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Restraints and Seclusions: Practical Guidance for Complying with the New Requirements

MASE Best Practices Seminar

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In 2009, Minnesota lawmakers enacted significant changes to the State statutes governing the restraint and seclusion of special education students. When it becomes effective, this law will radically alter the manner in which teachers and other district employees implement restraints and seclusion. There is also a federal bill currently pending before the United States Senate that, if finalized, will result in further changes to school districts' use of restraints and seclusions.

In this presentation, we will examine the changes imposed by the 2009 State law, and the prospective changes in the federal bill. We will also discuss steps for districts to take to ensure compliance with the new law.

NOTE: The purpose of this presentation, and the accompanying materials, is to inform you of interesting and important legal developments. While current as of the date of presentation, the information given today may be superseded by court decisions and legislative amendments. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts discussed in the presentation or addressed in this outline, you should consult your legal counsel.

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I. State Regulation of Restraints and Seclusion

Minnesota Statutes, Sections 125A.094 through 125A.0942 become effective on August 1, 2011. These sections redefine school districts' authority with respect to the use of restraints and seclusions.

A. *What is the current law?* Currently, school districts may use “conditional procedures” in accordance with students’ IEPs, or in an emergency situation. Minn. R. 3525.2900, subp. 5. “Conditional procedures” include manual restraint, mechanical restraint, and “time out procedures for seclusion.” Minn. R. 3525.0210, subp. 9. Moreover, districts are prohibited from imposing “prohibited procedures” such as corporal punishment, aversive stimuli, and withholding food, water or toilet facilities. Minn. R. 3525.2900, subp. 5.

B. *What Has Changed?* When they become effective, Sections 125A.094 through 125A.0942 repeal the rules pertaining to “conditional procedures” and “prohibited procedures.” The new statutes classify allowable behavioral interventions as “restrictive procedures” and prohibit certain other interventions that were previously classified as “prohibited procedures.” *See* Minn. Stat. § 125A.0942.

1. *What is a restrictive procedure?* The term “restrictive procedures” is defined as “the use of physical holding or seclusion in an emergency.” Minn. Stat. § 125A.0941(e).

Previously, both “manual restraint” and “time out procedures for seclusion” were considered “conditional procedures.” Minn. R. 3525.0210, subp. 9.

2. *How is “physical holding” defined?* “Physical holding” means physical intervention intended to hold a child immobile or limit a child’s movement and where body contact is the only source of physical restraint. The term physical holding does not mean physical contact that:

- (1) helps a child respond or complete a task;
- (2) assists a child without restricting the child’s movement;
- (3) is needed to administer an authorized health-related service or procedure; or
- (4) is needed to physically escort a child when the child does not resist or the child’s resistance is minimal. Minn. Stat. § 125A.0941(c).

The term does not include the use of “mechanical restraint,” which is currently defined as a “conditional procedure.” Minn. R. 3525.0210, subp. 9.

The four exceptions included in the definition of “physical holding” were not included in the definition of “manual restraint.” See Minn. R. § 3525.0210, subp. 29.

3. ***How is “seclusion” defined?*** “Seclusion” means “confining a child alone in a room from which egress is barred. Removing a child from an activity to a location where the child cannot participate in or observe the activity is not seclusion.” Minn. Stat. § 125A.0941(f).

This definition closely mirrors the current definition of “time out for seclusion,” which requires a “specially designed isolation room or similar space.” Minn. R. 3525.0210, subp. 47.

The exception in this definition partially incorporates the definition of a “time out for exclusion,” without the 30 minute time restriction. See Minn. R. 3525.0210, subp. 46.

4. ***When may restrictive procedures be used?*** Restrictive procedures may be used only in an “emergency” and only if certain other requirements have been met. Minn. Stat. § 125A.0942. The other requirements are discussed below.

- a. ***Changes from Current Law.*** Currently, “conditional procedures” can be used either in an emergency or as designated by a student’s IEP. Minn. R. § 3525.2900, subp. 5(A)(1). The new Section 125A.0942 allows IEPs to include restrictive procedures as behavior interventions, but prohibits their use unless there is in an emergency.

- b. ***Definition of “Emergency.”*** An “emergency” has been defined as a situation where immediate intervention is needed to protect a child or other individual from physical injury or to prevent serious property damage. Minn. Stat. § 125A.0941(b).

The new definition of “emergency” departs from the current definition, which also included “emotional abuse due to verbal and nonverbal threats and gestures.” See Minn. R. 3525.0210, subp. 17.

5. ***Which schools may employ restrictive procedures?*** Only schools that have enacted a publicly accessible restrictive procedures plan that lists: (1) the restrictive procedures the school intends to use; (2) how the school will monitor and review the use of restricted procedures including conducting post-use debriefings and convening an oversight committee; and (3) a written

description and documentation of the training staff completed. Minn. Stat. § 125A.0942, subd. 1.

