

SAMPLE RESTRAINT & SECLUSION LAW LANGUAGE

Notation: *Restraint is a practice that is cruel, severe, unusual, and unnecessary when treatment has failed. Restraint and seclusion (R&S) should be prohibited, especially for use in children and youth. Until this becomes standard practice, restraint use should be limited to an emergency only. Existing or new protections should include language (if not already incorporated) as suggested below. The language is based on Federal and various state regulations and legal papers that can provide a guideline for restricting restraint use, in order to decrease the risk of death and serious risks, especially to children. It is not verbatim. Many states have restraint and seclusion use protections for schools, but greater protections are needed for schools and behavioral-psychiatric facilities, especially the latter, where residents can be goaded by staff or are influenced by psychotropic drugs that can create violent and suicidal effects. [See <https://www.cchrnt.org/pdfs/violence-report.pdf>] Such recommendations are also proposed to limit the risk to staff, including nurses, in administering restraints.*

Language inclusion (may be modified from state laws reviewed)

"Emergency" Definition: a situation in which attempted preventive de-escalatory or other techniques have not effectively reduced the potential for injury and it is immediately necessary to intervene to prevent:

- A) imminent probable death or substantial bodily harm to the person.
 - B) imminent physical harm to another because the person overtly or continually makes or commits threats, attempts, or other acts.¹
- [Texas]

R&S may only be used to ensure safety of the person or others during an emergency situation. The least restrictive emergency safety intervention must be used.² [CMS]

Seclusion Definition: The "involuntary confinement of a patient alone in a room or area from which the patient is physically prevented from leaving."³ [CMS]

Seclusion has the purpose:

- A) to ensure the immediate safety of the child or others; and
- B) no less restrictive intervention is likely to ensure the safety of the child/resident or others.

Seclusion may never be used:

- A) for coercion, retaliation, or humiliation, or
- B) due to inadequate staffing or for the staff's convenience.⁴ [Utah]

Restraint must never be used:

- A) as a punishment or disciplinary sanction;
- B) as part of a treatment plan or behavior modification plan;
- C) for the purpose of retaliation by staff.⁵ [Colorado]

R&S regulation applies to, minimally:

- Psychiatric and behavioral residential and outpatient hospitals and centers
- Any residential facility that treats persons with mental retardation/disabilities
- Residential support programs
- Child-care institutions
- Outdoor youth programs
- Therapeutic schools
- Foster homes
- Youth programs
- Any behavioral-psychiatric facility that receives Medicare or Medicaid funds for the treatment of behavioral, learning and mental health difficulties
- A non-hospital facility with a provider agreement with the State Medicaid Agency (SMA) to provide the inpatient services to those under the age of 21 with behavioral/learning disabilities

Restrictions and Prohibitions

- Written or "as needed" (PRN), R&S orders are prohibited. Simultaneous use of restraint and seclusion is prohibited.⁶ [CMS]
- Restraint or seclusion may only be imposed to ensure the immediate physical safety of the patient, a staff member, or others and must be discontinued at the earliest possible time.⁷ [CMS]
- Restraints shall only be used to control acute or episodic aggressive behavior when a patient/resident is acting in a manner as to be a clear and present danger to himself, to other patients/residents, or to employees, and only when less restrictive measures and techniques have proven to be or are less effective.⁸ [Pennsylvania Code]

- Facilities may not use a cruel, severe, unusual, or unnecessary practice on a child, including, inducing pain to obtain compliance, hyperextending joints, peer restraints, discipline or punishment that is intended to frighten or humiliate, spanking, hitting, shaking, or otherwise engaging in aggressive physical contact, and others.⁹ [Utah]

A) A person may not administer to a child or resident of a regulated facility a restraint that is proscribed that includes:

