

## Comment and Question: Rulemaking Part 2 of 6.11 NMAC (Restraint and Seclusion)

Force, Kevin <Kevin.Force@nmlegis.gov>

Wed 4/18/2018 11:54 AM

To: Notification, Rule, PED <Rule.Notification@state.nm.us>;

Hey Jamie, I hope you are well.

I had a question/comment about the proposed rule for restraint and seclusion, noticed in the March 13, 2018 issue of the *New Mexico Register*. I see in the proposed rule at 6.11.2.10 (E)(3)(b)(ii), PED suggests that failure of a *school* to submit a timely school safety plan to the department may result in the “delay or withholding of the next regularly scheduled distribution of the school equalization guarantee (by which I assume you mean state equalization guarantee) to the local *school district*,” ...” We don’t see anything that would give the department statutory authority to so limit the SEG based on the failure to submit a safety plan to the department. A quick review of Chapter 22 seems to indicate that withholding of SEG distribution is only contemplated in fairly limited circumstances, namely for a school’s failure to satisfy fiscal obligations, and for failure to timely submit certain reports, such as audit reports. Can you please tell me from where you are deriving the authority for this potential withholding? Certainly, nothing in Section 22-5-4.12 NMSA 1978 grants such authority.

Please include this in the permanent rulemaking record.

Thank you very much, Jamie!

Kevin Force  
Senior Research Analyst II  
NM Legislative Education Study Committee  
325 Don Gaspar, Suite 200  
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# Comments on changes to 6.11.2 NMAC

Don Priola <[dpriola@drnm.org](mailto:dpriola@drnm.org)>

Thu 4/19/2018 11:30 AM

To:FeedBack, Rule, PED <[Rule.FeedBack@state.nm.us](mailto:Rule.FeedBack@state.nm.us)>;

Cc:Jason Gordon <[jgordon@drnm.org](mailto:jgordon@drnm.org)>;

 1 attachment

Comments6112NMAC.pdf;

Good afternoon,

Please find Disability Rights New Mexico's comments on the proposed changes to 6.11.2 NMAC.

Sincerely,

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Disability Rights New Mexico  
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Gary Housepian, Chief Executive Officer

*Promoting and Protecting the Rights of Persons with Disabilities*

VIA ELECTRONIC MAIL AND FACSIMILE

April 19, 2018

Jamie Gonzales  
Policy Division, New Mexico Public Education Department  
[rule.feedback@state.nm.us](mailto:rule.feedback@state.nm.us)  
Fax: (505) 827-6681

Good Afternoon,

Disability Rights New Mexico (DRNM) is a private, non-profit organization whose mission is to protect, promote, and expand the rights of persons with disabilities in our state. As a significant part of that mission, DRNM provides legal representation and advocacy services to children with disabilities who attend school throughout New Mexico. Those children depend on the state and federal government to supply them with school based services and a Free Appropriate Public Education as mandated by the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. § 1400.

The purpose of this correspondence is to provide comments on the changes that the New Mexico Public Education Department (PED) seeks to impose upon 6.11.2 NMAC, governing the Rights and Responsibilities of Public Schools and Public School Students. The proposed changes concern the use of seclusion and restraint in schools, and the school specific policies that must accompany those techniques under New Mexico law. NMSA 1978, § 22-5-4.12 DRNM urges that the version of 6.11.2 NMAC proposed by the PED be changed so that it adheres more closely to federal and state law and the standards of good practice.

**1. Seclusion and restraint techniques are not a form of discipline, and must never be utilized that way. Instead, these techniques are rarely used finite interventions to ensure immediate school safety. The proposed regulation incorrectly conflates the concepts of discipline and seclusion and restraint. The proposed language of 6.11.2 NMAC must be changed in order to guarantee that seclusion and restraint techniques will not be seen by school districts as a disciplinary tool.**

The plain language of NMSA 1978, § 22-5-4.12 shows that the state legislature did not intend for seclusion and restraint techniques to be used as a disciplinary tool. Seclusion and restraint can

only be utilized if student behavior poses an imminent danger of physical harm and less restrictive interventions appear insufficient to mitigate that harm. NMSA 1978, § 22-5-4.12 (A)(1) & (2). Further, the restraint and seclusion must end when that imminent danger has passed. NMSA 1978, § 22-5-4.12 (B)(2). These techniques are available as a temporary emergency safety measure, not as a punishment to enforce rules of conduct.

