Subject: ***Clarification on SB 179 & HB 491—Restraint and Seclusion*** ***Issued: October 18, 2023***	***Legal Reference – SB 179 & HB 491 (2022-2023 Legislative Session)*** • ***RSA 126-U***

This Technical Advisory continues the New Hampshire Department of Education's communication regarding legislation which was passed during the 2022-2023 legislative session. SB 179, which pertains to seclusion and HB 491, which pertains to restraint, amended various sections of RSA 126-U. A Technical Advisory relative to these bills was issued on September 5, 2023. This supplemental Technical Advisory provides additional guidance in response to questions which have been raised by the field. As such, this Technical Advisory should be read in conjunction with the Technical Advisory that was issued on September 5, 2023.

This supplemental Technical Advisory is limited to the following issues:

- *The applicability of the definition of "seclusion;" and*
- *Clarification of the reporting requirements.*

Applicability of the Definition of Seclusion:

As stated in the initial Technical Advisory, SB 179 modified the definition of the term "seclusion" so that it now reads as follows:

> the involuntary confinement of a child alone in any room or area from which the child is unable to exit, either due to physical manipulation by a person, a lock, or other mechanical device or barrier, ***or from which the child reasonably believes they are not free to leave***; or, the involuntary confinement of a child to a room or area, separate from their peers, with one or more adults who are using their physical presence to prevent egress.

This new phrase, "or from which the child reasonably believes they are not free to leave," must be read in context of the entire definition and the purpose of the statute. The crux of the analysis is ***not*** whether the child is alone in a classroom or office.

As envisioned by the statute, "seclusion" is a tool used to control a child's escalating behavior. Therefore, for a situation or action to constitute "seclusion," it must have been caused by a child's behavior that is posing "a substantial and imminent risk of physical harm to the child or to others" that results in the removal of the child from scheduled programming for purposes of controlling or de-escalating the child's behavior.

As such, ***not*** all instances in which a child is placed alone in a room or office from which he or she does not believe they are free to leave will automatically constitute "seclusion." Rather, the child must be in the location for purposes of controlling or de-escalating his or her behavior. For

instance, if a principal is conducting an investigation and places three students in three separate rooms for purposes of questioning them separately, that action alone—if not done to de-escalate or control escalating behavior—would not automatically constitute "seclusion."

Similarly, if a child is in the principal's office and the principal leaves the office momentarily, thereby leaving the child in the office alone, if the child is not in the office for purposes of de-escalating or controlling escalating behavior, then the action would not fall within the term of "seclusion" as envisioned by the statute. Although, once again, it is likely not a best practice for a principal to leave a child alone in his or her office and there are steps that can be taken to easily address that situation.

Reporting Requirements:

SB 179 requires that the instance of restraint and seclusion be documented on a form that is developed by the Department of Education and the Department of Health and Human Services. As of the date of the issuance of this supplemental Technical Advisory, the form is being finalized and will be issued to the field as soon as possible. However, the law does ***not*** require that the individual forms be sent to the Department of Education. Rather, in maintaining past practices, the cumulative number of restraints and seclusions are reported in the annual Safety Survey.

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Subject: ***Restraint and Seclusion*** ***Date Issued: Sept. 5, 2023***	***Legal Reference – SB 179 & HB 491 (2022-2023 Legislative Session)*** • ***RSA 126-U***

This Technical Advisory continues the New Hampshire Department of Education's communication regarding new legislation that was passed during the 2022-2023 legislative session. SB 179, which pertains to seclusion, and HB 491, which pertains to restraint, amend various sections of RSA 126-U.

SB 179 becomes effective August 6, 2023.
HB 491 becomes effective September 26, 2023.

This Technical Advisory supersedes prior Technical Advisories on restraint and seclusion.

During the 2022-2023 legislative session, SB 179, relative to seclusion, and HB 491, relative to physical restraint, were both passed into law. When read in conjunction with each other, these two bills make significant changes to RSA 126-U, which regulates restraint and seclusion in schools and treatment facilities.

Applicability of RSA 126-U, Restraint and Seclusion:

The provisions of RSA 126-U, restraint and seclusion, are applicable to traditional public, public charter schools, public academies, and approved non-public schools. As such, each school, public and private, is required to have written policies that pertain to the proper use of restraint and seclusion. The policy must describe how and under what circumstances restraint and seclusion are to be used and such policy must be provided annually to the parent, legal guardian or legal representative of each child that is enrolled at the school. The written policy must also include a provision that a school employee has a duty to report a violation of RSA 126-U when that individual has reason to believe that the action of another constituted a violation of the statute.

Definitions—Restraint:

The key to properly creating and implementing restraint and seclusion policies is to understand how those are terms are defined in the statute. More importantly perhaps is recognizing that the law also sets forth what actions *do* ***not*** *constitute* restraint and seclusion.

