RECENT CHANGES TO MAINE’S RULES ON STUDENT RESTRAINT AND SECLUSION

APRIL 2013
1. **INTRODUCTION TO CHAPTER 33**

Maine has adopted comprehensive regulations set forth in Chapter 33 that govern the use of physical restraint and seclusion in Maine schools. These regulations first went into effect in 2012, and then were revised in 2013. These rules apply to all students in virtually all school-related circumstances. Concerns about the breadth of Chapter 33 as it was approved in 2012 led to a certain degree of backlash. Maine School Management Association, MADSEC, and other organizations pursued revisions to these rules with the Maine Legislature, and in 2013 the Legislature approved concise but very important changes in the rules. The revisions went into effect in April 2013. The key changes in 2013 were as follows:

- The changes give school officials broader authority to use brief physical interventions to move students without considering such low level interventions to be “physical restraint”;
- The changes give school officials broader authority to intervene physically to break up a fight without considering any such “brief” interventions to be a “physical restraint”;
- The changes permit the use of physical restraint and seclusion to prevent a “risk of injury or harm,” rather than the old requirement that the risk of injury or harm must be immediate, or likely to happen at any moment.

These important revisions are slated to go into effect immediately. In the remainder of this memorandum we summarize the key provisions of Chapter 33 generally, while also noting the 2013 revisions to those rules.

**Background to the Rules on Physical Restraint and Seclusion**

Back in 2002, the Maine Department of Education first promulgated state rules governing the use of restraint and timeout rooms. There were always fairly deep structural flaws in those rules, however, and although the Maine DOE attempted to paper over those problems, the difficulties always stood out sharply and prevented the old rule from being fully effective. Most particularly, any reading of the plain language of the old rules made evident that virtually any type of restraint that one could imagine was in fact excluded from coverage under those rules if it was in any way arguable that the restraint would have been protected under Maine's law on civil liability for the use of reasonable force, discussed below.

As a result of these difficulties, and in keeping with national movements to regulate the use of restraint more closely, the Maine Department of Education undertook a careful review of its restraint rules and made use of a task force of “stakeholders” to assist in developing an alternative approach. This led to a total rewrite of the old rules and the promulgation of a new Chapter 33, which went into effect in 2012. In response to a backlash against the breadth of those rules, the Maine Legislature in 2013 required the relatively minor changes outlined above and discussed more fully below.¹

¹ See LD 243 (2013) (requiring certain changes to Chapter 33) (becoming law without the governor’s signature).
Overview of the Rules on Physical Restraint and Seclusion

The rules on physical restraint and seclusion are found in a totally rewritten Chapter 33 of the Maine education regulations. The rules include a section on physical restraint and a section on seclusion. But they also include an extensive set of definitions, a section mandating local policies, notification requirements, debriefing requirements, documentation requirements, reporting requirements, and a requirement for team meetings if a student receives multiple restraints or seclusions. Finally, there is a section on staff training.

One should note at the outset that these rules apply to all schools that receive public funds from the Maine Department of Education, including public schools, publicly supported private schools, charter schools, private special purpose schools, CDS services, and the like. The rules also require that any covered entity that contracts for services with an entity not covered by the law must include in the contract for services that the other entity will in fact comply with these rules.

The Rules for Physical Restraint

We begin with a discussion of physical restraint, and in particular with the definition of physical restraint. From there we move to a number of exceptions to the definition. And then we conclude with a summary of the many requirements that apply when a physical restraint occurs.

**Definition of “Physical Restraint”**

The definition of “physical restraint” is fairly complicated, given that it includes a broad general definition, and then a number of exceptions that have to be factored into the broad definition. The overall concept of physical restraint is defined as follows:

**Physical Restraint** is an intervention that restricts a student’s freedom of movement or normal access to his or her body, and includes physically moving a student who has not moved voluntarily.

This definition by itself is broad, and would encompass many ways in which school staff might hold or constrain a student. It includes holding a part of a student’s body, like a hand or an arm, in a manner that prevents or forces movement. It also includes physical movement of the child against his or her will. In other words, physical restraint includes physically constraining movement against a child’s will, and also physically forcing a child’s movement against his or her will. In many ways, the overall definition seems broadly intended to address situations where students are held, or moved physically against their will. As the reader sees, the definition aims at restrictions on a student’s “freedom of movement.”