1. obstruction to the resident's airway, including a procedure that places anything in, on, or over the resident's mouth or nose;
2. impairs the resident's breathing by putting pressure on the torso;
3. interferes with a resident's ability to communicate;¹⁰ [Texas]
4. any type of technique that obstructs airways or impairs breathing, any technique that obstructs vision, and any technique that restricts a patient's ability to communicate, should not be used under any circumstances;
5. any form of restraint that involves compression of the patient's chest which can increase the risk of death by asphyxiation;
6. prone restraints that increase the risk of suffocation;
7. supine restraint (**person is** restrained in a face up position on the back on the floor or other surface, and physical pressure is applied to the body to keep the person in the supine position), as this can increase the risk of aspiration;
8. the use of face towels to prevent biting or spitting, as these may also increase risk;
9. prolonged restraint, as this can increase the risk of deep vein thrombosis and pulmonary embolism, particularly in patients already at risk for these conditions;
10. choke holds and pressure on the patient's neck or throat.¹¹ (*The Journal of the American Academy of Psychiatry and the Law*, Vol. 39, No. 4, 2011)

B) Restraint use is prohibited as cruel, severe, unusual, or unnecessary practice when it:

1. induces pain to obtain compliance;
2. hyperextends joints (stretches body parts beyond the normal range of motion; such a movement may potentially make that particular joint unstable, and in turn, increase the risk and likelihood for dislocation or other potential injuries of the joint);
3. uses peer restraints;
4. disciplines or punishes to frighten or humiliate;

5. requires or forces the child to take an uncomfortable position, including squatting or bending;
 6. has the purpose of punishing or humiliating, requiring or forcing the child to repeat physical movements or physical exercises such as running laps or performing push-ups;
 7. involves spanking, hitting, shaking, or otherwise engaging in aggressive physical contact;
 8. deprives the child of a meal, water, rest, or opportunity for toileting.¹² [Utah]
- Neither restraints nor confinements shall be employed for the purpose of punishment or for the convenience of any facility personnel. No restraints or confinements shall be employed except as ordered as an emergency action by a physician who documents the need for such restraints or confinements in the resident's clinical record.¹³ [Illinois]
 - CMS does not consider the use of weapons in the application of restraint as a safe and appropriate health care intervention. The term "weapons" includes pepper spray, mace, nightsticks, tasers, cattle prods, stun guns, pistols, and other such device. Handcuffs, manacles, shackles, and other chain-type restraint devices are considered law enforcement restraint devices and would not be considered safe, appropriate health care restraint interventions for use by hospital staff to restrain patients.¹⁴ [CMS]

Requirement Before Use

- Before a facility may use restraints, it must have a written policy that includes the following:
 1. describes time limitations on the use of a restraint or seclusion;
 2. requires immediate and continuous review of the decision to use a restraint or seclusion;
 3. requires documenting the use of a restraint or seclusion;
 4. describes record keeping requirements for records related to the use of a restraint or seclusion.¹⁵ [Utah]
- A written order from a physician acting within the scope of his institutional privileges shall be required before any use of restraint or seclusion.

- However, if a physician is not immediately available, one may issue a telephone order for seclusion or restraint, if such an emergency order is indicated and for a restricted time limit. [Utah]
- In both instances a face-to-face examination by a physician, nurse, or physician's assistant must occur within one hour of placement in restraints or seclusion.¹⁶ [*The Journal of the American Academy of Psychiatry and the Law*] The restraint or seclusion must be ordered by a psychiatrist or physician who is held responsible for that order.

Patient/Resident Rights

Patients must be provided a list of rights regarding the use of R&S upon admission to the facility and be made aware of how to file a complaint. The information shall include:

- Minimum standards for the use of R&S must protect patients' basic constitutional rights, such as life and liberty interests and freedom from cruel and unusual punishment or unnecessary bodily restraints. [*The Journal of the American Academy of Psychiatry and the Law*]¹⁷
- All patients have the right to be free from physical or mental abuse, and corporal punishment. All patients have the right to be free from restraint or seclusion, of any form, imposed as a means of coercion, discipline, convenience, or retaliation by staff. All patients have the right to be free from restraint or seclusion, of any form, imposed as a means of coercion, discipline, convenience, or retaliation by staff. Restraint or seclusion may only be imposed [as an emergency order] to ensure the immediate physical safety of the patient, a staff member, or others and must be discontinued at the earliest possible time.¹⁸ [CMS]
- Patients have the right to be free from the use of seclusion and behavioral restraints of any form imposed as a means of coercion, discipline, convenience, or retaliation by staff.¹⁹ [California Code of Regulations]
- Restraints shall not be employed as punishment, for the convenience of staff, as a substitute for a treatment program, or in any way that interferes with the treatment program. Restraints shall not be applied unless all other available techniques or resources have failed, and the least possible restrictions shall be used.²⁰ [Commonwealth of Pennsylvania Code]