For purposes of RSA 126-U, the term "Restraint" means:

> the bodily physical restriction, mechanical devices, or any device that immobilizes a person or restricts the freedom of movement of the torso, head, arms, or legs. It includes mechanical restraint, physical restraint, and medication restraint used to control behavior

in an emergency or any involuntary medication. It is limited to actions taken by persons who are school or facility staff members, contractors, or otherwise under the control or direction of a school or facility.

School personnel permitted to engage in physical restraint are prohibited from utilizing medication restraint and may only use mechanical restraint when transporting children.

As mentioned above, the law also sets forth what actions fall outside of the definition of restraint as the following:

- Brief touching or holding to calm, comfort, encourage, or guide a child, so long as limitation of freedom of movement of the child does not occur. This could include the circumstance in which a parent hands a young child to a provider at the start of the school day;

- The temporary holding of the hand, wrist, arm, shoulder, or back for the purpose of inducing a child to stand, if necessary, and then walk to a safe location, so long as the child is in an upright position and moving toward a safe location. Similar to above, this provision could include the circumstance of when a parent hands a young child to a provider;

- Physical devices, such as orthopedically prescribed appliances, surgical dressings and bandages, and supportive body bands, or other physical holding when necessary for routine physical examinations and tests or for orthopedic, surgical, and other similar medical treatment purposes, or when used to provide support for the achievement of functional body position or proper balance or to protect a person from falling out of bed, or to permit a child to participate in activities without the risk of physical harm;

- The use of seat belts, safety belts, or similar passenger restraints during the transportation of a child in a motor vehicle; and

- The use of force by a person to defend himself or herself or a third person from what the actor reasonably believes to be the imminent use of unlawful force by a child, when the actor uses a degree of such force which he or she reasonably believes to be necessary for such purpose and the actor does not immobilize a child or restrict the freedom of movement of the torso, head, arms, or legs of any child. In the field, this provision is commonly referred to as "Intentional Physical Contact."

Restraint of a child shall not be imposed for longer than is necessary to protect the child or others from the substantial and imminent risk of serious bodily harm. Children in restraint shall be the subject of continuous direct observation by personnel who are trained in the safe use of restraints. No period of restraint of a child may exceed 15 minutes without the approval of the school principal or designee. No period of restraint of a child may exceed 30 minutes unless a face-to-face assessment of the mental, emotional, and physical well-being of the child is conducted by the facility or principal or by a supervisory employee designated by the principal who is trained to do such assessments. The assessment shall also include a determination of whether the restraint is being conducted safely and for a purpose authorized by the law. Such assessments shall be

repeated at least every 30 minutes during the period of restraint. Each such assessment shall be documented in writing and such records must be retained by the school as part of the required written notification as set forth fully below.

Under the current law, the use of a prone restraint is already prohibited due to the inherent dangerous nature of the technique. However, to ensure consistent and uniform application of the restraint law, House Bill 491 defined the term "prone restraint" and then expressly prohibited its use. As such, the term "prone restraint" is now defined as:

> A prohibited physical restraint technique which occurs when a child is intentionally placed face-down on the floor or another surface, and the child's physical movement is limited to keep the child in a prone position. For the purpose of this definition, physical restraint that involves the temporary controlling of an individual in a prone position while transitioning to an alternative, safer form of restraint is not considered to be a prohibited form of physical restraint.

In addition, HB 491 added a "catch-all" category of prohibited "circumstances under which the use of other forms of physical restraint must cease to protect the well being of the child." Those conditions are set forth as follows:

> During the administration of restraint, the physical status of the child . . . shall be continuously monitored. The child shall be released from restraint immediately if they demonstrate signs of one or more of the following: difficulty breathing; choking; vomiting; bleeding; fainting; unconsciousness; discoloration; swelling at points of restraint; cold extremities, or similar manifestations.

The conditions above must have been caused by the restraint, rather than as a condition of the circumstances which lead to the need for the restraint. For example, if a child has broken a window out of anger and is bleeding because of that action and a restraint is necessary to address the needs of the child, then the conditions of the above paragraph above would apply only to the extent that they are a result of the restraint. As such, staff who administer physical restraint should be aware that the law now explicitly requires them to cease a restraint if a child exhibits any of the conditions set forth above which were caused by the restraint technique.

Definitions—Seclusion:

Senate Bill 179 modified the definition of "Seclusion" so that it now means:

> the involuntary confinement of a child alone in any room or area from which the child is unable to exit, either due to physical manipulation by a person, a lock, or other mechanical device or barrier, ***or from which the child reasonably believes they are not free to leave***; or, the involuntary confinement of a child to a room or area, separate from their peers, with one or more adults who are using their physical presence to prevent egress.