It is worth noting that because we are talking about “physical restraint,” the term does

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2 See Maine Dep’t of Ed. Reg. ch. 33, § 2(4), .3(1) (2012).
3 See Maine Dep’t of Ed. Reg. ch. 33, § 3(2) (2012).
4 See Maine Dep’t of Ed. Reg. ch. 33, § 2(16) (2012).
NOT cover verbal restraint. For example, a building principal might order a student to stand still. If this order works, some might consider that the student’s freedom of movement has been restricted. The definition states that physical restraint is an “intervention that restricts” the student’s freedom of movement. Verbal directives by an authority figure can have that effect, but because the term in question is “physical restraint,” it does not appear to apply to non-physical interventions from an authority figure that have the effect of restricting freedom of movement.\(^5\)

Physical restraint is not prohibited by this rule, of course. But what the rule does is limit the use of physical restraints to those situations when the student presents a risk of physical injury or harm to the student or to others, as will be discussed in more detail later in the memo. Given the limited circumstances when physical restraint can be used, it is important to be clear whether the conduct is in fact a physical restraint, or is not. If it is, then this limitation applies, as well as many procedural requirements in terms of how the restraint is addressed.

The broad definition of “physical restraint” is modified by a number of specific exceptions. These exceptions are absolutely critical to understanding in a practical manner what types of physical interactions are controlled by Chapter 33, and which interactions are not. If a type of physical interaction with a student falls within one of the exceptions to the definition of “physical restraint,” then that type of interaction is NOT covered by Chapter 33 and is not subject to any of the requirements that are addressed below.

An Exception for “Physical Prompts”

There is an exception to the definition of “physical restraint” for something called a “physical prompt.”\(^6\) When there is a physical prompt, even if the prompt restrains movement, it would not be considered a physical restraint because of this exclusion. The term physical prompt is defined as “a teaching technique that involves physical contact with the student and that enables the student to learn or model the physical movement necessary for the development of the desired competency.”\(^7\) In this case, although a prompt might move a student’s body or limb in a manner that the student did not desire, the prompt is primarily meant as a teaching tool. Presumably the student’s participation in the prompting action is voluntary, but even if not, in those circumstances when the physical contact is a teaching technique to enable the child to learn or to model a physical movement that is a part of an educational competency the student is learning, then it is NOT a physical restraint and all the rules that govern physical restraints do not apply.

Readers should be sensitive to the possibility of a physical prompt turning into a physical restraint. A teacher might be attempting to coach or move a student in a particular way that would be considered a prompt. The student might, however, become resistant and make clear that he or she does not want to continue. If the teacher were then to attempt to force the student physically to participate in the exercise – no longer really prompting, but attempting to move the student back into the educational exercise – the permissible physical prompt may have turned

\(^5\) See Draft Chapter 33 Comments and Responses, page 4 (2012) (movement by oral direction is not physical restraint).


\(^7\) See Maine Dep’t of Ed. Reg. ch. 33, § 2(15) (2012).
into a physical restraint.

**An Exception for “Physical Escorts”**

The exception for “physical escorts” is one of the most important changes to Chapter 33 that was adopted by the Maine Legislature in 2013. Prior to that change, this exception was very narrow, because it was limited to physical escorts that were voluntary for the child. But with the 2013 revisions, that has now changed. The term “physical escort” now means:

The temporary touching or hold for the purpose of inducing a student to walk to another location. This includes assisting the child to his/her feet in order to be escorted.

This new language would seem to permit a broad range of low level physical interaction between school staff and students. In many situations, for example, a student could be disrupting a classroom or other school setting, but without creating a risk of injury to anyone. Under the old rules, school officials could not physically move this child out of the room against the child’s will. Under the new 2013 rules school officials could attempt to move, or “escort”, the child out of the area that he or she is disrupting. Certainly if a relatively brief holding, or physical movement of the child is unsuccessful and a more invasive physical interaction is required, what began as a physical escort would then become a physical restraint and would be covered by these rules. But as long as a relatively brief physical interaction can result in movement of the child out of the area that he or she is disrupting, then the physical holding or movement of that child would be considered a “physical escort” and would fall outside the definition of physical restraint and therefore not be subject to the extensive requirements of Chapter 33.

**An exception for fights**

The 2013 revisions also include another new exception to the definition of physical restraint. This exception is for intervening to break up a fight. Here, the exception is for “a brief period of physical contact necessary to break up a fight.”

Of course, under the 2012 rules, physical contact to break up a fight would always have been permitted, but such an intervention usually would have been considered an example of a permissible physical restraint, and therefore subject to all the procedural requirements and training requirements of Chapter 33. Including a “brief period of physical contact to break up a fight” as an exception to the definition of physical restraint means that when this brief physical contact occurs, it would fall outside the definition of physical restraint and would not be subject to all the procedural and training requirements of the rule.