- Patients have the right to be free from the use of a drug used in order to control behavior or to restrict the person's freedom of movement.²¹ [California Code of Regulations]
- Whenever a period of use of a restraint is initiated, the resident shall be advised of his or her right to have a person or organization of his or her choosing, including the Guardianship or Advocacy agency or outside advocacy/human rights agency be notified of the restraint.²² [Illinois]
- Each patient shall be treated with respect and with recognition of the patient's dignity by all employees of the service provider and by all licensed, certified, registered or permitted providers of health care with whom the patient comes in contact.²³ [Wisconsin]

Retaliation Prohibited

- A facility may not discharge or otherwise retaliate against an employee, client, resident, or other person because the employee, client, resident, or other person files a complaint, presents a grievance, or otherwise provides in good faith information relating to the misuse of restraint or seclusion at the facility.²⁴ [Texas]
- All use of chemical restraint shall be prohibited. A chemical restraint is defined as the use of drugs or chemicals for the specific and exclusive purpose of controlling acute or episodic aggressive behavior by a patient/resident.

Mandatory Inspections & Penalties

- The use of R&S to control a patient who does not pose an imminent risk of harm can result in serious sanctions through the legal system, of which patients/residents should be apprised.²⁵ [*The Journal of the American Academy of Psychiatry and the Law*]
- Not only is the punitive or custodial use of R&S potentially harmful to patients, mental health clinicians lack the legal authority to use R&S for punishment or control of a patient whose agitated or uncooperative behavior is troublesome but not dangerous.²⁶ [*The Journal of the American Academy of Psychiatry and the Law*]
- A health and human services or other relevant government agency that registers or otherwise licenses or certifies a facility shall conduct

regular inspections, including unannounced inspections of licensed facilities.²⁷ [Utah]

- Such agencies may:
 1. revoke, suspend, or refuse to renew the license, registration, or certification of a facility that violates R&S regulations.
 2. place on probation a facility that violates R&S regulations.
 3. impose an administrative penalty against the facility
 4. each day a violation continues or occurs is a separate violation for purposes of imposing a penalty.²⁸ [Texas]

- Criminal penalties shall be imposed for any proven unlawful use of R&S or violation of the regulations and, minimally on par with violating disclosing patients' health information under The Health Insurance Portability and Accountability Act of 1996 (HIPAA), including the facility that allowed the violation and the person(s) responsible for the violation(s), may face a criminal penalty of up to \$50,000 and up to 1-year imprisonment. The criminal penalties increase to \$100,000 and up to 5-year imprisonment if the wrongful conduct/violation involves false pretenses and to \$250,000 and up to 10-year imprisonment if the wrongful conduct/violating involves malicious harm or death.²⁹

Mandatory Reporting System

- As a requirement for receiving Medicare and Medicaid funds and state licensing, any behavioral or related facility must report promptly to the State licensing body and the appropriate State Protection and Advocacy system:
 1. All patient deaths and serious injuries among persons with mental illness or mental retardation, and to indicate whether restraint or seclusion was used during or immediately prior to the death or injury.³⁰

- All hospitals and facilities must report to the appropriate agency all deaths occurring while an individual is secluded and each death occurring within 24 hours of individual being released from seclusion, and deaths where it is reasonable to assume that the death resulted from seclusion.³¹ [CMS]

- Each facility shall report each serious occurrence to the designated state protection, advocacy and/or health agency. Serious occurrences to be reported include:

1. a minor child's death,
 2. a serious injury to a minor child, and
 3. a minor child's suicide attempt.³² [Michigan]
- CMS requires reporting of all serious occurrences to the State Medicaid Agency and the State Protection and Advocacy agency.³³
 - The Children's Health Act of 2000 Section 3207 requires any health care facility receiving Federal funds to notify the appropriate agency of R&S-related deaths.³⁴
 - A health and human services or other agency that regulates such facilities shall refer all incidents of death and serious injury occurring during or following restraint or seclusion use to the police for an independent investigation.

