

**DEPARTMENT OF EDUCATION
OFFICE OF THE SECRETARY**

Statutory Authority: 14 Delaware Code, Section 122(d) (14 **Del.C.** §122(d))

FINAL

REGULATORY IMPLEMENTING ORDER

610 Limitations on Use of Seclusion and Restraint

I. Summary of the Evidence and Information Submitted

The Secretary of Education intends to amend Title 14 of the Delaware Administrative Code by adding a new regulation 14 **DE Admin. Code** 610 Limitations on Use of Seclusion and Restraint. This regulation is required by Senate Bill 100 of the 147th General Assembly.

Notice of the proposed regulation was published in the *News Journal* and the *Delaware State News* on **June 7, 2014**, in the form hereto attached as *Exhibit "A"*. Comments were received from Governor's Advisory Council for Exceptional Citizens, State Council for Persons with Disabilities, and representatives from two of the special programs operating in Delaware. The Department considered all the comments and made changes as noted by the bold and bracketed language. These include but, are not limited to, clarification of the development of a uniform form for submission of a waiver and timeline for notification for waiver decisions. There were several comments with suggested changes that were in conflict with statutory language. A letter will be forthcoming to each of the entities that submitted comments.

II. Findings of Facts

The Secretary finds that it is appropriate to amend Title 14 of the Delaware Administrative Code by adding a new regulation 14 **DE Admin. Code** 610 Limitations on Use of Seclusion and Restraint. This regulation is required by Senate Bill 100 of the 147th General Assembly.

III. Decision to Amend the Regulation

For the foregoing reasons, the Secretary concludes that it is appropriate to amend 14 **DE Admin. Code** 610 Limitations on Use of Seclusion and Restraint. Therefore, pursuant to 14 **Del.C.** §122, 14 **DE Admin. Code** 610 Limitations on Use of Seclusion and Restraint attached hereto as *Exhibit "B"* is hereby amended. Pursuant to the provision of 14 **Del.C.** §122(e), 14 **DE Admin. Code** 610 Limitations on Use of Seclusion and Restraint hereby amended shall be in effect for a period of five years from the effective date of this order as set forth in Section V. below.

IV. Text and Citation

The text of 14 **DE Admin. Code** 610 Limitations on Use of Seclusion and Restraint amended hereby shall be in the form attached hereto as *Exhibit "B"*, and said regulation shall be cited as 14 **DE Admin. Code** 610 Limitations on Use of Seclusion and Restraint in the *Administrative Code of Regulations* for the Department of Education.

V. Effective Date of Order

The actions hereinabove referred to were taken by the Secretary pursuant to 14 **Del.C.** §122 on July 17, 2014. The effective date of this Order shall be ten (10) days from the date this Order is published in the Delaware *Register of Regulations*.

IT IS SO ORDERED the 17th day of July 2014.

Department of Education

Mark T. Murphy, Secretary of Education

Approved this 17th day of July 2014

610 Limitations on Use of Seclusion and Restraint

1.0 Purpose and Authority

- 1.1 The purpose of these regulations is to establish standards and procedures for the use of physical restraint, [chemical restraint,] mechanical restraint, and seclusion to provide safety for all individuals. The regulations set forth permitted and prohibited uses of restraint and seclusion, required training for public school, private program, or alternative program personnel, required documentation and reporting of incidents of restraint and seclusion, required notification to parents, and waiver procedures for individual students.
- 1.2 These regulations are promulgated in accordance with 14 Del.C. §4112F.

2.0 Definitions

The following words and terms, when used in this regulation, shall have the following meaning unless the context clearly indicates otherwise:

“Alternative program” means a program established pursuant to 14 Del.C. Ch. 16.

“Chemical restraint” means a drug or medication used on a student to control behavior or restrict freedom of movement that is either not medically prescribed for the standard treatment of a student’s medical or psychiatric condition or not administered as prescribed. (Authority: 14 Del.C. §4112F(a)(1)).