Currently, school districts are not required to publicize any type of plan before implementing conditional procedures.

6. ***Which staff members may employ restrictive procedures?*** Only the following staff members may employ restrictive procedures: licensed special education teachers, school social workers, school psychologists, behavior analysts certified by the National Behavior Analyst Certification Board, individuals with a master's degree in behavioral analysis, other licensed education professionals, paraprofessionals who are highly qualified under Minn. Stat. § 120B.363, or mental health professionals under Minn. Stat. § 245.4871, subd. 27, who have completed the training program. Minn. Stat. § 125A.0942, subd. 2(a).

Currently, there are no restrictions as to which specific staff members may employ conditional procedures.

7. ***What staff training is required before a staff member can use restrictive procedures?*** Staff members who use restrictive procedures shall complete training in the following skills and knowledge areas:

- (1) positive behavioral interventions;
- (2) communicative intent of behaviors;
- (3) relationship building;
- (4) alternatives to restrictive procedures, including techniques to identify events and environmental factors that may escalate behavior;
- (5) de-escalation methods;
- (6) standards for using restrictive procedures;
- (7) obtaining emergency medical assistance;
- (8) the physiological and psychological impact of physical holding and seclusion;
- (9) monitoring and responding to a child's physical signs of distress when physical holding is being used; and

- (10) recognizing the symptoms of an intervention that may cause positional asphyxia when physical holding is used.

The District must maintain records of staff who have been trained and the organization or professional that conducted the training. Minn. Stat. § 125A.0942, subd. 5.

Currently, there are no training requirements. However, as discussed below, the use of conditional procedures by improperly trained staff potentially exposes a school district to negligence claims.

8. *What actions or procedures are prohibited?* The following actions or procedures are prohibited:

- (1) corporal punishment;
- (2) requiring a child to assume and maintain a specified physical position, activity, or posture that induces physical pain;
- (3) totally or partially restricting a child's senses as punishment;
- (4) presenting an intense sound, light, or other sensory stimuli using smell, taste, substance, or spray as punishment;
- (5) denying or restricting a child's access to required equipment and devices (e.g. wheelchair) that facilitate the child's functioning, except when temporarily removing the equipment or device is needed to prevent injury to the child or others or serious damage to the equipment or device, in which case the equipment or device shall be returned to the child as soon as possible;
- (6) interacting with a child in a manner that constitutes sexual abuse, neglect, or physical abuse;
- (7) withholding regularly scheduled meals or water;
- (8) denying access to the bathroom; and
- (9) physical holding that restricts or impairs a child's ability to breathe. Minn. Stat. § 125A.0942, subd. 4.

This prohibition encompasses most of the procedures currently prohibited by Rule 3525.2900, subp. 5(A)(2). It does not specifically include "faradic skin shock" which is currently specifically prohibited. However, such shock would either constitute "corporal punishment" or "physical abuse."

Moreover, the law is broader than the old regulation in that it specifically incorporates physical and sexual abuse and neglect. It also specifically includes physical holds that impair breathing.

9. *What other requirements must be observed?* The following other requirements must be met whenever physical holding or seclusion is used:

(1) the physical holding or seclusion must be the least intrusive intervention that effectively responds to the emergency;

(2) the physical holding or seclusion must cease when the threat of harm ends and the staff determines that the child can safely return to the classroom or activity;

(3) staff must directly observe the child while the restrictive procedures are being employed;

(4) each time a restrictive procedure is used, the staff person who implements or oversees the restricted procedure must document the following information as soon as possible after the incident concludes:

- (a) a description of the incident that led to the physical holding or seclusion;
- (b) why a less restrictive measure failed or was determined by staff to be inappropriate or impractical;
- (c) the time the physical holding or seclusion began and the time the child was released; and
- (d) a brief record of the child's behavioral and physical status.
Minn. Stat. § 125A.0942, subd. 3.

10. *What are the requirements for the seclusion room?* The room used for seclusion must meet the following requirements:

(1) be at least six feet by five feet;

(2) be well lit, well ventilated, adequately heated, and clean;

(3) have a window that allows staff to directly observe a child in seclusion;

- (4) have tamperproof fixtures, electrical switches located immediately outside the door, and secure ceilings;
- (5) have doors that open out and are unlocked, locked with keyless locks that have immediate release mechanisms, or locked with locks that have immediate release mechanisms connected with a fire and emergency system; and
- (6) not contain objects that a child may use to injure the child or others.

11. *What steps must be followed before using a seclusion room?* Before using a room for seclusion, a school must:

- (1) receive written notice from local authorities that the room and the locking mechanisms comply with applicable building, fire, and safety codes; and
- (2) register the room with the commissioner, who may view the room.