Facility licensees must:

1. report the use of a restraint or seclusion within one business day after the day on which the use of the restraint or seclusion occurred; and
2. report a critical incident within one business day after the day on which the incident occurred.³⁵ [Utah]

The health (or other) agency shall prepare reporting forms to be used by an institution/facility, shall aggregate the data collected from each institution, and shall annually report the data to the state-designated protection and advocacy or other agency.

Based on the California reporting system the following shall be collected and posted annually online:

- Number of Seclusion Episodes
- Number of Restraint Episodes
- Number of Seclusion Episodes (per 1,000 patient days)
- Number of Restraint Episodes (per 1,000 patient days)
- Total Hours of Seclusion
- Total Hours of Restraint
- Average Time in Seclusion
- Average Time in Restraints
- Emergency Medication Administrations Total
- Emergency Medication Administrations Total (per patient days)
- Seclusion & Restraint Related Staff Injuries
- Seclusion & Restraint Related Patient Injuries

- Seclusion & Restraint Related Deaths³⁶ [California]

Federal bill H.R. 587, "Stop Child Abuse in Residential Programs for Teens Act of 2008" (not enacted) but includes valuable language:

The government must:

- track abuse complaints for all residential providers and each program's history of violations, and deaths. Any owner or operator found to have violated the standards required could have faced a penalty of up to \$50,000 for each violation and specified that those injured "may bring suit or a claim demanding relief."³⁷

¹ Texas S.B. No. 325, "CHAPTER 322. USE OF RESTRAINT AND SECLUSION IN CERTAIN HEALTH CARE FACILITIES,"

<https://capitol.texas.gov/tlodocs/79R/billtext/html/SB00325F.HTM>

² Ellen W. Blackwell, MSW, "Seclusion and Restraint in Medicaid Programs," Center for Medicaid, CHIP, and Survey & Certification Interagency Autism Coordinating Committee, Joint Services/Safety Subcommittee Meeting, May 19, 2011, https://iacc.hhs.gov/meetings/iacc-meetings/2011/safety-subcommittee/may19/slides_ellen_blackwell_051911.pdf

³ Centers for Medicare & Medicaid Services, HHS, 42 CFR Ch. IV (10–1–14 Edition), § 482.13 Condition of participation: Patient's rights, <https://www.govinfo.gov/content/pkg/CFR-2014-title42-vol5/pdf/CFR-2014-title42-vol5-sec482-13.pdf>

⁴ Utah S.B. 127 Human Services Program Amendments, <https://le.utah.gov/~2021/bills/static/SB0127.html>, p. 31, lines 942, 948-950

⁵ The Colorado Revised Statutes (CRS), Title 26, Human Services Code, Article 20, "Protection of Persons from Restraint," CRS 26-20-103. Basis for use of restraint or seclusion, <https://law.justia.com/codes/colorado/2016/title-26/article-20/section-26-20-103/>

⁶ *Op. cit.*, "Seclusion and Restraint in Medicaid Programs"

⁷ *Op. cit.*, Centers for Medicare & Medicaid Services, HHS, 42 CFR Ch. IV

⁸ CHAPTER 13. USE OF RESTRAINTS IN TREATING PATIENTS/RESIDENTS, Pennsylvania Code,

<https://www.pacodeandbulletin.gov/Display/pacode?file=/secure/pacode/data/055/chapter13/chap13toc.html>

⁹ *Op. cit.*, Utah S.B. 127, pp. 29-30, lines 884-905

¹⁰ *Op. cit.*, Texas S.B. No. 325

¹¹ *Op. cit.*, *The Journal of the American Academy of Psychiatry and the Law*, Vol. 39, No. 4

¹² *Op. cit.*, Utah S.B. 127, pp. 29-30, lines 883-903

¹³ Illinois Compiled Statutes, Chapter 210 - HEALTH FACILITIES AND REGULATION, Section 45/2-106, <https://www.ilga.gov/legislation/ilcs/fulltext.asp?DocName=021000450K2-106>