As with all of these exceptions, it is not difficult to see how a brief period of physical contact necessary to break up a fight could easily slide into a physical restraint – again, a permissible restraint, but one that would now be subject to the rules. Briefly holding a student

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8 *See* Maine Dep’t of Ed. Reg. ch. 33, § 2(14) (2012).
9 *See* Maine Dep’t of Ed. Reg. ch. 33, § 2(14) (2013).
back from a fight, holding his or her arms, or otherwise making brief contact, would seem to be within the exception. But if the fight becomes more aggressive, and the physical intervention becomes more extensive, more physical, and longer in time, at some point that interaction would surely be understood as a physical restraint and become subject to the rule.

An Exception for Seat Belts and Harnesses

There is an important exception to the definition of physical restraint in Chapter 33 for the use of “seat belts, safety belts, or similar passenger restraint.”11 This exception applies only when used as intended “during the transportation of a child in a motor vehicle.” And there is a related exception for “the use of a medically prescribed harness, when used as intended.”12

The seat belt exception applies to the use of seat belts in motor vehicles, even though they restrict the freedom of movement and even though a child might not want to wear it – and without considering such use to be a physical restraint. Of course, the belts or harnesses have to be used as intended. Keeping a child on the bus during a track meet, strapped into the seat with a seat belt, would not be using the belt as intended and would be considered a physical restraint – assuming it in fact restricts the child’s freedom of movement.

This same concept applies to the use of harnesses, when used as intended – an exception that applies to devices meant to keep a person properly situated in a chair or wheelchair, or perhaps in other situations as well. But this exception applies only if the harness has been medically prescribed, and of course if it is used as intended.

An Exception for Comfort Holds

The rules include an exception for behavior that essentially amounts to a hug of the child, if the child accepts the behavior. This exception once was written as an exception for holding a student “to calm or comfort the student.” But the reference to calming was too broad for the Legislature, and it was rewritten as an exception for physical contact that is intended “to comfort a student and the student voluntarily accepts the contact.”13 Of course physical contact that does NOT restrain a child’s freedom of movement is not a restraint in any event. It may be helpful for the rules to state that comforting contact is not a physical restraint, and this exception makes that clear. But behavior described in this exception most likely would have fallen outside the definition of physical restraint in any event.

An Exception for Deflecting Bodily Movement

There is an additional exception for what amounts to a deflection of bodily movement.14 This is a provison that the Legislature modified somewhat in 2012 from the Department’s initial draft rule. This exception excludes from the definition of physical restraint any action that “momentarily deflect[s] the movement of a child when the child’s movements would be

13 See LD 1838 (2012).
destructive, harmful, or dangerous to the child or to others.” In other words, if the child moves to strike someone, and a staff member uses his or her body to deflect the movement of the child’s body, this deflection would not be considered a physical restraint.

The 2013 amendment that now excludes from the definition of physical restraint any brief contact to break up a fight may make this “deflection exception” somewhat irrelevant. But even in circumstances where a physical deflection does occur without it being for the purpose of breaking up a fight, a staff member could usually have undertaken the interaction in any event because, as defined, the student’s action presents a risk of harm. Yet since the deflection behavior has been excluded from the definition of physical restraint, this means that this type of action is not subject to any of the many procedural requirements that must be met when a restraint occurs.

**When Can Staff Physically Restraining?**

As noted earlier, these rules do not bar physical restraint. They simply limit the circumstances in which a physical restraint can be used. The original 2012 rules required there to be a risk of “imminent” physical harm for a person to use a restraint, and harm would be “imminent” only if a reasonable person would conclude that it was “likely to occur at any moment.” In the 2013 amendments, the language was changed to remove the concept of imminence. Thus, school officials now are permitted to use physical restraint any time that the student:

- presents a risk of injury or harm to the student or others, and only after other less intrusive interventions have failed or been deemed inappropriate.

The rules go on to provide some further definition of what a “risk of injury or harm” would be, and again, in 2013 this explanation was altered to remove references to imminence. Now the language applies to situations in which a person could conclude that the student “has the means to cause physical injury or harm to self or others” and that this injury or harm seems likely to occur. The removal of the concept of “imminence” from this standard alleviates the concerns of many school officials that their staff might shy away from a necessary intervention because the staff member wasn’t sure if the risk of injury was truly about to occur, or imminent. Now, with the new language it would appear that physical restraint is permissible anytime it seems that a physical injury could occur at some point if the behavior were to occur. In particular, this new language would seem to address the situation when younger students appear to be about to leave the school building when departure is not permitted, or refuse to come back into school when return is mandatory. Under earlier language, it was debatable whether such circumstances presented an imminent risk of harm. Now, it seems clear that this behavior would present a risk of harm, even though the risk might not quite be imminent. As always, however, physical restraint should be used “only after other less intrusive interventions have failed or been deemed inappropriate.”

