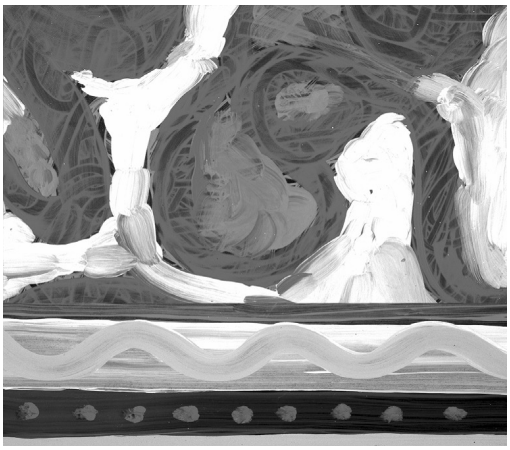

The Legal Perspective

Robert Fleischner, Esq.

Jennifer Honig, Esq.

Kathryn Rucker, Esq.

Susan Stefan, Esq.

> “The welfare of the people is the ultimate law.”
>
> Cicero

LEGAL LIMITATIONS ON THE USE OF RESTRAINT AND SECLUSION ON CHILDREN AND ADOLESCENTS IN TREATMENT SETTINGS AND RESOURCES TO SUPPORT THEIR CARE

Robert Fleischner, Kathryn Rucker, Susan Stefan, and Jennifer Honig

OVERVIEW OF FEDERAL AND STATE REGULATORY LIMITATIONS ON THE USE OF RESTRAINT AND SECLUSION

Since different kinds of children's facilities and programs are subject to different requirements, it is important to know which rules apply. In fact, some programs may be subject to more than one set of rules (or to both rules and accreditation requirements) and the requirements of each may differ. While the information in this chapter is up to date as of February 2018, the reader should be aware of which regulations apply to his or her facility or program and keep up to date on any new regulations. Agencies that provide legal assistance to individuals with psychiatric disabilities are listed at the end of this chapter, and may be able to provide up-to-date information on restraint and seclusion regulations. In addition, web sites with this information are listed.

CONSTITUTIONAL RIGHT

Involuntarily committed children, adolescents, and adults have a federal constitutional right to be free from unreasonable bodily restraint and from the use of excessive force in state facilities. They also have a right to safety, which may be threatened by dangerous restraint procedures, including airway obstruction, basket-holds, or prolonged pressure on the torso during takedowns. In addition, involuntarily committed individuals have a right to minimally

adequate treatment that will help them be free from unreasonable bodily restraint.

The standard used in determining whether a particular practice or omission violates the Constitution is whether the practice or omission constitutes a substantial departure from professional judgment or standards, *Youngberg v. Romeo,* 457 U.S. 307, 323-24 (1982).

While this constitutional standard may not apply to private facilities, patients in private facilities have a right to be free from negligent treatment, i.e., treatment that violates the standards of care.

FEDERAL REQUIREMENTS

In additional to constitutional standards, there are federal statutes and regulatory requirements regarding restraint of adults and youth.

Until fairly recently, the regulation of restraint and seclusion was mostly a matter of state law and, to a limited extent, accreditation standards. Most federal requirements are new since 1999, when the Centers for Medicare and Medicaid Services (CMS) issued rules regarding restraint at all Medicare and Medicaid participating hospitals. These rules are available at 42 C.F.R. 482.13.

In addition, the Children's Health Act of 2000, codified at 42 U.S.C. § 290ii & 290jj et seq., restricts the use of seclusion and restraint in federally funded inpatient facilities and community-based residential programs for youth. The Children's Health Act was established by Congress and restricts the use of restraint and seclusion with children and adolescents in psychiatric facilities receiving federal funds. Regulations regarding restraint in inpatient facilities promulgated pursuant to § 290ii are codified at 42 C.F.R. 482.13.

There are also accreditation standards regarding restraint. For example, The Joint Commission (formerly the Joint Commission on the Accreditation of Health Care Organizations or JCAHO) has accreditation requirements for inpatient psychiatric facilities regarding the oversight of restraint and seclusion. For example, the measurement of hours in restraint and seclusion is a "core indicator" for psychiatric inpatient facilities. This means that all accredited inpatient psychiatric facilities must provide The Joint Commission with quarterly data on the number of hours patients spend in restraint and seclusion, and the public is able to compare hospitals' performance on this core quality indicator.

