

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Health Policy

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**BILL:** CS/SB 260

**INTRODUCER:** Education Committee and Senator Book and others

**SUBJECT:** Students with Disabilities in Public Schools

**DATE:** February 12, 2018      **REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Androff</u>	<u>Graf</u>	<u>ED</u>	<u>Fav/CS</u>
2.	<u>Lloyd</u>	<u>Stovall</u>	<u>HP</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

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**Please see Section IX. for Additional Information:**

PLEASE MAKE SELECTION

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**I. Summary:**

CS/SB 260 revises the use of restraint techniques on public school students with disabilities, requires use of exclusionary and nonexclusionary time, prohibits use of seclusion, and specifies responsibilities for school districts, schools, and the Commissioner of the Florida Department of Education (commissioner).

The bill defines exclusionary and nonexclusionary time and establishes the conditions under which students with disabilities may be placed in exclusionary and nonexclusionary time. The bill defines types of protective equipment and restraint that may be used and imminent risk of serious injury or death as it relates to the use of physical restraint.

Use of restraints and exclusionary and nonexclusionary time must be monitored by the schools and school district and its use must be reported monthly to the department. The bill requires redacted copies of incident reports and data of incident reports on the use of restraints and exclusionary and nonexclusionary time to be posted for the public on a monthly basis beginning no later than October 1, 2018.

School personnel must develop additional policies and procedures on the use of restraints, training procedures, and escalating behavioral strategies that may be used to ensure student safety and reduce the use of restraints. The new policies and procedures must be publicly posted by the school districts at the beginning of each school year.

The bill requires the commissioner to develop recommendations for in-service training for teachers of students with emotional and behavioral disabilities on the early identification of and intervention for emotional and behavioral disabilities. The policy recommendations must also address the appropriate use of restraints, deescalation and redirection, reporting requirements, and response to possible medical emergencies in the use of restraints.

The bill has an indeterminate fiscal impact.

This bill takes effect July 1, 2018.

## II. Present Situation:

### Federal Law and Regulations

Federal law provides individuals with disabilities several protections against discrimination, including specific provisions for students with disabilities. Those provisions can be found across those sections of federal law dealing with public education, labor, juvenile and criminal justice, and health care. Any federal and state agencies, public entities and organizations, and other programs that may receive federal funds or assistance are subject to those laws and their implementing regulations which can be found in their respective sections of the Code of Federal Regulations (CFR). Some of those federal law and regulations are highlighted below.

#### *Section 504 of the Rehabilitation Act of 1973 (Section 504)*

Section 504 of the Rehabilitation Act (Section 504) is a federal law that prohibits entities that receive federal financial assistance, such as public schools and charter schools, from discrimination against individuals with disabilities, regardless of the nature or severity of their disability.<sup>1</sup> The section guarantees students with disabilities the right to a free and appropriate public education (FAPE). Under Section 504, to meet the FAPE threshold, a school district, institution of higher learning, and other state and local education agencies must provide regular or special education and related aids and services that meet the student's individual educational needs as adequately as the needs of nondisabled students are met.<sup>2,3</sup>

#### *Title II of the American with Disabilities Act*

The American with Disabilities Act of 1990 (ADA)<sup>4</sup> guarantees that individuals with disabilities have the same opportunities as those without disabilities. The ADA protects against discrimination on the basis of disability in employment, state and local government, public accommodations, commercial facilities, transportation, and telecommunications. Federal funding of public education falls under state and local government activities (Title II).<sup>5</sup>

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<sup>1</sup> 29 U.S.C. s. 794; 34 C.F.R., pt. 104.

<sup>2</sup> U.S. Department of Education, Office for Civil Rights, *Protecting Students with Disabilities*, <https://www2.ed.gov/about/offices/list/ocr/504faq.html> (last viewed Feb. 9, 2018).

<sup>3</sup> An individual with a disability is defined in 29 U.S.C. §705 (20), and a student with a disability is defined in 29 U.S.C. s. 705(37).

<sup>4</sup> 42 U.S.C. 12101 et seq.

<sup>5</sup> U.S. Department of Justice, *A Guide to Disability Rights Laws* (July 2009), <https://www.ada.gov/cguide.htm> (last viewed Feb. 9, 2018).

The ADA prohibits the exclusion of any qualified individual from participation in or the denial of benefits, services, programs, or activities of a public entity or the discrimination by any public entity.<sup>6</sup> The United States Department of Justice has the responsibility for enforcement of the regulations implementing the ADA, including those specific to access to services, programs and activities provided by state and local government entities.

