

New Restraint and Seclusion Law in Effect as of March 4, 2020

On March 2, 2020, Governor Evers signed 2019 Wisconsin Act 118 (“Act 118”), an Act amending the statutory requirements associated with the use of restraint and seclusion in schools. The new law revises Wisconsin Statute § 118.305 (Use of seclusion and physical restraint) by adding training components for staff, enhancing parental notice procedures when restraint or seclusion is used, mandating a post-incident meeting, prohibiting specific restraint techniques, and amending the timing of IEP team meetings and revisions to IEPs when students with disabilities are restrained or secluded. Given that Act 118 is already in effect, districts should closely review the new law and take steps to revise existing policies and procedures and educate all district staff. The summary of changes below may assist districts in engaging in those tasks.

Defining an “Incident”

At times, districts have struggled with what constitutes an “incident” of restraint or seclusion. The new law clarifies what an “incident” is, and it is defined as follows:

“an occurrence of a covered individual or a law enforcement officer using seclusion or physical restraint on a pupil. It is considered one incident if immediately following the use of seclusion or physical restraint on a pupil, the pupil’s behavior presents a clear, present, and imminent risk to the physical safety of the pupil or others, and a covered individual or law enforcement officer resumes the use of seclusion or physical restraint.”

Previously, districts may have recorded incidents of restraint or seclusion occurring in quick succession as multiple incidents. The definition above makes clear that in those circumstances, districts may count those scenarios as “one incident.” Districts may not count an extended scenario with multiple events of seclusion and restraint as one incident if, immediately following the use seclusion or restraint, the student’s behavior does not present a clear, present, and imminent to the physical safety of the student or others. In that case, multiple incidents would need to be recorded.

Additional Training Requirements

According to the current law, unless an emergency is present, district staff may not engage in restraint of a student unless they have received specified training. The new law adds the following requirements to the components of that training:

- Evidence-based instruction related to positive behavioral supports and interventions, safe physical escort, understanding antecedents, de-escalation, conflict prevention, and conflict management.
- Evidence-based techniques, including debriefing, that have been shown to prevent or reduce the use of physical restraint.
- A requirement that the trainee demonstrate his or her ability to identify prohibited techniques in administering physical restraint.

Districts should also be aware that the training requirements associated with the use of restraint now apply to private school staff who use restraint on a student placed by a public school district in that private school.

Many districts use commercial vendors to provide training regarding restraint and seclusion. Districts should actively consult with those vendors to ensure that their training curriculum is up-to-date, consistent with the new law, and incorporates the above components. As part of that consultation, districts may want to request documentation from the vendor of the specific evidence upon which the vendor based its training program.

Prohibited Practices

The prior version of the restraint and seclusion law prohibited any door “connecting the room or area in which the pupil is secluded to other rooms or areas is capable of being locked.” The newly revised statute goes one step further and prevents any door on a seclusion room from having a lock on it.

The prior law also included certain prohibited restraint maneuvers and techniques. The new law adds a prohibition on the use of any type of restraint “that place[s] the pupil in a prone position.” The Department of Public Instruction (“DPI”), based upon guidance from the United States Department of Education, has consistently taken the position that prone restraint restricts breathing and it should never be used. Consequently, the new statutory prohibition merely codifies DPI’s long-standing position regarding prone restraint.

Finally, the new law also clarifies that the use of “vehicle safety restraints when used as intended during transport of a pupil in a moving vehicle” does not constitute the use of mechanical restraint.

Reporting Requirements

Under the prior version of the restraint and seclusion law, there was some ambiguity regarding whether an incident of restraint or seclusion involving a law enforcement officer was subject to the reporting requirements of the statute. The new law resolves that ambiguity and states all incidents of restraint or seclusion occurring “at school,” including those involving law enforcement, must be reported to the student’s parent within one business day after the incident and a written report must be created within two business days after the incident. The new law further states that if law enforcement is involved in an incident of restraint or seclusion, the written report must be prepared after “consulting with the covered individuals and any **law enforcement officers** present during the incident” and the report must also include the “names and titles of the covered individuals and any **law enforcement officers** who were present during the incident.”