It is important to note that pursuant to this new definition, seclusion can occur even when no lock or physical barrier is used if the "child reasonably believes that they are not free to leave." Reading the new phrase in context of the definition, it is important to remember that there still has to be the

element of "confinement" in order for the action to constitute seclusion. For instance, if a teacher sends a child into the hallway due to a behavior issue, with the instruction that they are to return once they have regained composure, this action would not be "seclusion" because the child is not confined in any space or room. Additionally, if a child is in the principal's office and the principal leaves the office momentarily, leaving the child in the office, this action could reasonably be interpreted to be a seclusion. Therefore, as a matter of best practices, a principal or teacher should be cognizant to take steps to avoid this situation. For example, the principal could ask the child to sit outside the office for a brief period or ask an assistant to come sit in the office with the child. Finally, an adult's mere presence in a room—classroom or office for example—does not automatically mean that the child is secluded in accordance with the statutory definition. Rather, to constitute "seclusion," the child must reasonably believe that they are not free to leave either because of a verbal instruction or some other communication, which could include an adult physically blocking the student from leaving.

Similar to the definition of restraint, it is critical to view this definition in conjunction with what circumstances fall outside of the term "seclusion." As such, the follow conditions *do **not** constitute* seclusion: the voluntary separation of a child from a stressful environment for the purpose of allowing the child to regain self-control, when such separation is to an area which a child is able to leave; circumstances in which there is no physical barrier, and the child is physically able to leave; or involuntary confinement of a child to a room or area with an adult who is actively engaging in a therapeutic intervention. A circumstance may be considered seclusion even if a window or other device for visual observation is present, if the other elements of this definition are satisfied.

Finally, SB 179 also made it explicitly clear that seclusion should never be used—explicitly or implicitly—as a form of punishment or discipline. This statutory change should not require any modification in practices for school districts—rather it simply codified the long-standing rule that seclusion is not a form of punishment.

Requirement of a Co-Regulator—Seclusion:

The other significant change within SB 179, which will create a new practice for schools, is the requirement of having a "co-regulator" to assist with seclusion. The law now states as follows:

> When seclusion is used, school or facility staff shall designate a co-regulator to monitor the child and develop a plan to help the child manage their state of regulation and their return to a less restrictive setting. The co-regulator shall check the child at regular intervals not to exceed 30 minutes between any one interval. The co-regulator shall be selected and designated in the following order of preference:
>
> (a) A trusted adult selected by the child;
> (b) A clinician or counselor trained in trauma informed practices;
> (c) A staff member known to have a positive relationship with the child;
> (d) A staff member who was not involved in the incident leading to seclusion.

While this is a new legal requirement, as a practical matter, the use of having more than one staff member participate in a seclusion of a child should not be an unfamiliar practice, as seclusion should already be performed with a minimum of two people. The new law provides clarification on the role that the second person, i.e. "the co-regulator" should play—namely to model calm behavior during the situation, leading a team de-brief after the event, and participating in the development of a plan to decrease the need for seclusion in the future.

The law also enumerates a list of people that could be the "co-regulator." Once again, this new legal requirement should not be an unfamiliar practice. As a practical matter, a child's behavior plan should already list who would be supporting the child during a behavioral incident. The new law simply codifies who exactly, those individuals can be. Depending upon the length of the incident, it is also possible to have more than one co-regulator.

Other best practices should include that the individual who is leading the intervention should designate the co-regulator. School districts should take this opportunity to think about what this new requirement will mean when they use seclusion and be sure to update their relevant policies on seclusion as well as their behavior plans for individual students.

Reporting Requirements:

As an initial matter, the law as it pertains to reporting requirements uses the words "incident" and "occurrence" yet does not provide a definition for either term. As a matter of best practice, the Department of Education suggests that an "incident" starts when the child begins to display behavior(s) which are a threat to themselves or others and is removed from scheduled programming and is ultimately restrained or secluded and ends once the restraint or seclusion concludes, the child's behavior has returned to baseline, and the child is returned to scheduled programming. The "occurrence" is the specific event of a restraint or seclusion during the "incident". Each "incident" of restraint or seclusion will be reported utilizing the State-issued form discussed in more detail below. Each "incident" will be reported using an individual form. Recognizing that there can be multiple "occurrences" of restraint or seclusion during one "incident," the reporting form also requires the documentation of the number of individual "occurrences" of restraint or seclusion. In short, both numbers, the number of "incidents" and the number of "occurrences" of restraint and seclusion will be reported.

If restraint or seclusion has been used on a child, the school or facility must "make reasonable efforts" to verbally notify the child's parent or guardian. "Such notification shall be made as soon as practicable and in no event later than the time of the return of the child to the parent or guardian or the end of the business day, whichever is earlier." The "[n]otification shall be made in a manner calculated to give the parent or guardian actual notice of the incident at the earliest practicable time."

