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## The New Michigan Emergency Seclusion and Restraint Law and the Role of the Mediator

By Laura A. Athens, [www.lathenslaw.com](http://www.lathenslaw.com)

Imagine your boss came into your office, tied you to a chair with bungee cords and duct taped your hands to the chair, then hit and kicked you. Now imagine this happening to your child at school. This scenario is not fiction. In 2014, a Senate Majority Committee described a case involving a Pennsylvania special education teacher who repeatedly hit, kicked, and used bungee cords and duct tape to restrain seven elementary students who had developmental disabilities. *Dangerous Use of Seclusion and Restraints in Schools Remains Widespread and Difficult to Remedy: A Review of Ten Cases (February 14, 2014)*. Classroom aides waited two years before reporting the abuse to administration due to fear of retaliation. Thereafter, teachers at the school refused to allow the aides in their classrooms. The special education teacher was convicted of child abuse. Ultimately, the parents obtained a \$5 million settlement. However, the school district refused to admit any wrongdoing. Sadly, conduct that would be considered criminal if committed by private parties often remains unaddressed if it occurs in a school setting.

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## Seclusion and Restraint in the Schools

This is not an isolated case. According to United States Department of Education, Office of Civil Rights (OCR) data collection for the 2013-14 school year, more than 100,000 students were placed in seclusion, involuntary confinement or were physically restrained at school, including almost 69,000 students with disabilities. Students with disabilities were subjected to seclusion and restraint at rates that far exceeded other students. While special education students served under the Individuals with Disabilities Education Act (IDEA) represent 12% of all students, 67% of them were subjected to restraint or seclusion.

Unfortunately, the practice is perpetuated because the students involved in these cases frequently cannot communicate their pain and suffering due to their age, disabilities and emotional distress.

It is common for special education students to be secluded for prolonged periods of time in closet-sized rooms with concrete walls without adult supervision. Seclusion has resulted in students soiling themselves, screaming, banging on walls, engaging in self injurious behaviors and committing suicide. A seclusion led to the tragic death of a 13-year-old boy who had attention deficit with hyperactivity disorder and depression. He hung himself with a rope his teacher had given him to hold up his pants after being repeatedly locked into a seclusion room that resembled a prison cell.

After a thorough review of the research and ten sample cases, the Senate Majority Committee concluded that parents face five common challenges in these situations: (1) frequently parents are not aware or notified of the seclusion and restraint and school records documenting seclusion and restraint often are inaccessible or unreliable; (2) legal hurdles make filing and bringing a case to trial arduous and very expensive, (3) psychological harm is difficult to prove; (4) schools and publicly employed personnel have sovereign or qualified immunity; school staff tend to adopt a “code of silence” at the first sign of trouble with a parent; and courts often give deference to school personnel due to the “halo effect” surrounding educators; and (5) existing remedies fail to offer adequate relief.

