

LFC Requester:	Sunny Liu
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**AGENCY BILL ANALYSIS
2017 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply: Date January 30, 2017
Original **Amendment** **Bill No:** HB75
Correction **Substitute**

Sponsor: Rep. James E. Smith **Agency Code:** 924
Short Title: LIMIT SCHOOL USE OF RESTRAINT & SECLUSION **Person Writing:** Aguilar/Koscielniak
Phone: 827-6519 **Email:** paulj.aguilar@state.nm.us

SECTION II: FISCAL IMPACT

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		See fiscal implications	See fiscal implications		Recurring	School District Budgets

(Parenthesis () Indicate Expenditure Decreases)

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

House Bill 75 (HB 75) amends the Public School Code by adding a new section, defining several types of restraints (chemical, mechanical, prone and physical) in-school suspension, time-out and seclusion. HB 75 does not allow the use of certain restraints and aversive interventions even in the event of an emergency. HB 75 also prohibits the use of restraints and seclusion except in the event of emergency situations, and only to the extent necessary, to protect a student or another person from imminent, serious physical harm and only as a last resort. Furthermore, physical restraint and seclusion shall only be administered by staff trained in evidence-based crisis intervention including de-escalation training and first aid as well as identifying signs of medical distress. The new section further details parental notification criteria and provides a requirement for districts and charter schools to annually report use of restraints and seclusion to the New Mexico Public Education Department (PED).

FISCAL IMPLICATIONS

The PED would need to inform school districts and state charter schools of the new section of the Public School Code within Chapter 22 NMSA 1978, clarify the new section of the Public School Code in relation to the Individuals with Disabilities Education Act (IDEA), and inform school districts and state charter schools how to annually report to the PED the use of physical restraints and/or seclusion of students. This would require collaboration between the Coordinated School Health and Wellness Bureau, the Special Education Bureau, the Information Technology Division and the PED's General Counsel. This would also require updating and/or creating a data system within the PED's Student Teacher Accountability Reporting System (STARS). The hours, collectively, to accomplish this cannot be quantified at this time but would be significant.

The collection and review of the reporting requirements would require redefining a percentage of an existing FTE's scope of work both within the Information Technology Division and within the Federal Programs Division. Funding to support this effort is cannot be determined at this time; however funding would need to be from the State's general fund since this reporting is not required under the IDEA and includes all students, not just students with disabilities.

HB 75 requires school districts and charter schools to adopt policies and procedures with respect to the use of physical restraints and seclusion. It is unclear if there are costs associated with this effort and how policies and procedures would be reviewed and monitored. School districts would be responsible for having staff members trained in evidence based crisis intervention training, including de-escalation techniques and first aid and the cost of this training is unknown.

SIGNIFICANT ISSUES

HB 75 is similar to House Bill 190 (HB 190) from the 2016 New Mexico Legislative Session. Unlike HB 190, HB 75 strictly prohibits the use of prone, chemical and mechanical restraints and aversive interventions even in emergency situations. In addition, HB 75 adds language that does not allow the use of physical restraint and seclusion to be included in emergency plan documents for individual students except as necessary to describe the methods, techniques or circumstances for the allowable use of seclusion and physical restraint in the event of an emergency for an individual student. The bill also describes the methods, techniques and circumstances when physical restraint and seclusion are prohibited for individual students, even in an emergency situation. If a student's emergency plan proposes the use of physical restraint or seclusion, the student's parents must be provided with a prior written notice detailing why the school believes it is necessary to include physical restraint or seclusion in the emergency plan. Parents must be advised of the dangers posed by the use of physical restraint and seclusion, the types of physical holds that could be used and information about any available legal assistance.

On December 28, 2016 A Dear Colleague letter regarding the use of restraints and seclusion with students with disabilities was issued by the U.S. Department of Education Office for Civil Rights. The letter defines restraint and seclusion and the threshold for what determines that the use of restraint or seclusion violates Section 504 of the Rehabilitation Act of 1973 also known as Section 504 when students are denied a Free Appropriate Public Education (FAPE).

<http://www.shipmangoodwin.com/webfiles/OCR%20Restraint%20and%20Seclusion%20Dec%202016.PDF> .

HB 75 puts specific limitations on the use of physical restraint or seclusion within emergency situations in order to protect the student or another person from imminent, serious physical harm. The definition of an “emergency situation” may be unclear to school districts and charter schools as to who is qualified to determine whether a situation is an emergency. The adoption of policies and procedures with regard to use of physical restraint and seclusion would be left to each school district and charter school to determine. HB75 does, however, state that physical restraint and seclusion shall only be administered by staff trained in evidence-based crisis intervention, including de-escalation training and first aid as well as identifying signs of medical distress. Differing from HB 190, if trained staff are not available, physical restraint and seclusion shall be used only to the least degree necessary to prevent the student from harming themselves or others.