The regulations to the 2008 Amendments to the ADA's regulations for Title II were finalized in 2016 and published as a final rule on October 11, 2016. The final regulation included a revised definition of disability related to the meaning of physical or mental impairment. While the final regulation lists many specific impairments such as cerebral palsy, epilepsy, muscular dystrophy, and cancer, the comments to the final rule notes that it does not include all the possible conditions. Along with these specific diagnoses, the provision also uses more general descriptions of disorders such as, any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems.<sup>7</sup>

### ***Individuals with Disabilities Education Act (IDEA)***

The Individuals with Disabilities Education Act (IDEA) was originally signed into law by President Gerald Ford as the Education for All Handicapped Children Act (Pub. Law 94-142) in 1975. The intent of the law in 1975 and its re-authorization as the IDEA in 2004, as amended through the Every Student Succeeds Act in December 2015, remains the same: to ensure FAPE<sup>8</sup> to eligible children with disabilities and special education and related services to those children.<sup>8</sup> The FAPE is accomplished through an individualized education plan or an IEP for each child.

In its opinion, *Endrew F. (a minor) v. Douglas County School District*, the U.S. Supreme Court recently reiterated the right created under the IDEA and established that the essential function of an IEP was to set out a plan for pursuing academic and functional advancement for a student with disabilities with the expertise of school officials and input from a child's parents or guardians.<sup>9</sup> As the court states, to meet its substantive obligation under the IDEA, the IEP must be reasonably calculated to enable the child to make progress appropriate to the child's circumstances.<sup>10</sup>

The development, review, and revision requirements for a child's IEP are also included in the federal regulations.<sup>11</sup> The regulations include consideration of special factors such as whether the child's behavior will impede the child's learning or that of others. The IEP team is directed to consider the use of positive behavioral interventions and supports and other strategies to address any such behavior.<sup>12</sup>

Under the CFR relating to a FAPE, a child with a disability is defined differently than under either the Section 504 or the ADA. The definition reads, in part:

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<sup>6</sup> 28 CFR 35.130

<sup>7</sup> 28 CFR Parts 35 and 36, Amendment of Americans with Disabilities Act Title II and III Regulations to Implement ADA Amendments Act of 2008, [https://www.ada.gov/regs2016/final\\_rule\\_adaaa.html](https://www.ada.gov/regs2016/final_rule_adaaa.html) (last viewed Feb. 9, 2018).

<sup>8</sup> U.S. Department of Education, *About IDEA*, <https://sites.ed.gov/idea/about-idea> (last viewed Feb. 9, 2018).

<sup>9</sup> 580 U.S. (2017) p. 11

<sup>10</sup> *Id.*

<sup>11</sup> See 34 C.F.R. 300.324 – 520.

<sup>12</sup> 34 C.F.R. 300.324.

Section 300.8 Child with a disability.

(a)General.

(1) Child with a disability means a child evaluated in accordance with ss 300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as “emotional disturbance,”) an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.<sup>13</sup>

The regulation then defines each impairment within the definition specifically.<sup>14</sup>

The IDEA provides formula grants to states and discretionary grants to state educational agencies, institutions of higher learning, and other nonprofit organizations. The federal legislation also requires of any state educational agency, State agency, or local education agency that receives federal funds certain assurances that specific procedural safeguards and other due process procedures are in place to ensure that children with disabilities and their parents receive the FAPE to which the student with disabilities is entitled.<sup>15</sup>

**Children’s Health Act (Pub. Law 106-310)**

In October 2000, the Children’s Health Act of 2000<sup>16</sup> (act) was signed by President Bill Clinton. The act included additional safeguards for children and youth who were residents of certain non-medical community-based facilities that also received funds under Title V of the Public Health Services Act.<sup>17</sup>

Physical restraints<sup>18</sup> and seclusion under the act are limited to emergency situations and to ensure the immediate safety of the resident, a staff member, or others and when less restrictive interventions have been determined to be ineffective.<sup>19</sup> The restraints and seclusion may only be used by an individual trained and certified by a State-recognized body in the prevention and use of restraints and seclusion. Specific alternative methods to restraints and seclusion are listed in

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<sup>13</sup> 34 C.F.R. 300.8

<sup>14</sup> See 34 C.F.R. 300.8(1)-(13).

<sup>15</sup> 20 U.S.C. §1415.

<sup>16</sup> Children’s Health Act of 2000, Pub. Law 106-310, s. 595, 42 U.S.C. 290jj (2000).

<sup>17</sup> Title V of the Public Health Services Act is the Maternal and Child Health Block Grant Program, one of the largest federal block grant programs. It funds programs for mothers and children, health promotion, prenatal and postnatal care, diagnostic and treatment services for low-income children, preventive and child care services, family-centered, coordinated care for children with special health care needs, and application assistance to pregnant women who may be eligible for Medicaid.