Unfortunately, the proposed version of 6.11.2 NMAC improperly combines the concepts of discipline and seclusion and restraint, which could lead to confusion and the inappropriate use of these techniques to enforce rules of conduct. DRNM proposes the following changes to emphasize that seclusion and restraint is not to be utilized for disciplinary purposes:

-The section of the proposed regulations addressing seclusion and restraint (and where the majority of the proposed changes are outlined) is 6.11.2(E) NMAC. Section E is placed in the middle of long paragraphs dealing with school discipline, preceded by Section D entitled “Selection of Disciplinary Sanctions” and followed by sections on corporal punishment, detention suspension and expulsion, and discipline of students experiencing homelessness and students with disabilities. In order to ensure that restraint and seclusion are not perceived in the same way as these disciplinary measures, the section governing seclusion and restraint should be removed from the middle of the disciplinary rules and made the last section of the regulation.

- After what is now Section E is moved to the end of the document, it should be revised to include a line outlining the purpose of seclusion and restraint techniques. It should state that said techniques shall never be utilized as a disciplinary tool, and are a temporary emergency safety measure to be used only in rare cases and in compliance with the procedures outlined in 6.11.2 NMAC and NMSA 1978, § 22-5-4.12.

-The language of Section 6.11.2(C) also confuses Seclusion and Restraint with disciplinary measures, stating:

“C. Basis for disciplinary action: A student may be appropriately disciplined by administrative authorities in the following circumstance: (1) for committing any act which endangers the health or safety of students, school personnel or others for whose safety the public school is responsible, or for the conduct which reasonably appears to threaten such dangers if not **restrained**, regardless of whether an established rule of conduct has been violated” (emphasis added).

The bolded “**restrained**” should be changed to “stopped” to avoid improperly linking this text to the section on seclusion and restraint procedures that will follow it.

**2. NMSA 1978, § 22-5-4.12 includes explicit circumstances when exclusion and restraint techniques may be used. This language should be included in proposed 6.11.2 NMAC.**

The New Mexico Legislature explicitly limited the circumstances under which seclusion and restraint can be utilized. The first section of NMSA 1978, § 22-5-4.12 reads:

“A. A school may permit the use of restraint or seclusion techniques on any student only if both the following apply: (1) the student’s behavior presents an imminent danger of serious physical harm to the student or others and (2) less restrictive interventions appear insufficient to mitigate the imminent danger of serious physical harm.”

The language outlined above, critical to understanding the permissible uses of seclusion and restraint, does not appear in the version of 6.11.2(E) NMAC proposed by the PED. The proposed language states that less restrictive interventions shall be attempted prior to the use of a restraint or seclusion, but does not link the process to an imminent danger of serious physical harm. And any mention of seclusion and restraint being used only if student behavior causes imminent and serious physical danger is completely absent.

The language in NMSA 1978, § 22-5-4.12 (A) should be incorporated fully into the beginning of 6.11.2(E) NMAC. This will ensure that school districts are clear that restraint and seclusion techniques are only to be used in the rare cases where there is an imminent danger of serious physical harm in a school setting. When that language has been added to the proposed regulation, 6.11.2(E)(1)(b) NMAC should remain unchanged. Both the statutory language and 6.11.2(E)(1)(b) NMAC will serve to emphasize the critical policy put forward clearly by the New Mexico Legislature: less restrictive techniques, including positive behavioral supports, must be employed before an act of seclusion or restraint is considered. Finally, the language of NMSA 1978, § 22-5-4.12(B)(2), stating that any restraint or seclusion shall end when there is no longer a danger of harm, should also be incorporated into 6.11.2(E) NMAC.

### **3. Seclusion *and* restraint should be changed to seclusion *or* restraint**

Proposed 6.11.2(E)(a)(1) NMAC states that: “A school may permit the use of restraint **and** seclusion techniques on any student pursuant to the requirements in Section 22-5-4.12 NMSA 1978.” The language in that section should be changed from “restraint **and** seclusion” to “restraint **or** seclusion.” This change brings the proposed regulation into conformity with the language used in NMSA 1978, § 22-5-4.12. It also reinforces the key principle that restraint and seclusion techniques must not be used simultaneously during a behavioral incident.

### **4. Paragraph I titled “Discipline of Students with Disabilities” should be deleted or rewritten.**

The PED has not proposed making substantive changes to 6.11.2(I) NMAC, but DRNM asserts that the paragraph entitled “Discipline of Students with Disabilities” must be deleted or rewritten. This section is a warning that “students with disabilities are not immune from school disciplinary processes”, and that individuals with disabilities are not entitled to remain in a classroom where their behavior disrupts the learning of others. Finally, the section minimizes and distorts school obligations under the IDEA, stating that districts are required to meet the individual needs of students with disabilities “to the extent that current educational expertise permits”.

