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Disability Rights Center Comments on Chapter 33 November 8, 2010

Introduction

In preparation for this discussion, Disability Rights Center (DRC) staff carefully reviewed a number of documents. These included: the current proposed federal legislation (H.R. 4247 and S. 3895); the recommendations of numerous national organizations representing stakeholder groups; reports and studies regarding the use of restraint and seclusion on children, and best practices for managing student behavior; legislation and regulations enacted and proposed in other states; DOE complaint investigation reports regarding Chapter 33; DRC's individual cases involving allegations of violations of Chapter 33;¹ and input provided by Maine stakeholders.

A key document for this discussion is the April 14, 2010 commentary submitted by Jill Adams on behalf of Maine Administrators of Services for Children with Disabilities (MADSEC). DRC finds more common ground with MADSEC's suggestions than disagreement. As such, only significant differences with MADSEC's April 14, 2010 comments are stated below.

But first a note about process... As is evident from the discussions thus far, any proposed revisions to Chapter 33 bring up a host of legal, philosophical, and practical challenges. Chapter 33 was created to solve a variety of problems and to serve a number of masters. As a result, the final regulations are disjointed and conflict internally. It is our recommendation that the meeting on November 9th be the beginning, rather than the end of this discussion. The stakeholders invited to the meeting on the 9th should continue to meet, along with DOE staff. The group's charge should be the discussion of one significant topic per meeting, and its final product a core set of recommendations for revisions to Chapter 33.² The lives and well-being of Maine's children are at stake.³ It is far more important that the regulations be right than that they be produced by a deadline.

Enforcement

Chapter 33 currently does not provide a method by which a parent may request an investigation of a violation of its provisions. DOE has handled Chapter 33 complaints informally over the past few years, at first within the Special Services Due Process Office and most recently, within Certification, however there is no publicly available written

¹ DRC has handled over forty cases involving restraint and seclusion of children in Maine's public schools in the past two years.

² For example, the question of the definition and goal of "time-out" is worthy of significant discussion in and of itself.

³ In the Spring of 2009, the Committee on Education and Cultural Affairs voted "Ought Not to Pass" on LD 1096. We were told by Committee members at that time that their decision was based in part on a promise that DOE would review these regulations. We have waited to begin the formal discussion of Chapter 33 until now, and now are rushing to submit regulations before the legislature reconvenes. Maine's children deserve better than this.

protocol for this complaint process. Therefore, families and school staff have no information to prepare them for this process or to help them understand what to expect from it. Roles, timelines and investigation requirements are unclear.

Chapter 33 should be revised to provide a complaint process with clear, transparent procedures. These procedures must include, among other things, a designated division within DOE to complete the investigations, a specific timeline for the completion of investigations, and must require a written report with specific findings, conclusions, and a corrective action plan when violations are found. There should be a protocol for investigation that includes in-person interviews with all involved parties and a review of all relevant documents. Redacted copies of these reports must be publicly posted.

The Chapter 33 complaint process should be family friendly in the sense that parents may file a complaint successfully with the bare minimum of specific information. For example, if the family has not been provided timely and complete notice of incidents of restraint or seclusion, the family is not expected to provide the dates of incidents to a complaint investigator since they have no way to obtain this information. It should also be clear what forms of relief can be requested and systemic relief, e.g. staff training and/or policy change, must be available through this process in order to ensure student safety.

The current IDEA complaint process provides procedures that can be adopted for Chapter 33 with some alterations. We recommend that the workgroup discuss the above and evaluate adaptation of the current IDEA model as a low cost solution.

Definitional Issues

Currently, Chapter 33's definitions of "therapeutic restraint" and "time out" are confusing and internally inconsistent.⁴ They are especially so to families because the same child may be covered by different definitions and legal requirements across settings. One set of requirements covers schools, a different set covered private hospitals and so on. We recommend that the definitions used in the federal Children's Health Act of 2000⁵ be adopted as the proposed federal legislation has done, with one minor change, so as to ensure consistency internally and across settings.

In addition, the current terms are misleading. Restraint and seclusion are not therapeutic. Seclusion and timeout are not the same thing.⁶ Therefore, we recommend the following definitions replace those in Chapter 33, Section 2.1 and 2.3.

⁴ Within Chapter 33, section 1.1 is not consistent with 2.1 and 2.3 regarding coverage. Section 1.1 (Policy and Purpose) includes property damage and disruption, but 2.1 (Timeout) covers injury to self or others and property damage, but not disruption. Section 2.3 (Therapeutic Restraint) limits coverage to injury to self or others, but not property damage or disruption. Both seclusion (timeout) and restraint should be limited to instances in which the student's behavior poses an *"imminent danger of serious bodily injury to the student, school personnel or others."* (See S. 3895, Sec 102(a)(2)(A)). Section 1.1 should be clarified accordingly. Otherwise, it is difficult for staff to understand their mandate.

⁵ Public Law 106-310

⁶ According to current federal CMS regulations, seclusion is situation from which one reasonably believes one cannot leave or physically is unable to leave. "Timeout" is a voluntary situation in which the individual can leave and knows this to be true. Seclusion is limited to instances involving the safety of the patient or others. See 71 FR 71378, 71404; 42 CFR 483.352. The same distinction should be the case in a school setting. There is no reason for it to be different.

Physical Restraint is “a personal restriction that immobilizes or reduces the ability of an individual to move the individual’s arms, legs, body or head freely. Such term does not include a physical escort.”⁷

Seclusion is “a behavioral control technique in which a student is involuntarily confined to a room or area from which the student is physically prevented from leaving.” (CMS regulations, 42 CFR §441.352.)