<sup>18</sup> Physical restraint is defined in the act as a personal restriction that immobilizes or reduces the ability of an individual to move his or her arms or legs, or head freely. Such term does not include a physical escort. A physical escort in the act means the temporary touching or holding of the hand, wrist, arm, shoulder or back for the purpose of inducing a resident who is acting out to walk to a safe location. See 42 U.S.C. 290jj(d)(3) and 42 U.S.C. 290jj(d)(2)

<sup>19</sup> 42 U.S.C. 290jj(b)(1)(A).

the federal law, including requiring a process for approval for continued restraints, documentation, follow-up, processing, and investigation of injuries and complaints.<sup>20</sup>

The act expressly prohibits the use of a drug or medication as a restraint to control behavior or to restrict a resident's freedom of movement if it is not part of the resident's medical or psychiatric condition.<sup>21</sup> Mechanical restraints<sup>22</sup> are also expressly prohibited in the facilities.<sup>23</sup>

Seclusion<sup>24, 25</sup> is permitted in a non-medical, community-based facility for children and youth under specific conditions: a staff member must be continuously face-to-face monitoring the resident and there must also be strong licensing or accreditation and internal controls in place.<sup>26</sup>

### **United States Department of Education – Office for Civil Rights**

On December 28, 2016, the Office for Civil Rights (OCR) in the United States Department of Education (DOE) issued a *Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities*<sup>27</sup> letter to explain the limits on the use of restraints and seclusion by public elementary and secondary school districts. The letter was precipitated by data collection from the school year 2013-2014, which showed that students with disabilities were subject to restraint and seclusion at rates that far exceeded those of students who were not considered disabled. The OCR raised the issue of whether the school districts were using restraints and seclusion in discriminatory ways.<sup>28</sup>

The continued use of restraint or seclusion, according to the *Fact Sheet* issued by the DOE, could result in a denial of FAPE as the traumatizing effect could result in new behaviors, impaired concentration or attention in class, or increased absences for the student.<sup>29</sup> The DOE guidance directs the school to:

- Determine the extent to which additional or different interventions or supports and services, including positive behavioral interventions and supports and other behavioral strategies, may be needed;
- Determine if current intervention and support are being properly implemented;
- Ensure that any needed changes are made promptly; and

<sup>20</sup> 42 U.S.C. 290jj(b)(1)(B).

<sup>21</sup> 42 U.S.C. 290jj(b)(3)(A).

<sup>22</sup> Mechanical restraint is defined in the act as the use of devices as a means of restricting a resident's freedom of movement. See 42 U.S.C. 290jj(d)(1).

<sup>23</sup> 42 U.S.C. 290jj(b)(3)(B).

<sup>24</sup> Seclusion is defined in the act to mean a behavior control technique involving locked isolation. Such term does not include time out. See 42 U.S.C. 290jj(d)(4).

<sup>25</sup> The act also include a term for time out. A time out means a behavior management technique that is part of an approved treatment program and may involve the separation of the resident from the group, in a non-locked setting, for the purpose of calming. Time out is not seclusion. See 42 U.S.C. 290jj(d)(4).

<sup>26</sup> 42 U.S.C. 290jj(b)(3)(C).

<sup>27</sup> U.S. Department of Education, *Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities* (December 28, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-504-restraint-seclusion-ps.pdf> (last viewed Feb. 10, 2018).

<sup>28</sup> U.S. Department of Education, Office for Civil Rights, *Fact Sheet: Restraint and Seclusion of Students with Disabilities* (December 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201612-504-restraint-seclusion-ps.pdf> (last viewed: Feb. 10, 2018).

<sup>29</sup> *Id.*

- Remedy any denial of FAPE that resulted from the school's prior use of restraint or seclusion.<sup>30</sup>

Parents and guardians must be given an opportunity to appeal any actions such as the identification, evaluation, or educational placement of their child with disabilities. They also have the right to be notified by the school of any action, to examine their child's records, to participate and be represented by counsel, and be provided a review procedure.<sup>31</sup>

### **Florida Law and Guidelines**

Florida law authorizes each teacher or other member of the staff of any school to have authority for the control and discipline of students that may be assigned by the principal or the principal's designated representative.<sup>32</sup> The teacher is further required to keep control of the classroom and the students that are assigned within the school district's code of conduct.<sup>33</sup> To the extent appropriate, students with disabilities are to be educated with students who are not disabled. Florida law requires that "segregation of exceptional students should only occur if the nature or severity of the exceptionality is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."<sup>34</sup>

Federal OCR guidance requires under Section 504 that school districts make reasonable accommodations in criteria, policies, practices, or procedures to avoid discrimination on the basis of disability.<sup>35</sup> The CFR implementing the IDEA and the IEPs notes the consideration of special factors that the IEP team should consider when developing an IEP such as positive behavioral intervention supports, assistive technologies and services, or special reading and writing media if visually impaired.<sup>36</sup>

Should there be a violation of the school code of conduct by a student with disabilities, Florida law allows school personnel to consider the unique circumstances on a case by case basis to determine whether there should be a change in placement, either permanently or on an interim basis.<sup>37</sup> The law also provides conditions for the use of restraint and seclusion on students with disabilities; and requires documentation, reporting, and monitoring of the use of such techniques.<sup>38</sup>

### **The Use of Restraint and Seclusion**

Florida law does not currently define restraint or seclusion, but guidance by the Florida Department of Education (department) directs that all documenting, reporting, and monitoring

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<sup>30</sup> *Id* at 2.