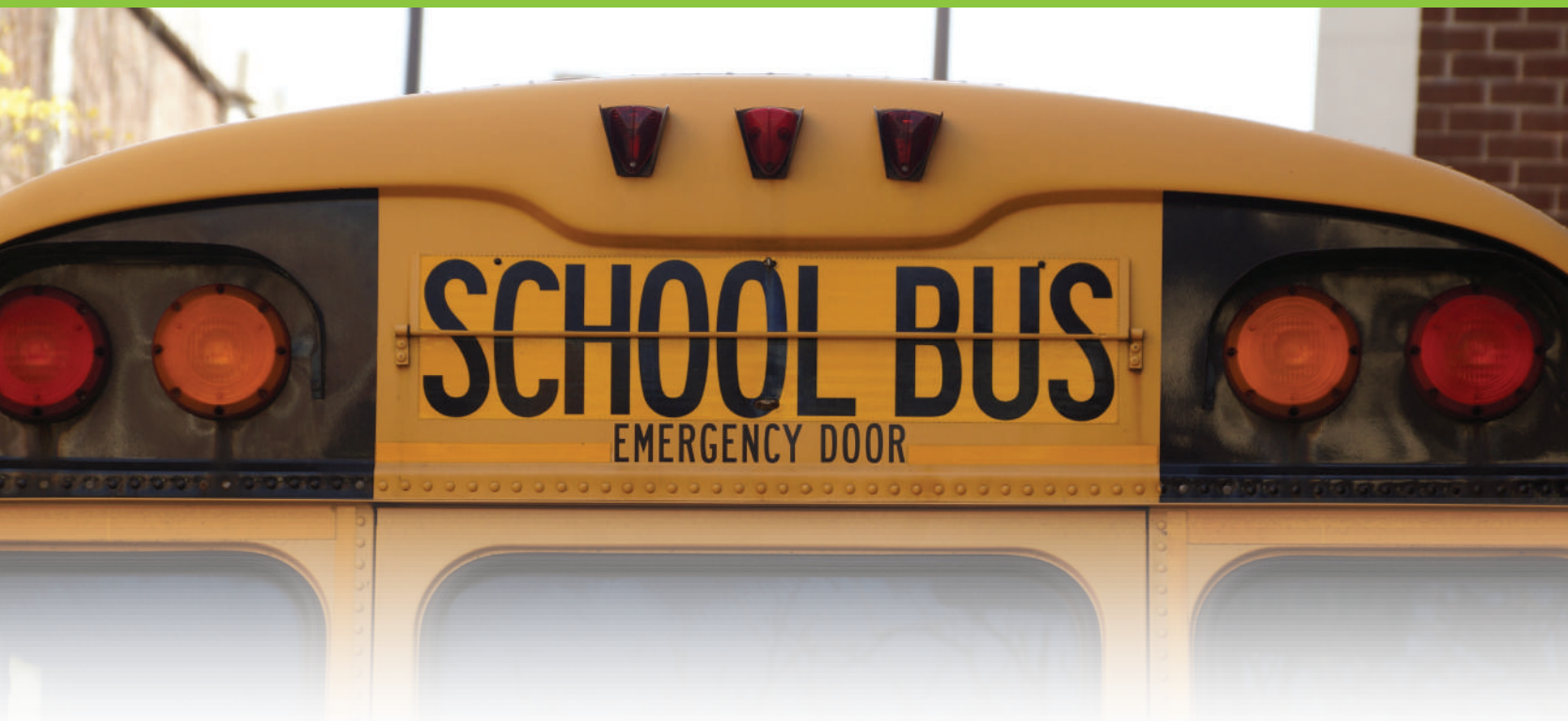
## Michigan's Emergency Seclusion and Restraint Standards and Law

In 2006, the Michigan State Board of Education adopted a Positive Behavior Support policy requiring all public schools to develop a system of school-wide positive behavioral supports. Later that year, the State Board of Education published standards for the emergency use of seclusion and restraint. Unfortunately, the standards did little to curb seclusion and restraint in public schools. Although the standards contained many requirements, school districts and their counsel frequently argued that the standards did not have the binding force of law and were more precatory than mandatory.

Recently, Michigan enacted statutory provisions to ensure that seclusion and restraint is used only in emergency situations and as a last resort in public schools. MCL 380.1307-380.1307h. In accordance with the statute, the State Board of Education developed a policy incorporating the statutory provisions in March 2017. Public school districts and public school academies are required to adopt and implement a local policy, consistent with the state policy, by the beginning of the 2017-2018 school year.

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The emergency seclusion and restraint statutory provisions are comprehensive and highly prescriptive. Sections address the purpose, duties, prohibited and permitted practices, training, definitions, documentation, reporting, data collection and analysis. The overall statutory purposes are to eliminate seclusion and restraint, increase meaningful instructional time and protect the safety, welfare and security of the school community and dignity of each student.

Under the statute, emergency seclusion and physical restraint may be used only as a last resort in emergency situations and only if essential to provide for the safety of the student or another. Seclusion and restraint must not be used for:

- the convenience of school personnel
- as discipline or punishment
- as a substitute for an appropriate educational program
- in place of adequate staffing or less restrictive interventions

School personnel are prohibited from subjecting students to corporal punishment, child abuse, mechanical or chemical restraint, prone restraint, deprivation of basic needs, seclusion, other than emergency seclusion and physical restraint. Physical restraint should be used no longer than necessary to allow the student to regain control of his or her behaviors. If a restraint lasts more than 10 minutes additional safety precautions must be instituted.

During an emergency seclusion, school personnel must continuously observe the student, the room or area must comply with state and local fire and building codes, the room must not be locked, must provide adequate space, lighting, ventilation, viewing, and protect the safety and dignity of the student. Emergency seclusion must not be used to confine preschool children or students who are severely self-injurious or suicidal. Lockdowns and fire drills are not considered seclusion.