“Mechanical restraint” means the application of any device or object that restricts a student’s freedom of movement or normal access to a portion of the body that the student cannot easily remove. “Mechanical restraint” does not include devices or objects used by trained school personnel, or used by a student, for the specific and approved therapeutic or safety purposes for which they were designed and, if applicable, prescribed, including the following:

- restraints for medical immobilization;
- adaptive devices or mechanical supports used to allow greater freedom of movement stability than would be possible without use of such devices or mechanical supports;
- vehicle safety restraints when used as intended during the transport of a student in a moving vehicle;
- instruction and use of restraints as part of a criminal justice or other course; or
- notwithstanding their design for other purposes, adaptive use of benign devices or objects, including mittens and caps, to deter self-injury.

(Authority: 14 Del.C. §4112F(a)(2))

“Parent” means:

- a biological or adoptive parent of a child;
- a guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State);
- an individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives and for whom a Relative Caregiver’s School Authorization executed in compliance with 14 Del.C. §202(f)(1) is on file;
- an individual who is otherwise legally responsible for the child's welfare; or
- a surrogate parent who has been appointed in accordance with 14 DE Admin. Code 926.19.0 or Section 639(a)(5) of the Act.

The biological or adoptive parent, when attempting to act as the parent under these regulations, and when more than one party is qualified under this definition to act as a parent, must be presumed to be the parent for purposes of this definition unless the biological or adoptive parent does not have legal authority to make educational decisions for the child. If a judicial decree or order identifies a specific person or persons to act as the "parent" of a child, or to make educational decisions on behalf of a child, then such person or persons shall be determined to be the "parent" for purposes of this definition.

(Authority: 20 U.S.C. 1401(23); 14 Del.C. §3110)

“Physical restraint” means a restriction imposed by a person that immobilizes or reduces the ability of a student to freely move arms, legs, body, or head. “Physical restraint” does not include physical contact that:

- helps a student respond or complete a task;
- is needed to administer an authorized health-related service or procedure; or
- is needed to physically escort a student when the student does not resist or the student’s resistance is minimal.

(Authority: 14 Del.C. §4112F(a)(3))

“Principal” means the building principal, or the equivalent of the building principal, of any public school or charter school, or the building principal's designee.

“Private program” means a non-public school or program contracted by a school district or charter school.

“Public school personnel” means an employee or contractor of a public school district or charter school. “Public school personnel” does not include the following:

- a law enforcement officer as defined in § 9200(b) of Title 11; or
- an employee or contractor providing educational services within a Department of Correction or Division of Youth Rehabilitative Services facility.(Authority: 14 Del.C. §4112F(a)(4))

“Seclusion” means the involuntary confinement of a student alone in a room, enclosure, or space that is either locked or, while unlocked, physically disallows egress. The use of a “timeout” procedure during which a staff member remains accessible to the student shall not be considered “seclusion.” (Authority: 14 Del.C. §4112F(a)(5))

“Student” means any individual enrolled in a Delaware public school or charter school, an alternative program pursuant to 14 Del.C. Ch. 16, or a private program pursuant to Title 14 Del.C., Chapter 31, Section 3124.

“Timeout” means a behavior management technique in which, to provide a student with the opportunity to reflect or regain self-control, a student is separated from others for a limited period in a setting that is not locked and the exit is not physically blocked by furniture, closed door held shut from outside, or other inanimate object. (Authority: 14 Del.C. §4112F(a)(6))

“Written report” means printed paper filings and electronic filings that can be printed.