<sup>31</sup> *Id.*

<sup>32</sup> Section 1003.32, F.S.

<sup>33</sup> *Id.*

<sup>34</sup> Section 1003.57(1)(d).

<sup>35</sup> *Supra* note 27, at 8.

<sup>36</sup> 34 CFR 300.24(2).

<sup>37</sup> Section 1003.57(1)(h).

<sup>38</sup> Section 1003.573, F.S.

requirements for restraint be based on the OCR definitions related to restraint and seclusion for all students.<sup>39</sup>

### ***Restraint***

The federal DOE OCR guidance defines restraint in two parts:

- Physical restraint immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely and does not include a physical escort.<sup>40</sup> A physical escort means a temporary touching or holding of the hand, wrist, arm, shoulder, or back for the purpose of inducing a student who is acting out to walk to a safe location.<sup>41</sup>
- Mechanical restraint is the use of any device or equipment to restrict a student's freedom of movement and does not include devices implemented by trained school personnel, or utilized by a student that have been prescribed by an appropriate medical or related service professional and are used for the specific and approved purposes for which such devices were designed.<sup>42</sup>

School personnel are prohibited from using a mechanical restraint or a physical or manual restraint that restricts a student's breathing.<sup>43</sup> School personnel may not close, lock, or physically block a student in a room that is unlit and does not meet the rules of the State Fire Marshall for seclusion time-out rooms.<sup>44</sup>

School districts began reporting incidents of restraint and seclusion at the beginning of the school year 2010-2011.<sup>45</sup> Since the inception of the reporting system through July 31, 2017, there have been 63,652 incidents of restraint reported.<sup>46</sup>

<b>School Year</b>	<b>Number of Students<sup>47</sup></b>	<b>Restraint Incidents</b>
2010-11	3,580	10,683
2011-12	4,369	9,789
2012-13	4,096	9,551
2013-14	3,479	8,964
2014-15	3,229	8,199
2015-16	3,437	7,696
2016-17	3,239	8,770
<b>Total</b>	<b>22,190</b>	<b>63,652</b>

<sup>39</sup> Florida Department of Education, Bureau of Exceptional Education and Student Services, *Guidelines for the Use, Documentation, Reporting, and Monitoring of Restraint and Seclusion with Students with Disabilities*, Technical Assistance Paper FY 2011-165 (Oct. 2011), available at <https://info.fldoe.org/docushare/dsweb/Get/Document-6212/dps-2011-165.pdf> (last viewed Feb. 10, 2018), at 2.

<sup>40</sup> *Supra* note 27, at 6.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Section 1003.573(4), F.S.

<sup>44</sup> *Id.* at (5); Rule 69A-58.0084, F.A.C.

<sup>45</sup> Florida Department of Education, *Senate Bill 260 Analysis* (Sept. 28, 2017), at 4.

<sup>46</sup> *Id.*

<sup>47</sup> Email from Florida Department of Education (Dec. 18, 2017).

### ***Seclusion***

The OCR defines seclusion as the involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving.<sup>48</sup> Seclusion does not include a time out room, which is a behavior management technique that is part of an approved program, involves the monitored separation of the student in a non-locked setting, and is implemented for the purpose of calming.<sup>49</sup>

School districts began reporting incidents of seclusion at the beginning of the school year 2010-2011.<sup>50</sup> Since the inception of the reporting system through July 31, 2017, there have been 19,354 incidents of seclusion reported.<sup>51</sup>

<b>School Year</b>	<b>Number of Students<sup>52</sup></b>	<b>Seclusion Incidents</b>
2010-11	1,321	4,637
2011-12	1,448	4,245
2012-13	1,237	3,024
2013-14	885	2,272
2014-15	732	2,262
2015-16	638	1,563
2016-17	503	1,351
<b>Total</b>	<b>6,621</b>	<b>19,354</b>

### **School District Responsibilities**

Each school district must develop policies and procedures that are consistent with Florida law regarding the use of restraint and seclusion on students with disabilities and that govern specified topics, such as:<sup>53</sup>

- Data collection and monitoring, including when, where, and why students are restrained or secluded; the frequency of occurrences of such restraint or seclusion; and the prone or mechanical restraint that is most used.
- Training programs relating to manual or physical restraint and seclusion.
- The district's plan for reducing the use of restraint and seclusion particularly in settings where it occurs frequently or with students who are restrained repeatedly, and for reducing the use of prone restraint and mechanical restraint.

<sup>48</sup> *Supra* note 27, at 7.