¹⁴ CMS State Operations Manual, Appendix A - Survey Protocol, Regulations and Interpretive Guidelines for Hospitals, Section §482.13(e), https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/som107ap_a_hospitals.pdf, p. 120

¹⁵ *Op. cit.*, Utah S.B. 127, p. 30, lines 913-918

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- ¹⁶ *Op. cit.*, *The Journal of the American Academy of Psychiatry and the Law*, Vol. 39, No. 4, 2011
- ¹⁷ *Ibid.*
- ¹⁸ *Op. cit.*, Centers for Medicare & Medicaid Services, HHS, 42 CFR Ch. IV
- ¹⁹ California Health and Safety Code - HSC § 1180.4(k),
https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=HSC&division=1.5.&title=&part=&chapter=&article=
- ²⁰ *Op. cit.*, Pennsylvania Code
- ²¹ *Op. cit.*, California Health and Safety Code - HSC § 1180.4(k)
- ²² *Op. cit.*, Illinois Compiled Statutes
- ²³ Wisconsin Administrative Code, Chapter DHS 94, PATIENT RIGHTS AND RESOLUTION OF PATIENT GRIEVANCES, Subchapter II - Patient Rights, DHS 94.24 (2)(b),
https://docs.legis.wisconsin.gov/code/admin_code/dhs/030/94/ii/24
- ²⁴ *Op. cit.*, Texas S.B. No. 325
- ²⁵ *Op. cit.*, *The Journal of the American Academy of Psychiatry and the Law*, Vol. 39, No. 4, 2011
- ²⁶ *Ibid.*
- ²⁷ *Op. cit.*, Utah S.B. 127, p. 16, lines 470-474
- ²⁸ *Op. cit.*, Texas S.B. No. 325
- ²⁹ "A Review of Basic Patient Rights in Psychiatric Care," Nursing Center, *JONA's Healthcare Law, Ethics, and Regulation*, Oct/Dec.2010, Vol. 12, No. 4, page 117 – 125,
https://www.nursingcenter.com/journalarticle?Article_ID=1095355
- ³⁰ "Medicaid Program; Use of Restraint and Seclusion in Psychiatric Residential Treatment Facilities Providing Psychiatric Services to Individuals Under Age 21," Health Care Financing Administration, 66 FR 7147, 22 Jan. 2001,
<https://www.federalregister.gov/documents/2001/01/22/01-1649/medicaid-program-use-of-restraint-and-seclusion-in-psychiatric-residential-treatment-facilities>
- ³¹ *Op. cit.*, Centers for Medicare & Medicaid Services, HHS, 42 CFR Ch. IV - The Final Rule mirrors this requirement, but requires hospitals to report deaths only to CMS. 42 C.F.R. § 482.13(g);
https://www.ndrn.org/images/Documents/Issues/Restraint_and_Seclusions/NDRN_Final_Rule_Summary.pdf
- ³² Michigan's law: MCL Act 116 of 1973, CHILD CARE ORGANIZATIONS, Sections 722.112b through Section 722.112e Personal restraint or seclusion; use; limitations; requirements; order; evaluation; face-to-face assessment; definitions. It has considerable language but ineffective.
[http://www.legislature.mi.gov/\(S\(k3aqqmihj4ma4q05cxsscrtx\)\)/mileg.aspx?page=getObject&objectName=mcl-722-112e](http://www.legislature.mi.gov/(S(k3aqqmihj4ma4q05cxsscrtx))/mileg.aspx?page=getObject&objectName=mcl-722-112e)
- ³³ *Op. cit.*, "Seclusion and Restraint in Medicaid Programs"
- ³⁴ *Ibid.*
- ³⁵ *Op. cit.*, Utah SB 127, p. 14, lines 413-415
- ³⁶ "Current Seclusion and Restraint Reports 2020," California Department of State Hospitals,
https://www.dsh.ca.gov/Publications/Reports_and_Data/Seclusion_and_Restraint/Current_SR_Reports.html
- ³⁷ H.R.5876 - Stop Child Abuse in Residential Programs for Teens Act of 2008, 110th Congress (2007-2008), Introduced, <https://www.congress.gov/bill/110th-congress/house-bill/5876/text>