3.0 Use of Restraints

3.1 Public school personnel, private program personnel, and alternative program personnel are prohibited from imposing on any student:

3.1.1 Chemical restraint; and

3.1.2 Subject to waiver authorized by 14 Del.C. §4112F(c)(4) and Section 8.0, mechanical restraint and seclusion.

3.2 Such personnel may impose physical restraint only in conformity with all of the following standards:

3.2.1 The student’s behavior presents a significant and imminent risk of bodily harm to self or others;

3.2.2 The physical restraint does not interfere with the student’s ability to communicate in the student’s primary language or mode of communication;

3.2.3 The physical restraint does not interfere with the student’s ability to breathe or place weight or pressure on the student’s head, throat, or neck;

3.2.4 The physical restraint does not recklessly exacerbate a medical or physical condition of the student;

3.2.5 Less restrictive interventions have been ineffective in stopping the imminent risk of bodily harm to the student or others, except in case of a rare and clearly unavoidable emergency circumstance posing imminent risk of bodily harm, including, without limitation, intervening in a student initiated physical assault or altercation;

3.2.6 For a student with a disability as defined in Chapter 31 of Title 14 or 34 C.F.R. Part 104, the physical restraint does not contravene provisions in an individualized education program (IEP), behavior intervention plan, accommodation plan, or any other planning document for the individual Student;

3.2.7 Personnel use only the amount of force necessary to protect the student or others from the threatened harm;

3.2.8 The physical restraint ends when a medical condition occurs putting the student at risk of harm or the student’s behavior no longer presents an imminent risk of bodily harm to the student or others;

3.2.9 The physical restraint is within the scope of force authorized by §468 of Title 11[; and.]

(Authority: 14 Del.C. §4112F(b))

4.0 Training of Personnel

4.1 Except as provided in 14 Del.C. §702(c), a student may be physically restrained only by public school personnel, private program personnel, or alternative program personnel who have [received completed] training in physical restraint procedures.

4.1.1 Such personnel shall receive annual training in the use of [emergency safety interventions crisis prevention and intervention techniques] consistent with nationally-recognized training programs, which shall meet the following minimum requirements:

4.1.1.1 The training shall address prevention techniques, de-escalation techniques, and positive behavioral intervention strategies and supports;

4.1.1.2 The training shall be designed to meet the needs of such personnel consistent with their duties and the potential need for emergency safety interventions; and

- 4.1.2 Each public school, private program, and alternative program shall maintain written or electronic documentation of each training provided, which shall include a list of all personnel who participated in the training.
- 4.2 Any public school personnel responsible for reporting the physical restraint of a student to the Department shall complete training on the reporting process approved by the Department and any additional training that the Department may prescribe from time to time.
 - 4.2.1 The approved training shall be provided using a web-based platform through the Department's Professional Development Management System (PDMS) or similar system. The training will be provided on an annual basis and made available throughout each school year.
 - 4.2.2 Such personnel responsible for reporting the physical restraint of a student shall complete the approved training at least once every three (3) years and during any year in which reporting procedures were changed from the previous year as indicated by the Department.

5.0 Parental Notification of Use of Physical Restraint

- 5.1 Except as provided in Section 5.1.1, if a student is physically restrained, a reasonable attempt shall be made to notify the parent on the same day, but in no event later than twenty-four hours after, the physical restraint is used. Such notification shall be made in person, by phone or by voicemail, or by e-mail. The school shall maintain written documentation of successful and unsuccessful attempts to notify the parent.
 - 5.1.1 Where physical restraint is included in the student's IEP or Section 504 Plan, the IEP Team or Section 504 Team, including the parent, shall determine a timeframe and manner of notification of each incident of physical restraint.
- 5.2 The parent shall be provided a copy of a final written report no later than the date on which such report is filed with the Department. The written report shall contain, at a minimum, the information required under Section 6.0.