Emergency physical restraint does not include and the statute does not prohibit:

- Briefly holding a student to prevent an impulsive action, such as running in front of a car
- Using safety equipment such as a seat belt
- Breaking up a fight, stopping a physical assault or taking a weapon from a student
- Actions integral to a sporting event, such as a referee pulling football players off a pile

The statute requires public schools to develop policies to encourage proactive, effective, evidence-based strategies and best practices to reduce challenging behavior. Each seclusion and restraint must be performed in a manner, based on research and evidence, that is safe, appropriate, and proportionate to and sensitive to the student's severity of behavior, chronological and developmental age, physical size, gender, physical condition, medical condition, psychiatric condition and personal history. Emergency seclusion should generally be no longer than 15 minutes for an elementary school student and no longer than 20 minutes for a middle school or high school student.

Each use of seclusion or restraint and the reason for its use must be documented in writing and reported to the school building administration and the student's parent immediately with a written report to parent within 1 school day or 7 calendar days, whichever is sooner.

After any seclusion or restraint, school personnel must make reasonable efforts to debrief and consult with the parent and student. If a student exhibits a pattern of behavior posing a substantial risk of creating an emergency situation in the future, school personnel are encouraged to conduct a functional behavioral assessment and develop or revise a positive behavioral intervention and support plan to facilitate the elimination of seclusion and restraint.

Schools must collect and report data on restraint and seclusion to the Michigan Department of Education (MDOE). Data must be disaggregated by race, age, grade, gender, disability status, medical condition, identity of the student; the school personnel initiating the use; and the name of the school or program where the seclusion or restraint was used. The data should be analyzed by the school in light of attendance, suspension, expulsion, and dropout data and for continuous improvement of training toward the elimination of seclusion and restraint.

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In accordance with MDOE guidelines, public schools must develop and implement a comprehensive training framework, that includes awareness training for all school personnel who have regular contact with students. Comprehensive training is mandated for key identified personnel who will be implementing behavior intervention. Key identified personnel must receive training on:

- proper implementation of proactive strategies and de-escalation techniques
- positive behavioral intervention and support strategies
- identification of behaviors and events that may trigger emergency situations
- proper use of emergency seclusion or physical restraint and the effects of seclusion and restraint on all students.
- obtaining appropriate medical assistance, cardiopulmonary resuscitation and first aid, conflict resolution, mediation, social skills training

### The Role of the Mediator and Facilitator

Inevitably, controversies will arise under the new emergency seclusion and restraint law. During the implementation phase, while school districts are struggling to develop policies and train personnel, mistakes are bound to occur.

Unfortunately, seclusion and restraint has become part of the culture of many public schools. Successfully reducing and eliminating seclusion and restraint will require a change in attitude. School staff will need to shift from negative to positive reinforcement and acknowledge pro-social behaviors, rather than focus on negative behaviors. They must ascertain the meaning behind disruptive behaviors to address the student's underlying needs more effectively. A new mindset is necessary; one that reframes the question from should we restrain or seclude to how do we keep students and staff safe.

After any use of seclusion or restraint, the statute requires school personnel to debrief and consult with the parent and the student to determine future actions. A facilitator may be very helpful during the debriefing process, which is likely to be highly emotional. These sessions can be facilitated by an impartial, knowledgeable, third party neutral who can diffuse the situation, help the parties understand what led up to the conflict and help them develop alternatives to seclusion and restraint. Some of the alternatives include:

- scheduled movement breaks
- one-on-one time with a trusted adult
- a quiet place, or a sensory room, for de-escalation
- separation of students who have frequent altercations
- engaging in a calming activity, such as listening to music, drawing or writing

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A simple accommodation such as changing a student's assigned seat can be very effective. Some students respond very favorably to having a service animal that may provide physical assistance, companionship, comfort and promote the student's self-esteem. Seclusion and restraint can result in psychological harm, physical injuries and death. Not only is seclusion and restraint dangerous, frequently, it is ineffective and increases the behaviors that staff are attempting to control or eliminate. Prone or facedown restraint that blocks air to the lungs can be deadly.