<sup>49</sup> *Id.*

<sup>50</sup> *Supra* note 45.

<sup>51</sup> *Id.*

<sup>52</sup> Email from Florida Department of Education (Dec. 18, 2017).

<sup>53</sup> Section 1003.573(3)(a), F.S.

### **School Responsibilities**

Florida law requires a school to prepare an incident report within 24 hours after a student is released from restraint or seclusion.<sup>54</sup> The incident report must contain information specified in law, such as:<sup>55</sup>

- The name, age, grade, ethnicity, and disability of the student restrained or secluded.
- The date and time of the event and the duration of the restraint or seclusion.
- A description of the type of restraint used in terms established by the department
- A detailed description of the incident.

A school must notify the parent or guardian of a student each time that manual or physical restraint or seclusion is used.<sup>56</sup> Such notification must be in writing and provided before the end of the school day on which the restraint or seclusion occurs.<sup>57</sup> Reasonable efforts must also be taken to notify the parent or guardian by telephone or computer e-mail, or both, and these efforts must be documented.<sup>58</sup> The school must obtain and keep in its records the parent's or guardian's signed acknowledgement that he or she was notified of his or her child's restraint or seclusion.<sup>59</sup> A school must also provide the parent or guardian with the completed incident report in writing by mail within three school days after a student was manually or physically restrained or secluded and the school must obtain, and keep in its records, the parents' or guardian's signed acknowledgement that he or she received a copy of the incident report.<sup>60</sup>

Florida law requires monitoring of the use of manual or physical restraint or seclusion on students to occur at the classroom, building, district, and state levels.<sup>61</sup> Documentation of the incident report and the notification to the parent or guardian must be provided to the school principal, the district director of Exceptional Student Education, and the bureau chief of the Bureau of Exceptional Education and Student Services electronically each month that school is in session.<sup>62</sup>

### **Florida Department of Education Responsibilities**

The department is required to maintain aggregate data of incidents of manual or physical restraint and seclusion and disaggregate data for analysis by county, school, student exceptionality, and other variables, including the type and method of restraint or seclusion used.<sup>63</sup> This information must be updated monthly.<sup>64</sup> The department is also required to establish

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<sup>54</sup> Section 1003.573(1)(a), F.S. If the student's release occurs on a day before the school closes for the weekend, a holiday or another reason, the incident report must be completed by the end of the school day on the day the school reopens. *Id.*

<sup>55</sup> Section 1003.573(1)(b), F.S.

<sup>56</sup> Section 1003.573(1)(c), F.S.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at (d).

<sup>61</sup> Section 1003.573(2)(a), F.S.

<sup>62</sup> Section 1003.573(1)(b), F.S.

<sup>63</sup> Section 1003.573(1)(c), F.S.

<sup>64</sup> *Id.*

standards for documenting, reporting, and monitoring the use of manual or physical restraint or mechanical restraint, and occurrences of seclusion for the school districts.<sup>65</sup>

The commissioner is required to develop recommendations to incorporate instruction regarding autism spectrum disorder, Down syndrome, and other developmental disabilities into continuing education or in-service training requirements for personnel.<sup>66</sup> These recommendations address:<sup>67</sup>

- Early identification and intervention methods;
- Curriculum planning and curricular and instructional modifications, adaptations, and specialized strategies and techniques;
- The use of available state and local resources;
- The use of positive behavioral supports to deescalate problem behaviors; and
- Appropriate use of manual physical restraint and seclusion techniques.

### **Alternative Techniques**

There are several behavioral interventions that have been adopted as alternative methods to address problem behavior for all students, including students with disabilities, which do not involve restraint or seclusion.

The positive behavioral interventions and supports (PBIS) approach is a multi-tiered behavioral framework that is intended to help improve academic outcomes by improving the overall school climate, preventing problem behavior, increasing learning time, promoting positive learning skills, and delivering effective behavioral interventions and supports.<sup>68</sup> A set of school-wide positive expectations is set and behaviors are defined and taught with routines that are consistent. The school establishes procedures for encouraging expected behavior and discouraging problem behavior while monitoring and evaluating data. Procedures must also be put in place for the selecting, training, and coaching of new personnel in the system and for encouraging school-family partnerships.<sup>69</sup>

Following the 1997 Amendments to the IDEA, two concepts received greater emphasis in the evaluation of students with disabilities because of their reference in the amendments.<sup>70</sup> The department issued a Technical Assistance Paper in December 1999 to help school personnel understand how to conduct these two interventions.<sup>71</sup>

The first, a functional behavioral assessment plan (FBA) is a process unique to an individual student to identify the function of a student's behavior and how that behavior relates to the student's environment. Procedures typically include a review of the records, interviews with the family and student, observations of the students, and formal and informal measurement

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<sup>65</sup> *Id.* at (d). *See also Supra* note 39, at Appendix A.