Additionally, if restraint or seclusion is used on a child, the school employee who administered restraint or seclusion must submit a written notification on a standard form that was developed by the Department of Education and Department of Health and Human Services. It is important to note that the requirement of reporting on the state-developed form is for instances of restraint and seclusion only and district should still utilize their own forms for other incidents. The requirement

of a standardized, state-developed form for reporting is a significant change in practice which was implemented by SB 179. Since the passage of RSA 126-U in 2014, districts have invested in creating their own forms, templates, and computer programs to accommodate the reporting requirements of the restraint and seclusion law. Districts will now have to pivot to utilize a standardized form that is created and disseminated from the state agency.

Each notification that is prepared pursuant to this section must be retained by the school for review by the State Board of Education. Additionally, within 2 business days of receiving the notification, the school principal shall send, via first class mail or by electronic transmission, the information contained within the notification to the child's parent or guardian or guardian ad litem.

If a school employee has intentional physical contact with a child which is in response to a child's aggression, misconduct, or disruptive behavior, a representative of the school must make reasonable efforts to promptly notify the child's parent or guardian. The notification must be made in a manner which is calculated to give the parent or guardian actual notice of the incident at the earliest practicable time. In any event, the notification must be made no later than the time of the return of the child to the parent or guardian or the end of the business day, whichever is earlier.

Additionally, within 5 business days, of the incident the school must prepare a written report, must contain, at a minimum, the following information:

(a) The date and time of the incident;
(b) A brief description of the actions of the child before, during, and after the occurrence;
(c) The names of the persons involved in the occurrence;
(d) A brief description of the actions of the facility or school employee involved before, during, and after the occurrence; and
(e) A description of any injuries sustained by, and any medical care administered to, the child, employees, or others before, during, or after the incident.

The notification and reporting requirements as set forth above are not required in the following circumstances:

(a) When a child is escorted from an area by way of holding of the hand, wrist, arm, shoulder, or back to induce the child to walk to a safe location. If, however, the child is actively combative, assaultive, or causes self-injury while being escorted, then the notification requirements described above are applicable.
(b) When actions are taken such as separating children from each other, inducing a child to stand, or otherwise physically preparing a child to be escorted.
(c) When the contact with the child is incidental or minor, such as for the purpose of gaining a misbehaving child's attention. However, blocking of a blow, forcible release from a grasp, or other significant and intentional physical contact with a disruptive or assaultive child shall be subject to the notification and reporting requirements described above.

Although the incidents described above are not subject to the notification and reporting requirements, schools are required to document complaints that they determine do not meet the

criteria for reporting. Such documentation must include the evidence relied upon in reaching said determination and shall be maintained by the school.

Cases Involving Serious Bodily Injury:

As an initial matter, the term "serious bodily injury" is defined as "any harm to the body which requires hospitalization or results in the fracture of any bone, non-superficial lacerations, injury to any internal organ, second-or third-degree burns, or any severe, permanent, or protracted loss of or impairment to the health or function of any part of the body." In cases which involve serious injury or death to a child who has been subjected to restraint or seclusion in a school, in addition to the notification and reporting requirements set forth above, the school, which includes traditional public, public charter schools, public academies, as well as approved non-public schools, as set forth above are required to notify the Commissioner of the Department of Education, the Attorney General's Office, and the state's federally-designated protection and advocacy agency for individuals with disabilities. The contact information for those respective agencies is as follows:

Commissioner of Education	**Attorney General**	**Disability Rights Center**
Frank Edelblut 25 Hall Street Concord, NH 03301 603-271-3144	NH Department of Justice Attn: Christopher Bond 33 Capitol Street Concord, NH 03301 603-271-3650	Legal Division 64 North Main Street Suite 2, 3rd Floor Concord, NH 03301 603-228-0432

Finally, below is a brief summary report of the restraint and seclusion report for 2022 with a comparison for the prior years:

School Restraint & Seclusion Report for School Years

Restraining Students (per RSA 126-U)	**SY 2021-20**	**SY 2020-19**	**SY2019-18**
# of students enrolled in the schools which responded to the School Safety Data Collection	**16,868**	**16,962**	**16,155**
# of restraint reports generated this year	**893**	**830**	**1827**
# of active/on-going restraint investigations	**0**	**2**	**0**
# of closed restraint investigations	**893**	**828**	**1827**
# of restraints resulting in bodily injury	**10**	**2**	**4**
# of restraints resulting in serious bodily injury or death	**0**	**0**	**0**
# of seclusion reports generated this year	**496**	**446**	**393**
# of active/on-going seclusion investigations	**0**	**0**	**0**
# of closed seclusion investigations	**496**	**446**	**393**

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