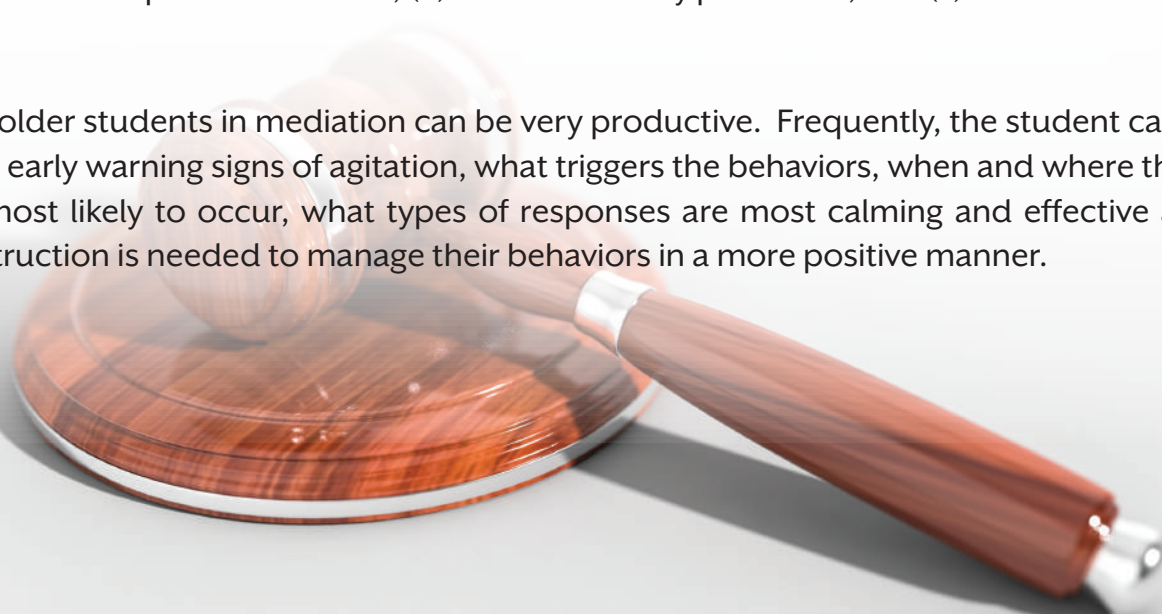
Parents have filed, on behalf of their children who have been subject to seclusion or restraint, disability-related claims under IDEA and Section 504 of the Rehabilitation Act; tort claims, such as gross negligence, false imprisonment, assault and battery, intentional infliction of emotional distress; and Constitutional claims for violation of the Fourth and Fourteenth Amendment right to be free from unreasonable seizures and Fourteenth Amendment right to be free from deprivation of liberty without due process. Legal actions have led to judgments including fines ranging from several thousand dollars to multimillion dollar settlements as well as incarceration.

Mediation is the preferred forum for resolving conflicts related to seclusion and restraint. A private, confidential and timely mediation is much more likely to result in an effective and expeditious resolution than litigation in court.

Through mediation, the parties may discover that staff needs training on early positive behavior intervention, de-escalation strategies, communication techniques, positive behavior intervention support plans and the proper use of emergency seclusion and restraint. Parent training may also be required to facilitate consistent implementation of positive behavior interventions across all settings.

During mediation, skilled mediators can make schools aware of studies that prove elimination or reduction in seclusion and restraint leads to positive outcomes for staff, including: (1) a significant reduction in staff injuries; (2) decreased staff turnover; (3) increased staff satisfaction; (4) reduced employee lost time and lost expenses; (4) reduced number of worker's compensation claims; (5) reduced total cost of worker's compensation claims; (6) reduced liability premiums; and (7) substantial cumulative savings.

Involvement of older students in mediation can be very productive. Frequently, the student can provide insight as to the early warning signs of agitation, what triggers the behaviors, when and where the behaviors are most likely to occur, what types of responses are most calming and effective and what coaching or instruction is needed to manage their behaviors in a more positive manner.



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## Conclusion

To be effective in cases involving seclusion or restraint, mediators must have a thorough understanding of the new statutory requirements regarding the use of emergency seclusion and restraint in the schools, MDOE policies and guidance and school policies. They also must be familiar with the potential legal causes of action and defenses.

Mediators must be highly skilled at dealing with the emotional reactions and defensiveness likely to arise in conflicts involving seclusion and restraint. Mediators must also be mindful of maintaining neutrality, and not making judgments or taking sides. Finally, they must be familiar with the more compassionate and humane alternatives to seclusion and restraint.