<sup>66</sup> Section 6, ch. 2010-224, Laws of Fla.; s. 1012.582(1), F.S.

<sup>67</sup> Section 1012.582(1)(a)-(e), F.S.

<sup>68</sup> *Id.* at 5.

<sup>69</sup> *Id.* at 14.

<sup>70</sup> 20 U.S.C. §1400(c)(2)(5).

<sup>71</sup> Florida Department of Education, *Technical Assistance Paper: Functional Behavioral Assessment and Behavioral Intervention Plans* (December 1999), <http://www.fldoe.org/core/fileparse.php/7590/urlt/0107234-tap99-3.pdf> (last viewed Feb 10, 2018).

procedures.<sup>72</sup> The information collected during the FBA process is used to create behavior supports and plans.

A behavior intervention plan (BIP) or a positive behavior intervention plan (PBIP) are the resulting detailed plan gathered during the FBA such as function, frequency, severity, or consequence.<sup>73</sup> The BIP or PBIP will also include specific information regarding the target behavior, behavior goals, in addition to the steps that are being proposed to reduce the occurrences of the inappropriate behavior and to increase the occurrence of the desired or appropriate behaviors. The plan should include progress and monitoring notes and any reviews of the plan.

### III. Effect of Proposed Changes:

CS/SB 260 modifies the title of the section, adds definitions, revises the use of restraint techniques on public school students with disabilities, prohibits placing such students in seclusion, and specifies responsibilities for school districts, schools, and the Commissioner of the Florida Department Education (commissioner).

**Section 1** - amends s. 1003.573, F.S., relating to the seclusion and restraint of students with a disability and the conditions under which these students may be placed in special environments. As used in this section, the term “student” means a student with a disability. Specifically this section:

- Establishes exclusionary and nonexclusionary time which is distinguished by whether the student remains in the event or instructional environment. During the nonexclusionary time, the student is given an opportunity to reflect on his or her behavior and given space and time to understand choices and consequences. For exclusionary time, the student is removed from the event or activity to encourage reflection and allowed time to understand his or her choices or consequences. Neither exclusionary or nonexclusionary time may be used as punishment or a negative consequence and the process must not embarrass or humiliate the child. The time must not exceed either one minute for every year of the child’s age or until the student is calm. A student may be placed in exclusionary or nonexclusionary time if all of the following conditions exist:
  - It is part of that student’s positive behavioral intervention plan;
  - Other positive behavioral supports that were not effective preceded its use;
  - It occurs in a classroom or in another environments where class educational activities are taking place;
  - The student is not prevented from leaving the exclusionary or nonexclusionary time area;
  - The student is observed constantly by an adult throughout the time; and
  - The exclusionary or nonexclusionary time area and process are free of action that is likely to embarrass or humiliate the student.

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<sup>72</sup> *Id.*

<sup>73</sup> Missouri Department of Elementary and Secondary Education, *Functional Behavioral Assessment & Behavioral Intervention Plans*, <https://dese.mo.gov/special-education/effective-practices/functional-behavioral-assessment-behavioral-intervention-plans> (last viewed Feb. 10, 2018).

- Defines restraint and provides parameters for its use. A restraint is the use of a mechanical or physical restraint which may be used only when all other behavioral strategies and intervention techniques have been exhausted.
  - A *mechanical restraint* is the use of a device that restricts a student's freedom of movement. The term includes, but is not limited to the use of straps, belts, tie-downs, and chairs with straps; however, the term does not include the use of any of the following:
    - Medical protective equipment, defined as health-related protective devices prescribed by a physician or dentist for use as student protection in response to an existing medical condition;
    - Behavioral protective equipment such as helmets, gloves, wraps, calming blankets, and other devices that are used temporarily to prevent severe tissue damage caused by behavioral excesses;
    - Physical equipment or orthopedic appliances, surgical dressings or bandages, or supportive body bands or other restraints necessary for ongoing medical treatment in the educational setting;
    - Devices used to support functional body position or proper balance, or to prevent a person from falling out of a bed or a wheelchair, except when such a device is used for a purpose other than supporting a body position or proper balance, such as coercion, discipline, convenience, or retaliation, to prevent imminent risk of serious injury or death of the student or others, or for any other behavior management reason; and
    - Equipment used for safety during transportation, such as seatbelts or wheelchair tie-downs.
  - A *physical restraint* is the use of manual restraint techniques that involve significant physical force applied by a teacher or other staff member to restrict the movement of all or part of a student's body. Physical restraint may only be used when there is an imminent risk of serious bodily injury or death to the student or others, notwithstanding the authority in s. 1003.32, F.S., which authorizes a teacher or others to maintain control, discipline, and good order. Imminent risk of serious injury or death means the impending risk of significant injury, such as a laceration, bone fracture, substantial hematoma, or injury to an internal organ, or death. Physical restraint may not:
    - Be used for discipline, to correct noncompliance, or for convenience of school district staff;
    - Be used longer than the period of the risk;
    - Exceed the degree of force necessary to protect the student or others from serious injury or death; or
    - Include specified techniques, or techniques or procedures acquired in a setting other than through employment with the school district.
- Prohibits placing students in seclusion. Seclusion means the removal of a student from an educational environment, involuntarily confining the student in a room or area, and preventing the student from leaving the area by blocking or artificially blocking the door. The term does not include exclusionary time.

