department. The bill removes the option to provide this information electronically. Additionally, schools must send redacted copies of the same documentation weekly to the Advocacy Center for Persons with Disabilities. According to DOE, this provision may need clarification and additional resources may be needed for the more frequent submission of documents.³¹

The bill requires DOE to maintain, and update monthly, data of incidents of manual physical restraint and to make such information available to the public on the department’s website no later than January 31, 2013.

Under the bill, the content of a school district’s policies and procedures must include information on the allowable use of restraint; personnel authorized to use manual physical restraint; training procedures; analysis of trend data; and the ongoing reduction of the use of restraint.

²⁷ “Seclusion” means removing a student from an educational environment, involuntarily confining the student in a room or area, and preventing the student from leaving the room or area if achieved by locking the door or otherwise physically blocking the student’s way, threatening physical force or other consequences, or using physical force.

²⁸ “Time-out” means a procedure in which access to varied sources of reinforcement is removed or reduced for a particular time period contingent on a response. The opportunity to receive reinforcement is contingently removed for a specified time. Either a student is contingently removed from the reinforcing environment or the reinforcing environment is contingently removed for some stipulated duration. A time-out setting may not be locked and the exit may not be blocked. Physical force or threats may not be used to place a student in time-out.

²⁹ Fla. Dep’t of Education, *supra* note 16.

³⁰ *Id.*

³¹ *Id.*

Finally, the bill makes technical and conforming changes, provides Legislative intent, and provides an effective date of July 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This bill amends Florida law regarding the use of restraints and seclusion on students with disabilities. The use of seclusion and restraint in public schools has been subject to constitutional challenges primarily based on the Fourteenth Amendment's guarantee of due process. The due process clause prohibits the government from depriving an individual of his or her liberty without due process of law.³² In the public school setting, due process challenges to the use of seclusion and restraint have generally been rejected if such tactics are deemed to be reasonable, especially if the use constitutes a routine disciplinary technique.³³ However, an individual may have a cause of action under the due process clause if the seclusion or restraint is found to be unreasonable such that it "shocks the conscious."³⁴

Some plaintiffs have also claimed that the use of seclusion and restraint violates the Fourth Amendment's prohibition against unreasonable seizures.³⁵ As with due process claims, courts assess these claims using a reasonableness standard. For example, the court in *Couture v. Board of Education of the Albuquerque Public Schools*³⁶ found that the use of supervised time-outs for a student who engaged in disruptive and threatening behavior was reasonable, particularly in light of the fact that the use of time-outs was authorized by the student's individualized education plan.³⁷

Finally, although the Individuals with Disabilities Education Act (IDEA) does not specifically reference the use of restraints and seclusion, cases have been brought

³² See U.S. CONST. amend. XIV, s. 1; FLA. CONST. art. I, s. 9.

³³ Nancy Lee Jones and Jody Feder, *supra* note 11, at 2.

³⁴ *Id.* at 3.

³⁵ See U.S. CONST. amend. IV; FLA. CONST. art. I, s. 12.

³⁶ 535 F.3d 1243 (10th Cir. N.M. 2008).

³⁷ Nancy Lee Jones and Jody Feder, *supra* note 11, at 3.

alleging that the use of such techniques violates a student's right to a free appropriate public education.³⁸

This bill prohibits the use of seclusion and provides criteria that must be followed when using manual physical restraints and time-out. The intent of the bill is to "prevent, and achieve an ongoing reduction of, the use of manual physical restraint in the public schools." Accordingly, the provisions of this bill may survive a constitutional challenge; however, "the due process inquiry, and the reasonableness standard upon which it relies, are subjective and highly dependent on the facts in a given case, thus making it difficult to predict the outcome of a due process challenge to the use of seclusion and restraint in public schools."³⁹

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill requires school personnel to be certified to use district-approved methods for the appropriate application of specific restraint techniques, and to take refresher certification training annually. The bill does not specify who is to pay for the training and certification. It appears that this cost will be borne by the school district; however, since this is not specifically spelled out in the bill, there may be a possibility that school personnel will be required to pay for the training and certification.