*\*Author's Note: I have tremendous respect for special education personnel, the vast majority of whom are highly skilled and incredibly dedicated to promoting their students' academic and social development, dignity and wellbeing.*

**Need Help?**  
AAoM's Navigator Team  
is here for you.

**877.463.AAOM | [Navigator@aaomi.org](mailto:Navigator@aaomi.org)**



The mission of Autism Alliance of Michigan is to lead collaborative efforts across the state that will improve the quality of life for individuals with autism through education, access to comprehensive services, community awareness, inclusion efforts and coordinated advocacy.





# OCTOBER AT A GLANCE

SUN	MON	TUE	WED	THR	FRI	SAT
<b>1</b> Stuffed Animal Program at Circle Rocking "S" Children's Farm (Free Soil)	<b>2</b> Autism: A Visual Journey (Grand Rapids)	<b>3</b> Halloween Hayride Pot Luck Dinner (Free Soil)	<b>4</b> Special Needs, Spectacular Moms Meet and Greet (Detroit)	<b>5</b> Awesome Autumn (Waterford)	<b>6</b> <b>3rd annual Battle for Bunyan Bar Crawl</b> (Ann Arbor) MIOTA Conference (Mackinaw Island)	<b>7</b> Youth Abilities Saturday Sports Special ages 6-18 (Royal Oak)
<b>8</b> Sensory Friendly Sunday at the Arab American National Museum by My Turn (Dearborn)	<b>9</b> MiWorks Outreach (Ypsilanti)	<b>10</b> Social Work Ethics & Pain Management Training (G.Rapids)	<b>11</b> Annual Michigan Autism Conference (Kalamazoo)  Rethinking Guardianship (Cadillac)	<b>12</b> Special Needs Harvest Dinner & Dance (Grand Blanc)	<b>13</b> Arjun Krishnan RAIN/D/VPRGS Brown Bag (East Lansing) FALCONERS Boo at the Zoo (Lansing)	<b>14</b> Super Sparks Community Celebration (Detroit)
<b>15</b> 2017 Autism Support of Kent County Visit to Klackle Orchard (Greenville)	<b>16</b> Overview of Discipline for Students with Disabilities: Questions to Ask and When to Ask Them (Northville)	<b>17</b> SAIL Action Day Conference (Marquette)	<b>18</b> Disability Network Parent Network Workshop ( Traverse City)	<b>19</b> Skills for Effective Parent Advocacy (Kalamazoo)  UPACC Fall Conference (Harris)	<b>20</b> Spartans Stores YMCA Family Hope Program (Wyoming)  Behavior is Communication (Jackson)	<b>21</b> <b>On Board With Autism</b> (Detroit)  Camp Zip Winter Cooking (Ann Arbor)
<b>22</b> Test Ride a Pony (Davidsburg)	<b>23</b> ADOS-2 Introductory / Clinical Training (Ann Arbor) 2017 MACMHB Fall Conference (Traverse City)	<b>24</b> The Ability Award (Holland)  Halloween Happiness (Southfield)	<b>25</b> ADOS-2 Toddler Module Introductory / Clinical Training (Ann Arbor)	<b>26</b> Arctoberfest (Lansing)  Halloween Dance-The Arc of Midland (Midland)	<b>27</b> Paul Shattuck RAIN/D Distinguished Speaker (East Lansing)	<b>28</b> The Wizarding World of Harry Potter (Grand Rapids) Dr. Seuss's the Cat in the Hat (East Lansing)
<b>29</b> Test Ride a Pony (Davidsburg)	<b>30</b>	<b>31</b> Mental Health First Aid Course (Grayling)	Please visit our community calendar for full event listings at <a href="http://www.navigator.autismallianceofmichigan.org/events">www.navigator.autismallianceofmichigan.org/events</a> .			

## You're Invited!

October 11, 2017 | 6:00PM-8:00PM

Join Women Advocating for Autism in Michigan (WAAM) at the Autism Alliance of Michigan office in Southfield for a strategic brainstorming meeting.

26500 American Dr. Southfield, MI 48034

Please let us know you are coming by contacting [Lauren.Lewis@aaomi.org](mailto:Lauren.Lewis@aaomi.org).

## We will provide:

- Introduction to Autism Alliance of Michigan and WAAM
- Refreshments
- Opportunity to meet and network with women in Michigan passionate about autism

## What you should prepare:

- Bring ideas on how WAAM can make an impact on the autism community in Michigan.