15 See Maine Dep’t of Ed. Reg. ch. 33, §§ 6(1)(A), 2.9(D) (2012).
16 See Maine Dep’t of Ed. Reg. ch. 33, § 6(1)(A) (2013).
And although the terms “injury or harm” do not in and of themselves refer to physical injury alone – in other contexts they could mean emotional or reputational injury – the language in Chapter 33 establishes that the injury in question must be of a physical sort.\textsuperscript{18} School staff could not physically restrain a student when there is simply a risk of emotional injury.

One issue unanswered in these rules is how much injury must be at risk. The rules simply use the terms “injury or harm” without any modifiers at all, such as “serious” or “substantial” injury. Would it be enough to use a physical restraint when the physical injury at risk is somewhat slight? Let’s say that a student declares that he is about to deliver a powerful flick to a fellow student’s ear, and is then poised and ready to deliver the flick. Could a teacher take hold of the student’s hand, restricting his or her freedom of movement, thereby preventing the flick from occurring, even though the injury or harm in question would be slight?

By themselves, the terms “injury or harm” include no severity modifiers. And at least in the special education context, courts have made clear that they are hesitant to include modifiers when the Legislature itself failed to do so.\textsuperscript{19} This would seem to be particularly true here, because elsewhere in the same regulations the rule-makers included a definition for “serious bodily injury,” showing that the Legislature knew how to employ standards of severity when desired.\textsuperscript{20}

As just noted, however, school officials should bear in mind that the same rules state that the physical restraint can be used only after “other less intrusive interventions have failed or been deemed inappropriate.”\textsuperscript{21} One would presumably use the least amount of restraint necessary, and if the behavior in question could be stopped without physical restraint, physical restraint would have to be avoided. In the case of the “flicker”, therefore, the teacher would not be justified in putting the student in a basket hold to prevent a flick. All that should be needed is either an oral statement (not a restraint), or taking hold of the student’s hand to prevent the flick (a physical restraint under this definition).

\textit{Prohibitions on Restraint}

Of course, the most important prohibition on physical restraint is that it can only be used to prevent the risk of physical injury or harm. But the rules go on to list a number of additional prohibitions on the use of physical restraint. Most of these prohibitions simply underline the primary restriction that physical restraint can be used only in the case of a risk of physical injury to the student or to others.

For example, physical restraint cannot be used to punish a student, cannot be used for staff convenience, and cannot be used to control behaviors that are simply “challenging.”\textsuperscript{22} In addition, physical restraint cannot be used to prevent property damage or simple disruption of the

\begin{footnotesize}
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\item See Maine Dep’t of Ed. Reg. ch. 33, § 2(9)(D) (2013).
\item See Mr. and Mrs. I v. M.S.A.D. No. 55, 480 F.3d 1 (1st Cir. 2007) (the term “adverse effect” means “any negative impact” regardless of degree, refusing to read into the phrase a severity requirement).
\item See Maine Dep’t of Ed. Reg. ch. 33, §§ 2(21), 7(3) (2012).
\item See Maine Dep’t of Ed. Reg. ch. 33, § 6(1)(A) (2012).
\item See Maine Dep’t of Ed. Reg. ch. 33, § 6(2)(A) (2012).
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environment “in the absence of risk of injury.” Nor may physical restraint be used “as a therapeutic or educational intervention.” Each of these prohibitions underlines that physical restraint is limited to those situations when there is a risk of injury or harm to the student or others.

The 2013 revisions must be kept in mind, however. In particular, as a result of these revisions it is no longer a restraint to physically touch or hold a student for a brief or short time for the purpose of “inducing a student to walk to another location” – the physical escort exclusion. Schools are not permitted to physically restrain a child to prevent property damage, but there is no ban on using a physical escort to prevent property damage, because a physical escort is NOT a physical restraint. Certainly if the “temporary touching or holding” of a child to induce the child “to walk to another location” is unsuccessful, the continuing risk of property damage by itself would be an insufficient justification for an actual physical restraint. But most of the time it would seem that a physical escort would be successful in eliminating the risk of property damage.

Beyond these limitations on the use of physical restraint, the rules go on to prevent certain types of physical restraints even in situations when there might in fact be a risk of injury or harm. For example, the rules prohibit any restraint that restricts the free movement of the diaphragm or chest or that restricts the airway so as to interrupt normal breathing or speech (restraint related positional asphyxia) of a student.

This limitation is extremely important, and the concern about this type of restraint is one of the major reasons that there has been such a push to revise the state regulations. It seems well accepted that physical restraints having this effect on a student present a significant risk of serious injury or death, and should simply not occur – even when there is a risk of injury or harm that is prompting the physical intervention.