The second requirement is new to Minnesota law.

12. *What notice must be provided to parents when a restrictive procedure is used?* A school shall make reasonable efforts to notify the parent on the same day a restrictive procedure is used on the child, or if the school is unable to provide same-day notice, notice is sent within two days by written or electronic means or as otherwise indicated by the child’s parents. Minn. Stat. § 125A.0942, subd. 2(b).

13. *When is a meeting required after using restrictive procedures?* When restrictive procedures are used twice in 30 days or when a pattern emerges and restrictive procedures are not included in a student’s IEP or BIP, the District must hold an IEP team meeting, conduct or review an FBA, review data, consider developing additional or revised positive behavioral interventions and supports, consider actions to reduce the use of restrictive procedures, and modify the IEP or BIP as appropriate. At the meeting, the team must review any known medical or psychological limitations that contraindicate the use of a restrictive procedure, consider whether to prohibit that restrictive procedure, and document any prohibition in the IEP or BIP. Minn. Stat. § 125A.0942, subd. 2(c).

14. *What are the IEP requirements related to restrictive procedures?* An IEP team may plan for using restrictive procedures and may include these procedures in an IEP or BIP; however, the restrictive procedures may be used only in response to behavior that constitutes an emergency. The IEP or BIP

must indicate how the parent wants to be notified when a restrictive procedure is used. Minn. Stat. § 125A.0942, subd. 2(d).

15. *When are these changes effective?*

These changes are effective August 1, 2011.

C. *Potential Legal Challenges to Districts' Use of Restraint and Seclusion*

As most districts are all too aware, there are a number of claims that parents of special education students might assert against school districts. The new legislation affects two of the more common types of claims.

1. Negligent Supervision/Training/Retention of Staff

This claim alleges that the *school district* is directly responsible for the alleged harm because it failed to properly train or supervise its employee, or failed to discipline/terminate an employee for previous conduct of a similar nature.

Based on the training requirements in the new law and the requirement that staff members observe all physical holding/seclusion, districts will have more evidence to support defenses to this claim. However, the training requirements also provide a baseline level of training. Districts whose staff does not have the required training may be found *per se* negligent if the improperly trained staff member causes harm.

2. IDEA Due Process Hearings

The new law provides more detailed requirements for the use of restraints and seclusions. It also limits their use to emergency situations, and redefines the term “emergency.” It is likely that the new rules will result in an increase of claims in due process hearings related to physical holdings/seclusion and whether an emergency existed that justified their use.

D. *Recent Court Decisions Regarding Restraints and Seclusion*

C.N. v. I.S.D. 347 et al., 2008 WL 3896205 (D. Minn. 2008), *affirmed* 591 F.3d 624 (8th Cir. 2010)

The *C.N.* case arose out of the parents’ appeal from an IDEA due process hearing result. In the appeal, the parent alleged that the student’s special education teacher had “abused” the student by: (1) utilizing a “thinking desk” which required the student to hold a physical posture in excess of thirty minutes or else face restraint; (2) shouting at the student; (3) pulling the student’s hair; (4) belittling and making

sarcastic remarks to the student; and (5) denying the student the use of bathroom facilities which resulted in the student having an “accident” on one occasion.

The hearing officer dismissed the due process hearing because the student had been enrolled in another school district prior to the parents’ filing of the due process complaint. The parents appealed the decision to federal court, and also attempted to hold the school district and various employees liable for the alleged “abuse.”

The Court dismissed the case on a number of grounds.

- a. *Official capacity claims.* IDEA and Section 504 claims brought against individual defendants in their official capacity are redundant of claims against the district and must be dismissed.
- b. *No individual liability under IDEA.* “As to defendants’ individual capacities, the IDEA does not authorize recovery of damages against teachers or education officials.”
- c. *No individual liability under Section 504.* “Further, Section 504, like the IDEA, does not authorize claims against school officials in their individual capacities.”
- d. *Bad faith or gross misjudgment required to hold a district liable under Section 504.* Applying existing law, the court confirmed that allegations of negligence do not “clear the hurdle set by the explicit language of Section 504.” Rather, in order to prevail against a school district under Section 504, a plaintiff must show that school officials acted in “bad faith” or exercised “gross misjudgment.”
- e. *Immunity barred individual liability under Section 1983.* A school official is entitled to qualified immunity from claims under Section 1983, if the official’s conduct was reasonable – meaning that it was not a “substantial departure from accepted professional judgment, practice, or standards.” Here, the court held that the teacher’s use of restraint and seclusion was reasonable because the student’s IEP allowed for the use of restraint and seclusion. The court quoted the following language from another federal case: “If we do not allow teachers to rely on a plan specifically approved by the student’s parents and which they are statutorily required to follow, we will put teachers in an impossible position – exposed to litigation no matter what they do.”
- f. *School district’s success under IDEA may bar other claims.* A plaintiff may not establish viable claims under laws other than IDEA if the predicate acts upon which those claims are premised have

withstood review under IDEA. Consequently, claims fail as a matter of law when they are intertwined with, or seek to rehash, claims that have been dismissed or resolved through the IDEA administrative hearing process.