There are a number of things in 6.11.2(I) NMAC that need to be removed or substantially rewritten. First, I have been representing students receiving services through the IDEA for more than a decade, and I have never heard any of them or their families argue that any student should be exempt from school discipline. The language in 6.11.2(I) NMAC is adversarial, unhelpful, and fails to address the prevailing problems behind disciplinary issues in school settings. Any concerns with behavior and a student with a disability are best solved when schools, families and the individual student work together to craft a meaningful Behavioral Intervention Plan (BIP) that relies on positive behavioral supports to ensure good outcomes.

6.11.2(I) NMAC says nothing about schools and families working together to support the student, and instead issues a warning that all will be subject to school disciplinary process. It is a warning that is not helpful to anyone attempting to provide support to a student with behavioral needs that must be addressed. Instead, any regulation that covers discipline of students with disabilities should emphasize that IEP teams and families must work together to provide behavioral support for students when needed.

Further, the IDEA requires that each student with a disability is provided with an individualized Free Appropriate Public Education. That means that each school district must seek out the educational and service provider expertise necessary to ensure that each student meets his or her IEP goals. The statement in 6.11.2(I) NMAC that individualized needs will be met “to the extent that current educational expertise permits” brushes off that critical requirement, and should be deleted.

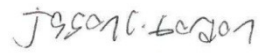
6.11.2(I) NMAC should either be deleted and replaced with citations to the statues and rules covering disciplinary protections for students with disabilities (such as the IDEA), or rewritten in the manner set forth above.

## **Conclusion**

The use of seclusion and restraint techniques must be extremely rare in schools, utilized only when there is an imminent and serious threat to physical safety. The key to providing meaningful and ongoing behavioral support to students with disabilities is the BIP process, where the school, student, and their families work together to craft a meaningful plan driven by positive behavioral supports. A well done, collaborative BIP process will ensure good outcomes for the student and the school. The revisions to 6.11.2 NMAC proposed by the PED should be altered as described above to emphasize these critical points and comply more fully with NMSA 1978, § 22-5-4.12.

Thank you for the opportunity to comment on the proposed revisions to 6.11.2 NMAC.

Sincerely,

A handwritten signature in black ink that reads "Jason C. Gordon". The signature is written in a cursive style.

Jason C. Gordon  
Litigation Manager  
Disability Rights New Mexico

# Comments to NMPED 04.19.18.pdf

James Burson <jburson@lagunapueblo-nsn.gov>

Thu 4/19/2018 3:24 PM

To: FeedBack, Rule, PED <Rule.FeedBack@state.nm.us>;

Cc: Ethel J. Abeita <eabeita@lagunapueblo-nsn.gov>; Diane K. Kie <dkkie@lagunapueblo-nsn.gov>; Terri L. Sarracino <tlsarracino@lagunapueblo-nsn.gov>; Pino, Tina <tpino@lagunapueblo-nsn.gov>; Siow, Virgil A. <vsow@lagunapueblo-nsn.gov>; Jim Hooper <jhooper@lagunapueblo-nsn.gov>; nataliecmz@gmail.com <nataliecmz@gmail.com>;

 1 attachment

Comments to NMPED 04.19.18.pdf;

Please find attached comments to NMAC 6.11.2 from the Pueblo of Laguna.



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April 19, 2018

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New Mexico Public Education Department, Room 101  
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Santa Fe, New Mexico 87501

RE: Comments to Amendments of NMAC 6.11.2, sections 3, 7, and 10, effective 7/1/2018

The Pueblo of Laguna (Laguna) appreciates the opportunity to provide comments on proposed amendments to NMAC 6.11.2. Laguna's Education Priority Team and TIPP met jointly to review and prepare comments for the Pueblo to submit.

The Pueblo generally supports NMPED's effort to align its rules with the McKinney-Vento Homelessness Assistance Act. As with any new mandate imposed upon public schools, Laguna requests that consideration be given to whether adequate funding exists or will exist for implementation and compliance. Although the definition of homelessness must align with the McKinney-Vento Act, its application under NMAC 6.11.2.10.H at Laguna and other tribal communities will need to be sensitive to cultural traditions of multi-generational households and practical considerations of available accommodations, which are often in short supply. Finally, NMPED must remain mindful that collection of data under NMAC 6.11.2.10.H(2) must be captured from a large enough pool to be considered in the aggregate.

Respectfully submitted,

A handwritten signature in black ink that reads "Virgil Siow". The signature is written in a cursive style.

Virgil A. Siow, Governor