The rules also prohibit methods of physical restraint that rely on pain for control, and include examples such as “joint hyperextension, excessive force, unsupported take-down (e.g. tackle), the use of any physical structure (e.g. wall, railing or post), punching and hitting.” This provision appears to be focusing on a prohibition on the use of pain as a means of control. What seems to be prohibited here is use of a physical structure to cause pain for a student with the intention that the pain could control that student’s behavior. Interventions that rely on the infliction of pain to control behavior are barred.

Similarly, the rules bar the use of aversive procedures and mechanical and chemical restraints “under any circumstances” – including when there is a risk of injury or harm. The rules define what these prohibited interventions are. For example, the rules define “aversive

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26 See Maine Dep’t of Ed. Reg. ch. 33, § 6(2)(C) (2012).
procedures” as:

the use of a substance or stimulus, intended to modify behavior, which the person administering it knows or should know is likely to cause physical and/or emotional trauma to a student, even when the substance or stimulus appears to be pleasant or neutral to others. Such substances and stimuli include but are not limited to: infliction of bodily pain, (e.g. hitting, pinching, slapping), water spray, noxious fumes, extreme physical exercise, costumes, or signs.29

In many ways, this definition includes some fairly obvious prohibitions, and these have long been in earlier versions of Chapter 33. The rules include a reference to use of substances that could be “pleasant or neutral to others” – but which in this case, for this student, are “likely to cause physical and/or emotional trauma” to the student. The rule bars use of what might for others be pleasant interventions if the staff member “knows or should know” that it could have a traumatic impact on this particular student.

Bear in mind that the ban on aversives includes a ban on use of “costumes or signs”, which one might not normally view as an aversive. Having a student wear a dunce cap would be banned as an aversive in Maine.

The definition of “chemical restraint” is simpler. It is “the use of medication, including those administered PRN (as needed), given involuntarily to control student behavior.”30 It is interesting to see that if the student voluntarily agrees to use of a medication, it appears to convert a prohibited “chemical restraint” into a restraint that might otherwise be permitted. The rules go on to state that “prescribed medications are not considered chemical restraints when administered by a health care provider consistent with a student’s health care plan.”31

The rule also bans the use of mechanical restraints, which are defined as “any item worn by or placed on the student to limit behavior or movement and which cannot be removed by the student.”32 If the student can remove the item, it is not a prohibited mechanical restraint. The rules interestingly note on this front that “prescribed assistive devices are not considered mechanical restraints when used as prescribed.” But in this situation, their use must be supervised by qualified and trained individuals in accordance with professional standards.33 The rules do not define “assistive devices.” Yet this specific language simply removes “assistive devices” from the concept of a “mechanical restraint” that is otherwise banned. The assistive device, if it involuntarily prevents freedom of movement by the student, would still appear to be a physical restraint, and subject to the restraint rules. That is, unless the assistive device is a seat belt or harness, and then if it used as intended, it is not a physical restraint at all.

We see some potential confusion in the meaning and application of this array of terms for mechanical interventions with students. Seat belts and harnesses are usually not considered

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29 See Maine Dep’t of Ed. Reg. ch. 33, § 2(1) (2012).
30 See Maine Dep’t of Ed. Reg. ch. 33, § 2(3) (2012).
31 See Maine Dep’t of Ed. Reg. ch. 33, § 6(2)(H) (2012).
33 See Maine Dep’t of Ed. Reg. ch. 33, § 6(2)(G) (2012).
restraints. Mechanical restraints are banned, but assistive devices are not mechanical restraints. One might expect some disagreement about when these rules will impose limits on use of such devices.

**Training for Staff Involved in Physical Restraint**

When use of physical restraint is required, the rules mandate that the persons implementing the restraint must be “staff certified in a state-approved training program to the extent possible.”34 There is an entire section in the rules devoted to staff training and approved programs. The Department of Education is required to maintain a directory of approved training programs, and these programs must require participants to demonstrate certain competencies to achieve certification.

Importantly, every covered entity must ensure that “a sufficient number of administrators or designees, general and special education staff, maintain certification in an approved training program.” Furthermore, there must be a list of staff with the required training available in each building office, as well as in the central office, and that list must be updated annually.35 It is unclear, however, what a “sufficient number” would be. One would at the least assume that if a school had students in a particular building that the school knew were likely to need physical restraint, that a “sufficient number” would include some persons in that building trained in restraint.

The requirement that physical restraint be administered by trained staff includes the important limitation that this should occur to the extent possible. The rule similarly states that if due to the nature of the emergency, untrained staff must implement the restraint, “trained personnel must be summoned to the scene and assume control of the situation as rapidly as possible” – but only if the need for the restraint continues.36

It is often true, of course, that staff who may not be trained in restraint will encounter a situation that requires immediate action to prevent harm, and it will be impossible to call for help before stepping in. In that situation, this rule permits untrained staff to intervene and to use physical restraint if deemed necessary to prevent injury or harm that appears to be about to happen.