Different kinds of facilities are subject to different federal regulations:

Different federal regulations and statutes apply to different kinds of facilities that serve children.

Inpatient Facilities

- *Hospital.* If the facility is a hospital, and it receives payments from Medicare or Medicaid, it is subject to Conditions of Participation relating to patients' rights, which include limitations on the use of restraint and seclusion. 42 C.F.R. 482.13(f). Any hospital, nursing facility, intermediate care facility, or other health care facility is also subject to the requirements of the Children's Health Act of 2000, 42 U.S.C. § 290ii, if it receives federal funding, whether directly or indirectly.
- *Psychiatric Residential Treatment Facility*. If a facility meets the definition of a "psychiatric residential treatment facility" (PRTF) under federal law, it must comply with certain specific regulations promulgated by the Center for Medicare and Medicaid Services (CMS) of the Department of Health and Human Services. A PRTF is "a facility, other than a hospital, that provides psychiatric services to individuals under the age of 21 in an inpatient setting." 42 C.F.R. 483.352. Many states are confused about just which, if any, programs in their states are PRTFs. In Massachusetts, Intensive Residential Treatment Programs (IRTPs) and Clinically Intensive Residential Treatment programs (CIRTs) meet

the definition. In January 2001, a Federal interim final rule was published on the use of restraint and seclusion in PRTFs to safeguard the treatment of child and adolescents under the age of 21. It established a Condition of Participation for PRTFs – 42 C.F.R. 483.350–483.376.

Community Facilities

- *Non-medical, community-based facility for children and youth.* If a facility is a "non-medical, community-based facility for children and youth" it is subject to a part of the Children's Health Act which prohibits the use of mechanical restraints, 42 U.S.C. § 290jj(b)(3)(B), and permits seclusion and physical restraint only in "emergency circumstances and only to ensure the immediate physical safety of the resident, a staff member or others, and only when less restrictive interventions have been determined to be ineffective." 42 U.S.C. § 290jj(b)(1)(A).

"Regulations implementing Part H (Requirements Relating to the Rights of Residents of Certain Facilities) of Title V of the Public health Service (PHS) Act have been promulgated, although regulations implementing Part I (Requirements relating to the rights of Residents of Certain Non-Medical, Community-Based Facilities for Children and Youth) of Title V of the PHS Act have not yet been promulgated. Moreover, regulations have not been issued regarding training of facility

staff." (See https://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.doc at p. 27, n.9.)

Also, consistent with section 3207 of the Children's Health Act, the Centers for Medicare and Medicaid Services (CMS) issued regulations setting forth patient rights to be free of medically unnecessary restraint and seclusion in several types of health care facilities and programs, including hospitals, in a final rule published at 71 Fed. Reg. 71378 (Dec. 8, 2006) that also applies to critical access hospitals; hospices, in a final rule published at 73 Fed. Reg. 32088 (June 5, 2008); Medicaid managed care, in a final rule published at 67 Fed. Reg. 40989 (June 14, 2002); programs of all-inclusive care for the elderly (PACE), in a final rule published at 71 Fed. Reg. 71244 (Dec. 8, 2006); and psychiatric residential treatment facilities for individuals under age 21, in an interim final rule published at 66 Fed. Reg. 7148 (Jan. 22, 2001). CMS also proposed regulations governing the use of restraint and seclusion in Community Mental Health Centers, at 76 Fed. Reg. 35684 (June 17, 2011).

The state Department of Early Education and Care, whose regulations apply, would license most such facilities in Massachusetts.

STATE REQUIREMENTS

Massachusetts's agencies have updated their rules to conform to the above-described federal requirements, as well as to be consistent with current professional judgment about the use of restraint. In addition, Massachusetts's agencies have promulgated their own rules regarding restraint in programs and facilities that serve youth. Such programs and facilities may be subject the rules of one or more of these state agencies.

Children and adolescents in Massachusetts may receive services from a variety of programs funded or regulated by any one of several state agencies. Although this chapter will consider the federal requirements and the Department of Mental Health (DMH) regulations applicable to inpatient facilities, with only occasional reference for comparison purposes to Department of Early Education and Care (DEEC), Department of Youth Services (DYS), and Department of Elementary and Secondary Education (DESE) standards, it is obviously important for service providers, consumers, family members, and advocates to know just which rules apply.