6.0 Uniform Data Collection

- 6.1 When an incident of physical restraint of a student by school personnel occurs:
 - 6.1.1 As soon as practicable thereafter, a reasonable attempt shall be made to interview the student regarding the incident; and
 - 6.1.2 The school principal must provide a ~~Ww~~ritten report, in a uniform format as determined by the Department, of the restraint to the Department within seventy-two (72) hours of the restraint, or within seventy-two (72) hours of the time in which the student's district or charter school of residence receives notice of the restraint from the contracted private program or alternative program, whichever the case may be; and
 - 6.1.3 The written report shall include, at a minimum:
 - 6.1.3.1 Details of the restraint incident, including, but not limited to, the student behavior and description of events leading to the use of physical restraint; de-escalation techniques utilized by school personnel prior to the restraint; a description of the student's behavior during the restraint; a summary of witness interviews, if applicable; any injury caused to the student, staff member(s), or other student(s); and any related treatment deemed necessary as a result of the restraint.
 - 6.1.3.2 Demographic information on affected students to include age, race, ethnicity, and disability category;
 - 6.1.3.3 A description of the interview conducted with the student, if applicable; and
 - 6.1.3.4 If applicable, a description of changes to any or all of the following that resulted from the restraint incident:
 - 6.1.3.4.1 For a student with a disability as defined in Chapter 31 of Title 14 or 34 C.F.R. Part 104, the student's IEP, behavioral support, crisis intervention plan, accommodation plan, or any other planning document for the individual student;
 - 6.1.3.4.2 School/LEA policy or procedure; or
 - 6.1.3.4.3 Additional staff training.

7.0 Annual Reporting Requirement

The Department shall issue an annual report on the use of physical restraint, which shall include rates of usage by school and by subcategories identified pursuant to Section 6.0, identify trends, and analyze significant results. The report shall be posted on the Department's website.

8.0 Waiver

- 8.1 Any public school, private program, or alternative program applicant for a waiver of the prohibition on the use of mechanical restraints or seclusion for an individual student must deliver the request in writing[, in a uniform format developed by the Department,] to the Secretary or Secretary's designee setting forth the grounds for the request.
- 8.1.1 The request shall be based on compelling justification supported by documentation, including, but not limited to, educational records, reporting of incidents, and the student's functional behavioral assessment and behavioral intervention plan, including implementation data, and medical documentation, if applicable.
- 8.1.2 The request shall contain a description of the conditions and safeguards that the applicant will utilize in connection with the waiver, including, but not limited to:
- 8.1.2.1 A detailed description of the proposed continual visual staff monitoring of student; **[and]**
- 8.1.2.2 A requirement that the parent be notified of each use of mechanical restraint or seclusion which conforms to the procedure set forth in Section 5.0 for reporting physical restraint **[except that the provisions of 5.1.1 shall not apply herein]; and**
- 8.1.2.3 A detailed description of the physical space within which the seclusion(s) will occur, or of the type of mechanical restraint(s) to be utilized, whichever is applicable.
- 8.1.3 The request shall include a written authorization signed by the parent agreeing to the issuance of a waiver on the prohibition of the use of mechanical restraints or seclusion for that student and a signed written consent for release of information to the Department and the waiver review committee.
- 8.1.4 All privileged documentation shall be maintained confidentially by the Department and the waiver review committee to the extent permitted by law.
- 8.2 All requests shall be considered by a waiver review committee appointed by the Secretary. A decision by the waiver review committee shall be rendered **[within no later than]** (60) sixty calendar days of receipt of the waiver request.
- 8.3 The committee shall make a written recommendation to the Secretary, which shall include:
- 8.3.1 A summary of the compelling justification based on the documentation submitted in support of the waiver requested;
- 8.3.2 Recommendations to include any specific conditions and safeguards, and a brief statement of the reasons therefore;
- 8.3.3 A requirement that, where a waiver is issued, there be continual visual monitoring, parental notice of each use of mechanical restraint or seclusion, and collection of data to include the number of times the student was subject to mechanical restraint or seclusion, the duration of each ~~[incident]~~ **mechanical restraint or seclusion**, and any other data as required by the Department;
- 8.3.4 A statement as to the duration of the waiver, not to exceed a period of one calendar year.
- 8.4 The Secretary shall consider the entire record of the case and the committee's recommendations in reaching a final decision. The Secretary's decision shall be issued in writing and mailed to the applicant and the parent by certified mail **[no later than ten (10) calendar days from receipt of the recommendation of the waiver review committee]**.
- 8.5 The Secretary's decision shall be final.

18 DE Reg. 130 (08/01/14) (Final)