The parents appealed the dismissal of their IDEA claim against the school district. The parents also appealed the dismissal of their claim for violation of the Fourth Amendment's prohibition on "search and seizure," and their claim that the school district deprived the student of substantive due process in violation of the Fourteenth Amendment. The Eighth Circuit Court of Appeals affirmed the district court's dismissal of these claims. Since the plaintiffs did not appeal the district court's dismissal of their other claims, the court did not address those claims.

The court found that the school district's employees were entitled to qualified immunity against plaintiffs' constitutional claims. The plaintiffs alleged violations of the Fourth Amendment's prohibition against unreasonable search and seizure, as well as the Fourteenth Amendment's substantive due process requirements. The court found that the plaintiffs' factual allegations did not support either claim.

With regard to the Fourth Amendment, the court found that the teacher's application of restraints and conditional procedures prescribed in the IEP was within accepted procedures and standards, and therefore was not "unreasonable." Therefore, the court found that the teacher had not violated the Fourth Amendment.

II. Pending Federal Legislation

On March 3, 2010 a Bill labeled the "Keeping all Students Safe Act" was approved by the United States House of Representatives. The Act is currently pending before the United States Senate. The Act contains, among other things, provisions that, if they become effective, are directly applicable to school districts use of restraints and seclusion.

The Act begins by asserting that "[p]hysical restraint and seclusion have resulted in physical injury, psychological trauma, and death to children in public and private schools. National research shows students have been subjected to physical restraint and seclusion in schools as a means of discipline, to force compliance, or as a substitute for appropriate educational support." The Act continues by recognizing that students "have the right to be free from physical or mental abuse, aversive behavioral interventions that compromise health and safety, and any physical restraint or seclusion imposed solely for purposes of discipline." The Act asserts that research "confirms that physical

restraint and seclusion are not therapeutic, nor are these practices effective means to calm or teach children, and may have an opposite effect while simultaneously decreasing a child's ability to learn." Section 2 of the Act also recognizes the right of school employees to work in a safe environment.

In order to meet its goal of promoting student safety, the Act requires the Department of Education to adopt rules no more than 180 days after its enactment. Specifically, the Act requires the Department of Education to adopt rules prohibiting the use of:

1. Mechanical restraints;
2. Chemical restraints;
3. Physical restraint or physical escort that restricts breathing; and
4. Aversive behavioral interventions that compromise health and safety.

The Act also requires rules to restrict the imposition of physical restraint and seclusion. Specifically, the Act would prohibit all physical restraint and seclusion unless:

1. The student's behavior poses an immediate danger of physical injury to the student, school personnel, or others;
2. Less restrictive interventions would be ineffective in stopping such imminent danger of physical injury;
3. The physical restraint or seclusion is imposed by school personnel who:
 - a. Continuously monitor the student face-to-face; or
 - b. If school personnel safety is significantly compromised by such face-to-face monitoring, are in continuous direct visual contact with the student
4. The physical restraint or seclusion is imposed by school personnel who have received training required by the Act and its implementing rules, or other staff persons in "a rare and clearly unavoidable emergency circumstance when school personal trained and certified as described [in the Act] are not immediately available due to the unforeseeable nature of the emergency circumstance; and"
5. The physical restraint or seclusion ends "immediately upon the cessation of the conditions described" in sentences 1 and 2.

The Act prohibits the use of restraints and seclusion as a “planned intervention” in a student’s IEP (or behavior intervention plan, or similar type of plan). Instead, it limits schools’ ability to plan for the use of restraints and seclusions to “policies and procedures for the use of physical restraint or seclusion in school safety or crisis plans, provided that such school plans are not specific to any individual student.”

The Act requires schools to institute procedures for notifying parents of students who become subject to physical restraints and/or seclusion. Such parents must be provided with “an immediate verbal or electronic communication on the same day as each such incident; and within 24 hours of each such incident, a written notification.” The Act also allows the Department of Education to determine whether additional notice is required.

The Act does contain some exceptions, such as the use of seatbelts, immobilization for medical treatment, the use of handcuffs by school resource officers, “time out” procedures, and therapeutic devices, if used by properly trained staff or the student.

The Act authorizes the Department of Education to withhold funds for violations of the Act. It does not authorize a private cause of action for violations.

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