The following agencies that may be involved in a young person's life operate, contract for, or license programs in which the use of restraint is regulated:

DMH: In 2006, the Massachusetts Department of Mental Health (DMH) promulgated first-in-the-nation regulations applying Six Core Strategy© restraint reduction principles to both state and private licensed psychiatric facilities. These regulations brought

Massachusetts facilities fully into conformity with the federal rules, Joint Commission standards, and the consensus of professional judgment concerning the use of restraint and seclusion (DMH, 2006). DMH's regulations took effect on April 3, 2006. Revisions to these regulations, which retain the key protections developed in 2006, will be promulgated in 2018.

When a child or adolescent receives mental health services from a program or facility operated, under contract with, or funded by DMH. DMH has specific regulations on the use of restraint and seclusion. However, these regulations apply only to programs or facilities operated, licensed, or contracted for by DMH (except for those children's programs that, although contracted for by DMH, are licensed by DEEC; these programs follow DEEC regulations although additional contract requirements with DMH may exceed DEEC requirements).

- DMH operates (under contract with a public provider) inpatient units for adolescents located at the Worcester Recovery Center and Hospital. The DMH restraint and seclusion regulations apply to those units, which are considered part of the state psychiatric hospital in which they are located. These services are also certified by The Joint Commission and discussed in further detail below.
- DMH licenses all inpatient mental health units, including child and adolescent mental health units, in private and public (for example, city or county) hospitals. Although the Department of Public Health (DPH) may also license the hospital as a whole, the DMH regulations apply to

the mental health units within the hospital. While DMH regulations do not apply in the emergency departments of these hospitals, where restraint may also be used, DPH and DMH work cooperatively when a DMH client is restrained in the emergency department.

- DMH licenses IRTPs (104 CMR 27.04(1)) and contracts with providers to operate the service. IRTPs provide residential diagnosis and treatment to adolescents. IRTPs can admit youth on an involuntary basis. The DMH restraint regulations of 104 CMR 27.12 apply in the IRTPs. IRTPs are located on state hospital grounds (such as Worcester Recovery Center and Hospital, Taunton State Hospital, and Tewksbury State Hospital). They are accredited by The Joint Commission separately (under the behavioral health standard and not as part of the hospitals in which they are located).
- While DMH contracts for community mental health services programs for children and adolescents, DMH does not license those programs. Therefore, the restraint standards in the DMH community licensing regulations do not apply to these programs. Since most of these programs are licensed by DEEC, the DEEC restraint regulations apply instead. (DMH does license *adult* mental health community residential programs and does not allow the use of chemical or mechanical restraint or seclusion in those adult community programs. Physical restraint is allowed. 104 CMR 28.05. This is one area in which the rules applying to

adults in community mental health programs are more stringent than those applying to children.)

Department of Early Education and Care: Among other functions, DEEC licenses most non-hospital based programs for adolescents and children, including residential programs and DYS facilities. DEEC has regulations regarding the use of restraint, 102 CMR 3.07(7)(j), and policies: DEEC Chemical and Mechanical Restraint Policy, P-EEC-R&P-02, available at http://www.mass.gov/edu/birth-grade-12/early-education-and-care/licensing/licensing-resources-for-residential-and-placement-programs/chemical-and-mechanical-restraint-policy.html and DEEC Behavior Management and Physical Restraint Policy, P-EEC-R&P-03, available at http://www.mass.gov/edu/birth-grade-12/early-education-and-care/licensing/licensing-resources-for-residential-and-placement-programs/behavior-management-and-physical-restraint-policy.html. DEEC has multiple regulations that apply to different types of child residential programs.
These standards, particularly for Group Care, can be found at http://www.eec.state.ma.us/kr_regulations_main_gcc.aspx (CIRTs, a DMH intensive residential treatment program for children under the age of 13, must comply with these standards).

Department of Youth Services: DYS programs, both community and facility-based, regardless of the degree of security, are licensed by DEEC. Although DEEC has some regulations concerning use of restraint in locked secure detention or treatment programs, the DYS regulations on

restraint and seclusion are the main source of rules for DYS operated or contracted programs (109 CMR 5.05 (involuntary room confinement), 109 CMR 6.01- 6.04 (restraint)).

Department of Children and Families: DCF provides a variety of residential services for youth. Although DCF licenses foster homes and pre-adoptive placements, the licensing of group care settings is the responsibility of DEEC. The restraint regulations that will apply to a child in a program will depend on which agency (e.g., DMH, DEEC) is the licensing authority. Most programs have their licenses posted in a conspicuous place. You can also ask program staff what agency licenses it.