Under the prior version of the law, the written report referenced above only needed to be “made available for review” by the parent. The new law eliminates that language and now requires districts to send the written report to the parent “by 1st class mail,” “electronic transmission,” or “hand delivery” within three business days of the incident.

Previously, principals, or their designees, were required to submit a report annually by September 1 to the school's "governing body" detailing the number of incidents of restraint and seclusion during the prior school year, the total number of students involved in those incidents, and the number of students with disabilities involved in those incidents. The new law changes the date of that report from September 1 to October 1. The law further requires that the report present the data disaggregated by incidents of restraint and incidents of seclusion. Finally, the governing body must now submit the reports submitted by each principal to the State Superintendent of Public Instruction annually by December 1.

One other significant change related to reporting involves students who are considered "LEA placed pupils," defined as students placed in a private school pursuant to a contract between the private school and the LEA or a student with a disability placed at a private school in order to satisfy a district's obligations under the Individuals with Disabilities Education Act ("IDEA"). In either of those instances, the "administrator of the private school or his or her designee" must complete all the reporting requirements noted above. For example, the private school administrator or designee, after an incident of restraint or seclusion, must notify the parent and the LEA within one business day of the incident, within two business days after the incident prepare a written report, and within three days of the incident send the report to the parent and the LEA. Public school districts who have students placed in private schools should, as soon as possible, consult with those private schools to inform them of their obligations and determine the manner in which the private school anticipates complying with the new requirements.

Post-Incident Meeting Requirements

The new law requires that the principal or designee "meet" with the covered individuals (i.e. district staff), which does not include members of law enforcement, who participated in an incident of restraint or seclusion to discuss the following:

- The events preceding, during, and following the use of the seclusion or physical restraint.
- How to prevent the need for seclusion or physical restraint, including the factors that may have contributed to the escalation of behaviors; alternatives to physical restraint, such as de-escalation techniques and possible interventions; and other strategies that the school principal or designee determines are appropriate.

It is noteworthy that the new law does not impose a timeline by which to conduct this meeting. Given that the information to be discussed during the meeting has significant overlap with information required in the written report of the incident (i.e., "a description of the incident, including a description of the actions of the pupil before, during, and after the incident") districts should consider holding the meeting within two business days of the incident and contemporaneously with the consultation that is required to develop the written report. It would also be best practice to document that the meeting took place, who attended the meeting, and the information gathered during the meeting. Such documentation may not only assist districts in demonstrating procedural compliance, but the information gathered may also be useful in conducting functional behavioral assessments ("FBA") and developing positive behavioral interventions and supports for students with disabilities (See the *Students with Disabilities* section below for more details regarding FBAs and interventions).

Students with Disabilities

The prior law required that after the first time a student with a disability was restrained or secluded, the IEP team meet "as soon as possible after the incident" to review the student's IEP "to ensure that it contains

appropriate positive behavioral interventions and supports and other strategies to address the behavior of concern.” The new law requires a meeting of a student’s IEP team after “the 2nd time that seclusion or physical restraint is used on a child with a disability within the same school year.” The law also mandates that the meeting take place “no later than 10 school days after the incident.” Finally, the new law adds a requirement that the IEP team ensure that “the interventions, supports, and other strategies included in the individualized education program related to a behavior that resulted in the use of seclusion or physical restraint on the child are based on a functional behavioral assessment of that behavior.” IEP teams should take note of this requirement to conduct a functional behavioral assessment (“FBA”). If a student’s IEP already contains interventions and supports related to the conduct resulting in restraint or seclusion, and if those interventions and supports are not based upon a previous FBA, the IEP team should immediately initiate an FBA to affirm the use of those interventions and supports or revise them based upon the results of that newly-conducted FBA.

Conclusion

DPI has already noted that it will be developing a document detailing the changes to the restraint and seclusion law. However, the law is already in effect. While awaiting DPI’s guidance, Districts will be well-served to review the recent revisions to the restraint and seclusion law, take appropriate steps to revise policies and procedures, and begin the process of educating staff regarding the new requirements. As always, the School Law Team is ready to assist with those tasks or answer any questions you may have.

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