**Monitoring Students in Physical Restraint**

Not only must the staff administering the restraint be trained, the rules also require that “at least two persons be present at all times when physical restraint is used except when, for safety reasons, waiting for a second adult is precluded.”37 This does NOT appear to be a requirement that schools have two trained staff at every restraint. The requirement for trained staff appears to apply only to those administering the restraint. If two are required by the circumstances to administer the restraint, then they should both be trained if possible. But if only

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34 See Maine Dep’t of Ed. Reg. ch. 33, § 6(1)(B) (2012).
35 See Maine Dep’t of Ed. Reg. ch. 33, § 12 (2012).
36 See Maine Dep’t of Ed. Reg. ch. 33, § 6(1)(B) (2012).
37 See Maine Dep’t of Ed. Reg. ch. 33, § 6(3)(A) (2012).
one person is needed actually to administer the restraint, then this requirement to have two persons present at all times during the restraint would not seem to require that they both be trained, only the person who is actually administering the restraint.

**Length and Termination of the Physical Restraint**

If a physical restraint has to continue for more than 10 minutes, then an “administrator or designee” must determine whether continued physical restraint is warranted, “and shall continue to monitor the status of the physical restraint every 10 minutes until the physical restraint is terminated.” The administrator may often be the building principal, but bear in mind that it can also be a designee of the administrator. Normally the person making this review decision every 10 minutes should not be the person actually administering the restraint. Of course, in the unfortunate situation when the administrator or designee is not available at those 10-minute intervals, the person involved in the restraint should be making ongoing assessments about termination or continuation.

The rule is very clear that staff involved in the restraint must continually assess the student for signs that the student is no longer presenting a risk of injury or harm to self or others, “and the emergency intervention must be discontinued as soon as possible” – which presumably means as soon as it is evident that the student no longer presents a risk of injury or harm to self or others once released. Thus, regardless of the administrator or designee who monitors and determines whether physical restraints should extend beyond 10-minute intervals, within each 10-minute interval the persons administering the restraint must also be assessing, and if it appears that the student no longer presents the risk of harm, the restraint should be terminated.

**The Rules for Seclusion**

There is some overlap between the rules on seclusion and the rules on physical restraint. We will not repeat here all of the overlap but will instead refer to earlier discussions.

**What is a Seclusion?**

As with physical restraint, the definition of “seclusion” in these rules is important. When a seclusion occurs under these rules, important requirements come into play, just as in the case of physical restraint. And as with physical restraint, perhaps the most important of these is that a “seclusion” can be used only if there is an “risk of injury or harm to the student or others, and only after other less intrusive interventions have failed or been deemed inappropriate.”

The term is new in Maine law. The earlier version of Chapter 33 addressed timeout rooms, not seclusion. The concept of seclusion broadens out what is being regulated, moving away from the notion of a particular room, and applies more broadly to confinement of students away from others, wherever the confinement might occur. The new regulations therefore define “seclusion” as follows:

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Seclusion is the involuntary confinement of a student alone in a room or clearly defined area from which the student is physically prevented from leaving. Seclusion is not timeout.41

The term picks up some of its meaning from what it is not, which is a “timeout.” The term timeout is defined as “an intervention where a student requests, or complies with an adult request for, a break, and is not covered by this rule.”42 As with physical restraint, the concept of voluntariness looms large in these definitions. A timeout involves a student complying with an adult request for a break. Placement in seclusion involves a student’s “involuntary” confinement. In the case of a seclusion, the student is actually prevented physically from leaving the area. If the student were free to leave, it would not be a seclusion.

Seclusion could be in a particular room, but it could also be in a “clearly defined area.” This broadening of the concept has led to some confusion focusing on whether a student who is required to remain in any particular area would be considered to be in seclusion – even if the student were in the principal’s office being interviewed for a disciplinary reason, or on a playground with many children around, but with the student being required to remain in a cool-down area.

The Maine Department of Education issued a response to comments when it proposed the draft regulations, and answered this particular issue. Their response is extremely important. They wrote:

The Department believes that the distinguishing feature of “seclusion” is isolation from all other people, including adults. “Seclusion” is defined in the rule as a situation in which the student is “alone.” The requirement for an adult to be “present” to monitor the student does seem inconsistent with this definition. However, the Department understands that an adult’s “presence” means that the adult is physically located in a position to properly monitor the student, not that the adult is in the room or area in which the student is being confined. The Department has amended the monitoring provision of the rule to clarify this point.