The current regulations are confusing because of the definitions of these terms and the lack of clarity regarding their coverage (see Footnote 4). A recent DOE complaint decision found that because the student was not a danger to self or others (the issue was disruption only), the holds were not therapeutic restraint, and, as such, Chapter 33 did not apply. Since Chapter 33 did not apply, the staff who restrained the student multiple times (approximately 12 times in 4 months) did not need to be trained. This conclusion is the result of unclear regulations and could result in harm to a child repeatedly being restrained by untrained staff.

In the case of both seclusion and restraint, one must look to the balance of harms. The potential harm to student and staff in the case of both restraint and seclusion is too great for it to be allowed in cases of disruption and property damage. It must be reserved for *“imminent danger of serious bodily injury to the student, school personnel or others.”*⁸ In any case in which restraint and/or seclusion are used, the full protections of Chapter 33 must apply. Staff must be trained, parents provided timely notice, documentation completed, and data collected. It is impossible to create a scenario where anything else would be appropriate public policy. The one and only exception is the case of a *“rare and clearly unavoidable emergency circumstances when trained staff are not immediately available due to the unforeseeable nature of the emergency, and trained staff are summoned immediately”* In such case, untrained staff may restrain the student until help arrives. But the remainder of the regulations must apply. There is absolutely no reason why, even in an emergency circumstance, a parent may not be provided timely notice after the fact. Those are the very circumstances in which they must receive notice so they can fulfill their parental roles responsibly.

The changes described above do not conflict with the statutory immunity provision, 20-A MRS §4009.⁹ If a staff person needs to control the behavior of a student who is acting violently, he or she may still do so. The regulations address other related but important issues, such as documentation and notice.

Inclusion in the IEP

⁷ We further recommend that “physical escort” be defined as “Guiding a child physically without restricting his or her movement..”

⁸ The one exception of course would be if property damage were likely to result in serious body injury to a person or persons. For example, if a student were throwing a computer at or very near to an individual, restraint might be warranted, but this is a logical and obvious exception.

⁹ 20-A MRS §4009: “Reasonable force. A teacher or other person entrusted with the care or supervision of a person for special or limited purposes may not be held civilly liable for the use of a reasonable degree of force against the person who creates a disturbance if the teacher or other person reasonably believes it is necessary to: A. Control the disturbing behavior; or B. Remove the person from the scene of the disturbance.”

Restraint and seclusion are not treatment, they are, in certain circumstances a response to a crisis. As such, they are not part of the services provided to students that make up a “free, appropriate public education” (FAPE) and have no place in an IEP. In addition, Chapter 33 covers all students. It would be inconsistent and potentially discriminatory to allow the use of restraint or seclusion for some students more than others by virtue of those students having an IEP.

Covered Entities

It should be clear that all public school students are covered by Chapter 33. This includes those attending private schools using public funds for tuition, including 60/40 schools and private special purpose schools. This is especially true as the population of some 60/40 schools is composed largely of public school students. In addition, Chapter 33 should clearly cover substitute teachers, school volunteers, tutors, contractors (including transportation), and school functions.

“Designated Time Out Room”

Chapter 33 regulations (Section 2.1, 2.2) should apply to any space in which seclusion occurs. Section 3’s requirements regarding the physical characteristics of the space are included in the regulations because of the safety needs of the secluded child, and as such should apply wherever a child is secluded. There should be no distinction between a designated or non-designated space. The distinction really involves whether or not the child can leave the space of his or her own free will, and whether or not the child is likely to get injured during the process of seclusion.

DRC has handled cases where the physical characteristics of the space were deemed irrelevant because the student was secluded in a non –designated space. This defies logic.

Note: DRC believes that specific time limits on the length of time that students may be secluded or restrained continue to be necessary to provide guidance to school staff.

Data Collection

In order to ensure a proper understanding of the use of restraint and seclusion in Maine, the following data should be reported annually to a single designated entity at DOE. LEAs should be required to report the total number of incidents of restraint and seclusion, including the number of incidents per child if any child is restrained or secluded more than once, the child’s age, gender, disability category(ies). LEAs should also report the total number of restraints by untrained individuals and the total number resulting injury or death.

Nurse Review

The regulations should clarify the circumstances under which a nurse must evaluate a student who has been restrained or secluded. In addition, a parent should be able to request in advance the inclusion of such review as part of a child’s health care plan if the child’s unique medical or psychological needs require it.

Child Find

When the Chapter 101 regulations are next reviewed, MUSER IV(2)(A) should be amended to add the use of restraint or seclusion as a trigger for evaluation. Note: this does not in any way require that a child will be found eligible, only that he or she will be considered for eligibility as the rules require.

Documentation

In addition to the items included by MADSEC, DRC would add a requirement that the documentation specify whether or not the staff person implementing the restraint or seclusion is trained/certified as required by these rules.

Mechanical Restraint

Chapter 33 should be amended to clarify that in order for a school resource officer to be exempted from these rules, he or she must be employed a police department.

Monitoring

DOE must clarify the roles of the following agencies/entities with regard to the monitoring of compliance with Chapter 33: School Approval; DOE Special Services monitoring (IDEA); Certification; and DHHS Office of Child and Family Services. It is our understanding that currently, DHHS Office of Child and Family Services will not investigate allegations of abuse or neglect in schools by school staff. But we are unclear who is responsible for completing an investigation if a child is injured while being restrained or secluded. This lack of clarification could allow the case of an injured child to fall through the cracks.

Thank you for taking the time to consider our comments. For further information, please contact me directly at (027) 626-2774, ext 220.

Sincerely,



Diane Smith
Staff Attorney