HB 75 provides that physical restraint and seclusion shall not be used as planned educational interventions, be included in individualized education program (IEP) documents and used as a disciplinary measure. As the IDEA does not prohibit the use of restraint, this amendment may exceed federal requirements and may alter the decision-making abilities of the IEP team, which includes the student’s parent. In situations where a student with a disability demonstrates behavior that impedes his or her learning or that of others, the IDEA 2004 at 20 U.S.C. 1414(d)(3)(B)(i) requires the student’s IEP team to consider positive behavioral interventions, strategies, and supports to address that behavior. In a case where the student’s problematic behavior is severe, persistent, and frequent, the PED has consistently interpreted this requirement to mean that the IEP team develops a Behavioral Intervention Plan (BIP) based on a Functional Behavioral Assessment as part of the IEP for that student. The BIP needs to emphasize positive interventions, strategies, and supports that teach appropriate replacement behaviors. However, an effective BIP must also address and specifically provide for emergency situations where a particular student exhibits aggressive, violent, or dangerous behavior that requires an immediate aversive intervention, such as physical restraint. In that case, physical restraint is designed to protect the student and others from serious injury or safeguard physical property and should be used only in an emergency.

HB 75 requires school districts and state charter schools to report annually to the PED all uses of physical restraint and seclusion, as defined in the new section of the Public School Code. The Office of Civil Rights (OCR) already requires the reporting of the number of instances where students are subjected to mechanical restraints, physical restraints, and/or seclusion. The Civil Rights Data Collection (CRDC) collects a variety of student information, and the data is disaggregated by race/ethnicity, sex, Limited English Proficiency and disability. This data collection is authorized under the statutes and regulations implementing Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973 and under the Department of Education Organization Act (20 U.S.C. 3413). This may be a duplication of effort for the school districts, charter schools and the PED.

The PED has published a comprehensive technical assistance manual focused on Positive Behavioral Intervention Supports (PBIS) and strategies and Behavioral Intervention Plans for individual students. The report, *Response to Intervention Framework 2014*, consists of a three-tier, problem-solving model that uses a set of increasingly intensive academic and/or behavioral supports/intervention and may be accessed at http://ped.state.nm.us/ped/RtI_index.html. Utilizing the Response to Intervention (RtI) model is a state requirement (NMAC 6.29.1.9.D.).

In March 2006, the PED issued comprehensive guidance on the use of physical restraints as a behavioral intervention for students with disabilities. The guidance indicates that it does not condone the use of mechanical restraints for students, requires the application of physical restraint to be performed by trained personnel only, and provides recommendations for documentation and reporting of restraint and the development of local policies. HB75 would require physical restraints and seclusion to only be administered by staff trained in evidence-based crisis intervention, de-

escalation training, first aid, and identifying signs of medical distress. The full guidance can be viewed at <http://ped.state.nm.us/SEB/law/Restraint.Policy.pdf>.

PERFORMANCE IMPLICATIONS

HB 75 may support the PED's strategic lever by ensuring that all students are provided a safe and supportive learning environment.

ADMINISTRATIVE IMPLICATIONS

The PED would need to inform school districts and state charter schools of the new section of the Public School Code within Chapter 22 NMSA 1978, clarifying the new section of the Public School Code in relation to the Individuals with Disabilities Education Act (IDEA), and informing school districts and state charter schools how to annually report to the PED the use of restraints and/or seclusion of students. This would require collaboration between the Coordinated School Health and Wellness Bureau, the Special Education Bureau, the Information Technology Division and the PED's General Counsel. This would also require updating and/or creating a data system within the PED's Student Teacher Accountability Reporting System (STARS). The hours, collectively, to accomplish this cannot be quantified at this time.

TECHNICAL ISSUES

Page one, lines 19-20 includes a "Private Right of Action" for parents which must be removed.

Page four, line 12 states "individual" and should be changed to "individualized" education program to align with federal and state laws.

OTHER SUBSTANTIVE ISSUES

Although HB 75 addresses the use of physical restraint and seclusion for all students in New Mexico, the use of physical restraint and seclusion with students with severe developmental disabilities receiving treatment or habilitation differs (32A-6A-10 NMSA 1978) in the area of parental notification and the requirement. In addition, 32A-6A-10 NMSA 1978 requires staff to debrief with students after an incident of restraint and seclusion in order to possibly prevent future restraint and seclusion. During a seclusion event, the student must be provided with an explanation of the behavior that resulted in the seclusion and instructions on the behavior required to return to the environment.

Neither the Office of Special Education and Rehabilitative Services (OSERS) nor the Office of Special Education Programs (OSEP) within the USDE expressly prohibits the use of physical restraints on students with disabilities. This is evidenced by two policy letters from the USDE OSEP and OSERS, Letter to Anonymous, 50 IDELR 228, and Letter to Trader, 48 IDELR 47. However, it is important to note that both require IEP Teams to consider the use of PBIS in relation to student discipline. There could be the potential for conflict between state and federal laws and/or interpretation.

ALTERNATIVES

Page six, line 16 states that a physician may recommend an "atypical use of a protective device." It is suggested that "recommended" be replaced with "ordered" since many devices are developed and guaranteed to work as designed and when altered are no longer effective.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

If HB 75 is not enacted, New Mexico school districts and state charters would continue to utilize existing behavioral strategies, such as PBIS as well as IEP strategies for students receiving special education services in addressing behavioral and emergency situations, and local policies would remain in effect. The PED's current guidance on the use of physical restraint will remain in place.