C. Government Sector Impact:

According to the Department of Education (DOE or department),

School districts would be required to provide refresher certification training courses in manual physical restraints at least annually to those individuals that have completed the initial training in manual physical restraints. To prevent use of manual physical restraint by non-certified personnel, the school district should offer the initial training course and refresher certification training to all applicable personnel. The cost of training implementation is indeterminate at this time.

The use of CPR has been added to the list of training requirements. School districts will incur costs associated with certifications and training in CPR classes.

Additionally, school districts will be required to have a student medically evaluated by a doctor, nurse, or other qualified medical professional as

³⁸ *Id.* at 5.

³⁹ *Id.* at 3.

soon as possible after the manual physical restraint⁴⁰ . . . The cost of the . . . medical examination is indeterminate at this time.⁴¹

The department also stated that technical assistance documents and resources will need to be amended to conform to the new statutory requirements.⁴²

VI. Technical Deficiencies:

On line 371 of the bill, it provides that a school must send a redacted copy of any incident report to the Advocacy Center for Persons with Disabilities, Inc., (Advocacy Center). It appears that the name of the Advocacy Center was changed a year ago and the entity is now known as Disability Rights Florida. The Legislature may wish to amend the bill to reflect the proper name of the Advocacy Center.

The bill specifically provides that mechanical restraints are a prohibited form of manual physical restraint techniques. Included in the definition of “mechanical restraints” are calming blankets. According to DOE, the intended purpose of a calming blanket is not to restrain a person and research indicates that some educators, therapists, and students have found this to be an effective calming method.⁴³

The bill provides that any pressure or weight on the chest causing chest compression is considered a manual physical restraint and is prohibited. The medical definition of cardiopulmonary resuscitation (CPR) involves chest compressions to make the heart pump and mouth-to-mouth ventilation to breath for the victim.⁴⁴ Because the definition of CPR includes pressure on the chest causing chest compressions, there may be a situation where school personnel refuses to conduct CPR for fear of repercussions for applying a prohibited manual physical restraint technique.

The bill provides that in order for school personnel to place a student in time-out, there must be documentation that the time-out was preceded by the use of other positive behavioral supports that were not effective (lines 225-227). The bill does not specify how many other techniques school personnel must try before placing a student in time-out,⁴⁵ nor does the bill provide how or where this documentation should occur.

Additionally, the bill provides that school personnel may place a student in time-out as long as the time-out area and process are free of any action that is likely to embarrass or

⁴⁰ The department stated that many schools do not have a school nurse on campus and the provisions of this bill may require the student to be transported to the office of a medical professional. If the parent or guardian of the student is unavailable to transport and accompany the student to the medical professional’s office, DOE assumes that the school or the school district will be required to do so. Fla. Dep’t of Education, *supra* note 16.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ MedicineNet.com, *Definition of cardiopulmonary resuscitation*, <http://www.medterms.com/script/main/art.asp?articlekey=2632> (last visited Feb. 6, 2012).

⁴⁵ It appears that in certain districts, the training provided to school personnel regarding restraints and seclusion includes a list of positive behavioral supports that school personnel should attempt prior to resorting to restraining or secluding the student. Conversation with Steve Moyer, parent (Feb. 7, 2012).

humiliate the student. This appears to be a subjective requirement; one in which the teacher could do everything properly but simply telling the student to go to time-out could embarrass the student.

Throughout the bill, the terms “school personnel” and “staff member” appear to be used interchangeably. Also, in the definition of “manual physical restraint” the term “teacher” is used. The Legislature may wish to amend the bill to use one term consistently in order to avoid confusion.

Finally, DOE suggested providing rulemaking authority to the department in order to address some of the issues presented in the bill.⁴⁶

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

⁴⁶ Fla. Dep’t of Education, *supra* note 16.