Department of Elementary and Secondary Education: DESE has restraint rules that apply to public elementary and secondary schools, including all Massachusetts public school districts, charter schools, virtual schools, educational collaboratives, and the school day of special education schools. These are found at 603 CMR 46.00 et seq. However, DEEC (not DESE) licenses the residential portions of special education schools, so DEEC regulations apply in those residential settings.

Department of Developmental Services (DDS): Although DDS has extensive restraint regulations, and very few children and adolescents with intellectual or developmental disabilities are served in DDS licensed programs. Instead, children with serious intellectual or developmental disabilities are likely to be in educational programs, either in their neighborhood schools or in day or residential schools.

Department of Public Health: DPH regulates and licenses general hospitals. Except for psychiatric units, which are also licensed by DMH and to which the DMH regulations apply, DPH rules apply elsewhere in the hospitals, including in hospital emergency departments. (If the hospital receives Medicaid funds, as almost all do, the hospital is bound by the CMS "Conditions of Participation," which include rules on restraint.)

The Joint Commission

Seclusion and restraint are among the highest priorities of certification and standard-setting agencies as well, such as The Joint Commission, which is the nation's oldest and largest accrediting body in health care.

The Joint Commission's accreditation standards are important because it accredits many inpatient facilities and some community programs. The Joint Commission's accredited facilities and programs are considered by CMS to meet its certification requirements, as long as the facility meets CMS restraint and seclusion certification and other requirements where they are more stringent than those of the Joint Commission. Massachusetts DMH also grants "deemed status" to Joint Commission-accredited facilities and programs to meet DMH licensing requirements, DMH requires facilities that it licenses to follow DMH's restraint and seclusion regulations.

The Joint Commission's revised restraint standards took effect in 2001. For the most part, they conformed to CMS Conditions of Participation involving patient rights (including restraint and

seclusion) and rules relating to psychiatric residential treatment centers for individuals under the age of 21.

While the Joint Commission receives many complaints about patient care and cannot respond to all of them, it has emphasized on its web site that complaints regarding restraint and seclusion will receive the highest investigative priority. This is also true at CMS, the federal Medicaid agency, which has suspended certification at a number of facilities due to violations of conditions of participation relating to restraint and seclusion.

LIABILITY

Because restraint is inherently dangerous, especially when used on children and adolescents, it is strictly limited and heavily regulated by federal and state law and regulations and by national licensing and accreditation standards. With a few exceptions, the limitations on the use of restraints with children and adolescents are considerably more exacting than those for adults. There are, for example, greater restrictions on the use and duration of restraint, and more stringent reporting requirements. Some types of community residential programs may not use mechanical restraint at all. Other programs are forbidden from using certain other forms of restraint and seclusion.

These are important matters. Not only does restraint have critical physical and clinical implications, but the improper use of restraint and seclusion, even in the absence of injury or

death, also may result in legal liability. There have been a number of lawsuits in Massachusetts related to restraint or seclusion events that resulted in injuries or death. Some have resulted in jury awards or settlements; still others have resulted in criminal or licensing investigations.

FEDERAL AND LEGAL RESOURCES

Where can I get further information on current federal requirements and efforts regarding restraint and seclusion of children and adolescents?

The Center for Medicare and Medicaid Services, https://www.cms.hhs.gov.

This website contains information about the Conditions of Participation for hospitals receiving Medicare and Medicaid funds, including question asked by surveyors to determine whether the hospital's attention to patient's rights meets the certification standards in the area of restraint and seclusion at http://www.cms.hhs.gov/CertificationandComplianc/13_PRTFs.asp#TopOfPage.

The Substance Abuse and Mental Health Services Administration of the Department of Health and Human Services has declared that reduction of restraint and seclusion is a national priority. Their National Center for Trauma-Informed Care and Alternatives to Seclusion and Restraint

(NCTIC) works to eliminate their use. Further information can be found at https://www.samhsa.gov/nctic.

The National Association of State Mental Health Program Directors has been a leader in developing a framework and techniques to prevent and reduce restraint and seclusion. The National Technical Assistance Center of the National Association of State Mental Health Program Directors has provided technical assistance to forty-eight states, including programs aimed specifically at reducing restraint and seclusion use in children's programs. For further information, see https://www.nasmhpd.org.