If a student has been restrained more than twice in a semester, the bill requires the school to conduct a review of:

- The incidences in which restraint was used and an analysis of how restraint can be avoided in future incidents;
- The student's functional behavioral assessment and positive behavioral intervention plan by the school staff and parent within two weeks before the end of a semester; and
- The training provided to staff on the use of restraints.

The bill also establishes several additional requirements for school districts, replacing provisions related to seclusion with exclusionary or nonexclusionary time, adding training components, and revising notification requirements.

Each school district under the bill is required to report its procedures for training in the use of restraint in the district's special policies and procedures manual. The districts must also provide training in the use of restraint in all of the following areas:

- Deescalation of problem behavior before it increases to a level which requires physical intervention;
- Risks associated with restraint and procedures associated with how to assess whether restraint is appropriate and safe;
- Actual use of specific techniques that range from least to most restrictive which allow for trainees to demonstrate their proficiency;
- Techniques for implementing restraint with multiple staff members working as a team;
- Techniques to assist a student with reentering the instructional environment and reengaging in learning;
- Instruction in the district's documentation and reporting requirements;
- Procedures to identify and deal with possible medical emergencies arising during the use of restraint; and
- Training for cardiopulmonary resuscitation.

At the beginning of each school year, the bill requires each school district to publicly post its policies on all emergency procedures, including those on the use of restraints. School districts are also directed to develop policies and procedures that provide for the physical safety and security of staff and students and which treat all students with dignity and respect.

Similar to reporting on the use of restraint, schools must also prepare incident reports on the use of exclusionary or nonexclusionary time within 24 hours after a student is released from that time. The report must include the age, grade, ethnicity, and disability of the student that was restrained, or placed in exclusionary or nonexclusionary time. The report must also include the length of time, location of the incident, if a restraint was used, the name of the person using or assisting with the restraint and the date those persons were last trained, the name or names of any witnesses, and a description of the event as specified in the statute. Schools must make responsible effort to notify the parent or guardian of the student before the end of the school day in which exclusionary or nonexclusionary time is used.

The required monthly monitoring reports to the department must also include the exclusionary and nonexclusionary times created in this bill. A redacted copy of the documentation created as part of the revised restraint, exclusionary and nonexclusionary reporting process in this bill will be updated monthly and made available to the public through the department's website no later

than October 1, 2018 along with aggregate and disaggregate data by county, school, student exceptionality, and other variables listed in the statute.

**Section 2** amends subsections (1) and (2) of section 1012.582, F.S., to require the Florida Commissioner of Education to develop recommendations to incorporate instruction regarding emotional or behavioral disabilities into continuing education and inservice training requirements for instructional personnel. The recommendations must also address the appropriate use of physical restraint and classroom behavior management strategies for differential reinforcement, precision commands, minimizing attention or access to other reinforcers, and exclusionary and nonexclusionary time methods.

**Section 3** provides an effective date for the act of July 1, 2018.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

##### **D. Other Constitutional Issues:**

CS/SB 260 applies only to students with disabilities in public schools and not in other locations or to non-disabled students.

The OCR's data from the school year 2013-2014 showed that while students with disabilities represented only 12 percent of the school population, those students were 67 percent of the students who were subjected to restraint or seclusion in school.<sup>74</sup> The OCR noted that data alone does not show discrimination, however it did raise a question of whether school districts were using restraint and seclusion in a discriminatory manner.<sup>75</sup>

The equal protection clause of the United States Constitution requires that no state shall deny any person within its jurisdiction "equal protection of the laws."<sup>76</sup> Furthermore, Florida's equal protection clause states:

Basic rights.--All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the

<sup>74</sup> *Supra* note 27, at 2.

<sup>75</sup> *Id.*

<sup>76</sup> U.S. CONST., amend XIV, s. 1.

right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.<sup>77</sup>

A court's response to an equal protection claim depends on the classification of people involved. A court will analyze government action that discriminates against people according to race, ethnicity, religion, and national origin with the strictest scrutiny.<sup>78</sup> In addition to those protected classes, federal and state courts also recognized quasi-suspect classes.<sup>79</sup> If a claim does not involve a fundamental right, a suspect class, or a quasi-class, then a court will analyze with rational basis scrutiny, whereby the court will uphold a law if it bears a reasonable relationship to the attainment of a legitimate government objective.<sup>80</sup>

This bill may raise equal protection issues by parents or guardians of students who are disabled and located in schools or facilities not covered by these changes, by public school students who are not identified as disabled, or by students do not meet the definition of disabled that is used by the department or the school district where the student is located since the definition of disabled is not included in the bill or this section of law.