The rule provision related to monitoring a student in seclusion is amended to require that an adult, “while not present in the room or area, must be situated so that the student is visible …”43

In other words, a seclusion occurs only when a student is involuntarily confined in a room or an area alone. Completely alone. If another person is in the area with him or her, then it is not a seclusion, even if it is involuntary. The commentary quoted above reflects the importance to this definition of the further requirement about mandatory observation. A student in seclusion must be “continuously monitored” during the seclusion, but the adult “while not

41 See Maine Dep’t of Ed. Reg. ch. 33, § 2(19) (2012).
42 See Maine Dep’t of Ed. Reg. ch. 33, § 2(23) (2012).
present in the room or defined area, must be situated so that the student is visible at all times.” If the person doing the monitoring is doing the monitoring inside the same room or space as the child, it is not a seclusion, and not subject to these rules – even if the child is being kept away from all other persons except the person watching him and her from within the same room or area. If the monitor is outside the room, or outside the area, then it becomes a seclusion subject to the rules.

For that reason, it would not be a seclusion for a child to be forced to go to the principal’s office and sit there with the school secretary, or be forced to be interviewed alone by the principal, or be forced to stand in an area with other children able to see and be seen by the student. In these situations, that child is not alone.

Seclusion would not normally appear to apply to a situation when a student is made to stand outside in a hallway during class, when others would not normally be in the hallway, even assuming that he is standing out there involuntarily. This is because usually the student will not be physically prevented from leaving the space in question, since he could walk away from that location to go wherever he desires.

In summary, the student must be completely alone in the space or room. He must be there involuntarily. And in fact he must be physically prevented from leaving the area. If he went there voluntarily, it is a timeout, not a seclusion. If he can leave whenever he wants, it is not a seclusion. If he is physically prevented from leaving, but the adult involved is in the same room or space with the student, it is not a seclusion.

An earlier version of Chapter 33 prior to 2012 prevented timeout rooms from being “locked, latched or secured in any way that would prevent the student from exiting the room.” But this appears no longer to be the case. Although the current rules state that a room used for seclusion cannot be locked, it would appear that the doors of any such room can be kept shut against the child’s will. This is because the child is not even considered to be in seclusion unless the child is involuntarily kept in the room and is “physically prevented” from leaving. Under the old rules, schools were not permitted to prevent a child from leaving the timeout room. Under the new rules, although the doors could not be locked, the child may be physically prevented from leaving.

**When Can Staff Use Seclusion and Who Can Use It?**

Assuming that school officials are actually contemplating placing a child against his or her will in a space or area without any other person in that room or area, and physically confining him or her to that space, the next question is when can this occur? Here, the standard is the same as with physical restraint. A true seclusion can be used only as “an emergency intervention” when the behavior of a student presents a “risk of injury or harm to the student or others, and only after other less intrusive interventions have failed or been deemed inappropriate.” The meaning of this concept is discussed above in the section on physical

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44 See Maine Dep’t of Ed. Reg. ch. 33, § 5(3)(A) (2012).
Also as with physical restraint, if school officials are placing a child in a true seclusion, the seclusion must be implemented by “staff certified in a state-approved training program to the extent possible.” And if untrained staff initiate the seclusion because of an emergency, trained staff must be summoned “as rapidly as possible.” This is similar to the requirement for physical restraint discussed earlier. And as discussed earlier, because a true seclusion can be used only to address a risk of injury or harm, it seems likely that these will occur occasionally when trained staff are not nearby. If there is such a risk, and the risk appears about to happen, the seclusion can be used without trained staff, but trained staff must then be summoned.

The concept of “trained staff” is also exactly the same for seclusion as for restraint, and the expectation is that these people will be trained in a state-approved program that addresses the use of both seclusion and restraint.

One difference from physical restraint is the number of people mandated to be involved in a seclusion. Assuming a true seclusion is occurring, the rules require that only one staff person be involved in the occurrence. The rule states that one adult must be physically present to continuously monitor a student in seclusion. Of course, more than one adult might have been involved because the seclusion may actually have begun with a physical restraint, which should involve at least two people. But once the intervention has become just a seclusion, and the child is alone in the room or area, then only a single staff member is required to be present and monitoring the seclusion continuously – again, from outside the room or area if the intervention is to be understood as a true seclusion.

Prohibited Uses of Seclusion

As with physical restraint, there are certain circumstances in which schools are barred from using seclusion. And these will sound familiar. Seclusion cannot be used for punitive purposes, staff convenience or to control challenging behaviors. Also like physical restraint, seclusion cannot be used to prevent “property destruction or disruption of the environment” in the absence of a risk of injury or harm. Seclusion also may not be used as a therapeutic or educational intervention. The purpose of a true seclusion is limited to addressing a risk of injury or harm.