Which agencies provide legal services to children with severe emotional disabilities and mental illness?

Legal services: For a complete list of free legal services programs in Massachusetts go to https://www.masslegalservices.org.

The Center for Public Representation (CPR), https://centerforpublicrep.org/, CPR has a Children's Law Project which assists children and adolescents in obtaining home and community based services and avoiding unnecessary residential placement. CPR has offices in Newton (617-965-0776) and Northampton (413-586-6024).

The Disability Law Center (DLC), 11 Beacon Street, Suite 925, Boston, MA 02108, (617) 723-8455 or (800) 872-9992, http://www.dlc-ma.org/. DLC is the protection and advocacy agency for the Commonwealth of Massachusetts. If this agency receives a complaint from a child's parent about abuse, neglect, or violation of the laws or regulations in a children's facility, it has federal authority to investigate the complaint, including access to the facility, staff, and records (with the parent's consent in most, but not all, cases).

The Mental Health Legal Advisor's Committee (MHLAC), 24 School Street, Suite 804, Boston, MA 02108, (617) 338-2345, http://www.mhlac.org/. MHLAC is an arm of the Supreme Judicial Court of Massachusetts which provides advice on legal matters and represents clients who are having difficulties receiving needed mental health services.

Children's Law Center of Massachusetts (CLC), 298 Union St., 2d Floor, P.O. Box 710, Lynn, MA 01903, (781) 581-1977, http://www.clcm.org/. CLC represents children and youth in legal and administrative proceedings, including child abuse and neglect, runaways, custody and adoption disputes, school matters including suspension/expulsion cases, special education cases, SSI matters, access to adequate and appropriate services for children in the custody of DCF or DYS and the cases of severely handicapped children who are denied services due to bureaucratic red tape.

Massachusetts Advocates for Children (MAC), 5 Kingston Street, #2f, Boston, MA 02111, (617) 357-8431, https://massadvocates.org/. MAC provides legislative, policy, administrative and case advocacy on behalf of children from low-income families in areas of education, special education, child welfare and health. Bi-lingual intake (Spanish, English) is available.

Health Law Advocates, Inc. (HLA), 1 Federal Street, Boston, MA 02110, (617) 338-5241, https://www.healthlawadvocates.org/. HLA is a public interest law firm affiliated with Health Care for All. HLA provides education, outreach and free legal representation to eligible consumers who live or work in Massachusetts and seek improved access to health care. HLA has a Children's Mental Health Project.

The Committee on Public Counsel Services (CPCS), 44 Bromfield Street, Boston, MA (and multiple other regional locations), (617) 285-4666, https://www.publiccounsel.net/. CPCS provides representation to individuals in Mass. Gen. Laws, sections 7&8 cases (involuntary commitment) and *Rogers* (involuntary medication) hearings. It coordinates and oversees the work of attorneys who represent children in delinquency, care and protection (abuse and neglect) and CRA (child requiring assistance) cases.

References for Legal Limitations on the Use of Restraint & Seclusion on Children and Adolescents in Treatment Settings

Children's Health Act. (2000). *Public Law 106-310* (codified at 42 USC 2010). http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_public_laws&docid=f:publ310.106.pdf

Joint Commission on Accreditation of Healthcare Organizations. (2001). *Restraint and Seclusion Standards for Behavioral Health.* Oakbrook Terrace, IL: JCAHO.

Massachusetts Department of Early Education and Care. (1997, rev. 2004). *Policy Statement: Chemical and Mechanical Restraint.* http://www.mass.gov/edu/birth-grade-12/early-education-and-care/licensing/licensing-resources-for-residential-and-placement-programs/chemical-and-mechanical-restraint-policy.html

Massachusetts Department of Early Education and Care. (2001). *Standards for the Licensure or Approval of Residential Programs serving Children and Teen Parents (102 CMR 3.00).* http://www.eec.state.ma.us/docs/residential_regs.pdf

Massachusetts Department of Early Education and Care (1997, rev 2004). *Policy Statement: Behavior Management and Physical Restraint.* http://www.mass.gov/edu/birth-grade-12/early-education-and-care/licensing/licensing-resources-for-residential-and-placement-programs/behavior-management-and-physical-restraint-policy.html

Massachusetts Department of Mental Health. (2006). *Licensing and Operational Standards for Mental Health Facilities.* 104 CMR 27.00. http://www.mass.gov/eohhs/gov/laws-regs/dmh/regulations.html