## V. Fiscal Impact Statement:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

Private entities that receive state funds to educate students with disabilities may be impacted by costs to update technology, provide training to staff, and comply with the changes included in this bill. The OCR has stated in its guidance that the nondiscrimination requirements of Section 504 extends to entities that carry out all or some of the schools' functions through contractual or other agreements.<sup>81</sup>

<sup>77</sup> FLA. CONST. art. I, s. 2.

<sup>78</sup> Under strict scrutiny, the government must show that a law with discriminatory effect advances a compelling state interest, is narrowly tailored, and is the least restrictive means for advancing that interest. *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

<sup>79</sup> BLACK'S LAW DICTIONARY (10th ed. 2014) defines quasi-suspect classification as "[a] statutory classification based on gender or legitimacy, and therefore subject to intermediate scrutiny under equal-protection analysis." BLACK'S defines intermediate scrutiny as "[a] standard lying between the extremes of rational-basis review and strict scrutiny. Under the standard, if a statute contains a quasi-suspect classification (such as gender or legitimacy), the classification must be substantially related to the achievement of an important governmental objective."

<sup>80</sup> *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

<sup>81</sup> *Supra*, note 27, at 15; 34 C.FR. §104.4(b).

### C. Government Sector Impact:

According to the Florida Department of Education, school districts may incur costs associated with certification and refresher training in district-approved techniques for manual physical restraint.<sup>82</sup> Such costs are currently indeterminable.<sup>83</sup>

## VI. Technical Deficiencies:

The bill includes a new definitions section for s. 1003.573, F.S.; however, there are several words or terms of art which are not defined, such as the following:

- Positive behavioral intervention plan;
- Functional behavioral assessment plan;
- Differential reinforcement;
- Precision commands;
- Minimizing attention; and
- Access to other reinforcers.

The bill requires school district staff and teachers to be trained or to be held to standards based on these terms of art and therefore, they should be clearly defined to avoid confusion.

Section 1003.573, F.S., does not include a definition of disability and there are many definitions of disability in both state and federal law.

In several places in the bill, the language prohibits the use of either physical restraint or exclusionary or nonexclusionary time for “student discipline, to correct student noncompliance”<sup>84</sup> or “punishment or negative consequence of a student’s behavior.”<sup>85</sup> Other than for imminent danger and safety, it is unclear when these techniques would ever be permitted or appropriate for the teacher’s use.

## VII. Related Issues:

The definition of “medical protective equipment” limits the protective devices to those prescribed by a physician or dentist. This definition would limit devices to only those health care practitioners who are licensed as medical doctors, osteopathic physicians, or dentists and not include other health care practitioners who might prescribe some of the devices that are not specifically named in the definition of “physical restraint equipment” or “medical protective equipment.”

The bill includes several phrases that include aspirational intentions or subjective measurements that may present difficulties for a school district or school staff to measure or to create guidelines that could be applicable to all students. For example:

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<sup>82</sup> Florida Department of Education, *Senate Bill 260 Analysis* (Sept. 28, 2017), at 7.

<sup>83</sup> *Id.*

<sup>84</sup> See line 90 of CS/SB 260.

<sup>85</sup> See line 146 of CS/SB 260.

- Lines 138 through 140, require the school personnel to establish an exclusionary and nonexclusionary time area and process free of any action that is likely to embarrass or humiliate the student;
- Lines 141 through 143, establish a time period for exclusionary and nonexclusionary time of one minute for each year of a student's age or until the student is calm enough to return to his or her seat; and
- Lines 284 through 288, require school districts and personnel to establish policies and procedures that provide for the physical safety and security of students and school personnel which treat all students with respect and dignity in an environment that promotes a positive school culture and climate.

The period for the exclusionary and nonexclusionary time does not provide for a maximum amount of time, such as the greater of those two values. If the student never calms down, there is no option available to the teacher.

#### **VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 1003.573 and 1012.582.

#### **IX. Additional Information:**

- A. **Committee Substitute – Statement of Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

##### **CS by Education on February 6, 2018.**

The committee substitute retains the substance of the bill with the following modifications:

- Defines student to mean a student with a disability.
- Explicitly prohibits the use of a prone or supine restraint.
- Prohibits the use of a mechanical restraint, defines mechanical restraint, identifies types of mechanical restraints, and clarifies that calming blankets do not constitute a mechanical restraint.
- Provides that documentation, reporting, and monitoring requirements in law also apply to the use of exclusionary or nonexclusionary time.
- Requires a school to make redacted copies of documentation related to the use of restraint or exclusionary or nonexclusionary time available to the public through the Department of Education's website by October 1, 2018.

- B. **Amendments:**

None.