Length and Termination of the Seclusion

The seclusion must be continuously monitored, and then “discontinued as soon as possible.” This seems to mean that the seclusion must therefore stop as soon as the student no longer presents a risk of injury to self or others. And as with physical restraint, if the seclusion extends for more than 10 minutes, an administrator or designee must determine whether

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49 See Maine Dep’t of Ed. Reg. ch. 33, § 5(3) (2012).
seclusion should continue, with that determination repeated every 10 minutes, if it should extend that long.\textsuperscript{53}

There is one difference from physical restraint that seems important, when considering termination of a seclusion. Seclusion has such a specific definition that one can easily imagine terminating the seclusion, but with the student still remaining in the room or area where the seclusion occurred. As discussed, the seclusion ends simply as a result of an adult entering the room with the child. It would also end if the child were told that he or she is free to leave whenever the child wants, but is also free to remain in the room or area to gain additional composure. In any of these examples, the seclusion has ended, even though the child is still in the room or area. If an adult joins him or her, or the stay in the space becomes truly voluntary, then the seclusion has ended.

\textit{Location of Seclusion}

The rules include requirements for the physical structure of any room within which a child is being secluded. The rule states:

Seclusion can be achieved in any part of a school building with adequate light, heat, ventilation and of normal room height. If a specific room is designated as a seclusion room, it must be a minimum of 60 square feet with adequate light, heat, ventilation, be of normal room height, contain an unbreakable observation window in a wall or door and be free of hazardous material and objects with which a student could self-inflict bodily injury.\textsuperscript{54}

Be aware of the requirement for an observation window. Recall that for this to be a true seclusion, no other person is in the area with the student. Yet there is also the requirement for continuous monitoring. Therefore if the seclusion is occurring within a room, there must be “an unbreakable observation window” to permit that observation.

\textbf{Additional Duties When Physical Restraint or Seclusion Occurs}

Under Chapter 33, there are a host of procedural requirements that apply whenever physical restraints or seclusion are used. The most important of these requirements are set forth in a list below, but this list does not include every single requirement. Here are the key procedural mandates:

- In the case of physical restraint, make sure two adults are there for the restraint, and those involved in the restraint should be appropriately trained. The same is true for seclusion, but only one person need be present. The rules permit restraint or seclusion by untrained personnel, however, as long as trained personnel have otherwise been summoned.

\textsuperscript{53} See Maine Dep’t of Ed. Reg. ch. 33, § 5(4)(E) (2012).
\textsuperscript{54} See Maine Dep’t of Ed. Reg. ch. 33, § 5(5) (2012).
• Continuously monitor the restraint or seclusion and end it when it is clear there is no longer a risk of injury or harm. If the restraint or seclusion lasts more than 10 minutes, an administrator or designee must make a decision whether it should continue.

• After the incident, notify both the family and an administrator or designee that same school day.

• After the incident, prepare a written report within 2 school days about the incident, which must contain many items specified in the rule.

• After the incident, provide the written report to an administrator or designee within 2 school days, and to the parents within 7 calendar days.

• After the incident, hold a debriefing meeting with the student within 2 school days.

• After the incident, hold a debriefing meeting with the involved staff within 2 school days.

• After the incident, prepare a written plan to minimize the need for restraint or seclusion in the future.

• If there have been 3 incidents of physical restraint or seclusion in a school year, schedule a 504 or IEP team meeting (depending on the child’s status), or simply a team meeting if the child is not disabled, and review or consider a functional behavior assessment or behavior intervention plan to prevent future incidents. This meeting should occur within 10 school days of the incident.

• Schools must annually provide information to parents and training to staff on the restraint and seclusion standards.

• Schools must have a local complaint procedure available to parents or others who believe schools are failing to meet their duties under these rules. A complainant can ask the Maine DOE to review decisions made by the local school unit in response to a complaint. As a practical matter, the complaint procedure should be included in the local board’s restraint and seclusion policy and procedure.

Again, these are just the high points. There are additional requirements in the rules beyond these.

Further Thoughts on Chapter 33

Despite all the detailed requirements of Chapter 33, it remains true that there is a very important general exception to all the rules on physical restraint and seclusion discussed in this memo, and this exception relates to interventions by the police or the school resource officer. The rules state:

Those restraints used by law enforcement officers or school resource officers
employed by a police department in the course of their professional duties are not subject to this rule.\textsuperscript{55}

In other words, in any situations covered by this language, the behavior of law enforcement personnel and school resource officers are not in any way covered by these rules.

Finally, nothing in this rule eliminates the protection from civil liability found at 20-A M.R.S.A. § 4009, which we reviewed at the beginning of the material. Although it is legally wrong to use restraint or seclusion in circumstances prohibited by the new rules, Maine’s law on civil liability will continue to provide school officials with some level of protection from law suits in court for monetary damages when restraint is used consistent with that law.

\textsuperscript{55} See Maine Dep’t of Ed. Reg. ch. 33, § 6(5) (2012).