

Steven L. Beshear
Governor



Terry Holliday, Ph.D.
Commissioner of Education

EDUCATION AND WORKFORCE DEVELOPMENT CABINET
DEPARTMENT OF EDUCATION

Capital Plaza Tower • 500 Mero Street • Frankfort Kentucky 40601
Phone: (502) 564-4770 • www.education.ky.gov

August 8, 2012

Mr. William Scott
Executive Director
Kentucky School Board Association (KSBA)
260 Democrat Drive
Frankfort, KY 40601

Mr. Wilson Sears
Executive Director
Kentucky Association of School Superintendents (KASS)
101 Woodland Drive
Somerset, KY 42501

Mr. Wayne Young
Executive Director
Kentucky Association of School Administrators (KASA)
152 Consumer Lane
Frankfort, KY 40601

Mr. Jon Akers
Executive Director
Kentucky Center for School Safety (KCSS)
Eastern Kentucky University
105 Stratton Building
521 Lancaster Avenue
Richmond, KY 40475

Dear Executive Directors:

I received your recent letter to the Kentucky Board of Education (KBE) opposing many aspects of the draft regulation, 704 KAR 7:160 Use of Restraint and Seclusion in Public Schools, version dated 7-12-12. I am happy to provide you with a response and with clarification on this important topic.

1. The U.S. Department of Education has endorsed its Resource Document.

First, in your letter, you stated that it is your understanding that the U.S. Department of Education's (USED) May 12, 2012 Restraint and Seclusion: Resource Document is "obtained from, but **not** endorsed by, the federal government and language for legislation currently **proposed** in Congress.... [T]hat document contains a statement that nothing in the document represents the positions or policies of the U.S. Department of Education, and further states the U.S. Department of Education does **not** officially endorse that document." (Letter at 1, 2 [emphasis original].)

Although the U.S. Department of Education's May 12, 2012 Restraint and Seclusion: Resource Document ("Document") does contain the standard statement that the federal agency is not endorsing the opinions or products of the private sector resources that the federal agency included in the Document, in its Attachment B, this statement does not in turn render the Document unendorsed by the USED. To the contrary, throughout the Document, the USED describes its commitment to the fifteen (15) principles provided in the Document for states', school districts', schools', parents' and other stakeholders' consideration "when developing or revising policies and procedures on the use of restraint and seclusion." (The Document's cover letter authored by USED Secretary Arne Duncan at iii.) The multiple mentions by USED in the Document that the 15 principles are endorsed by USED are provided below.

The U.S. Department of Education issues this Resource Document to provide guidance, and describe fifteen principles that States, school districts, school staff, parents, and other stakeholders may find helpful to consider when States, localities, and districts develop practices, policies, and procedures on the use of restraint and seclusion in schools. Our goal in providing this information is to inform States and school districts about how they can help to ensure that schools are safe learning environments for all students.

...

The purpose of this Resource Document is to present and describe 15 principles for State, district, and school staff; parents; and other stakeholders to consider when States, localities, and districts develop policies and procedures, which should be in writing on the use of restraint and seclusion. The principles are based on the nine principles that Secretary of Education Arne Duncan articulated in a 2009 letter to Chairman Christopher Dodd, Chairman George Miller, and Representative Cathy McMorris Rodgers in response to proposed legislation on restraint and seclusion. In his letter, the Secretary affirmed the Department's position that restraint and seclusion should not be used except when necessary to protect a child or others from imminent danger of serious physical harm. Since the Secretary issued his 2009 letter, the Department, working with the Department of Health and Human Services, further developed and refined the principles. The Department and the Department of Health and Human Services urge States, local districts, and schools to adopt policies that consider these 15 principles as the framework for the development and implementation of policies and procedures related to restraint and seclusion to help ensure that any use of restraint or seclusion in schools does not occur, except when there is a threat of imminent danger of serious physical harm to the student or others, and occurs in a manner that protects the safety of all children and adults at a school. The goal in presenting these principles is to help ensure that all schools and all learning environments are safe for all children and adults.

(The Document, available at <http://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf>, at 2, note 1; 6 and 12 [emphasis added].) Therefore the Kentucky Department of Education (KDE) interprets the Document as a resource issued by, **and endorsed by**, the USED for use for states', school districts', schools', parents' and other stakeholders' consideration "when developing or revising policies and procedures on the use of restraint and seclusion." (The Document's cover letter authored by USED Secretary Arne Duncan at iii.) Most importantly, the proposed KBE regulation is our effort to develop a policy utilizing a safer and more workable standard for restraints and seclusions in Kentucky schools.

2. The regulation should decrease the number of staff or student injuries resulting from the restraint or seclusion of students.

Your letter's assertions that staff and student injuries will increase under the restraint and seclusion regulation conflict with the USED and its data, referenced in the Document, which concluded that **fewer** staff and student injuries occur when school staff **do not** restrain or seclude students. The assertions in your letter ignore the draft regulation's allowance for the use of restraint or seclusion of a student where the "student's behavior poses an imminent danger of serious physical harm to self or others" as long as the school staff "use only the amount of force reasonably believed to be necessary to protect the student or others from imminent danger of serious physical harm to self or others." (Draft regulation at 6, line 22; 7, line 8; 8, lines 15-16 and 21-23.)

The current standard, which is embodied in the KSBA model policies, does not provide more protection of students or staff from injury than the draft regulation. You stated in your letter, "The current Kentucky standard utilized in public school board policies across Kentucky is the use of reasonable restraint to protect individuals from physical injury, to obtain possession of a weapon or a dangerous object..." Under the draft regulation, properly trained staff would be able to use the amount of force reasonably believed to be necessary to protect the student or others from imminent danger of serious physical harm to self or others. This would place in Kentucky law the requirement for training, for positive behavior support and intervention, and for the restriction of restraint and seclusion to the category of last resort while leaving it available as needed to protect the student or others from imminent danger of serious physical harm.

As most of you are aware, the current Kentucky standard of acceptable restraint and seclusion of students by public schools is pursuant to the Kentucky School Boards Association's (KSBA's) model policy, which most school districts have adopted. The significant difference between the KSBA and the regulation's standard is that the KSBA standard allows for the use of restraint and seclusion of students for the sole purpose of protecting property. The draft regulation does not.

It is important to note that any argument that student or staff safety will be jeopardized by the draft regulation's restrictions is premised upon a false assumption that restraint or seclusion could not be used when a student uses property to present an imminent threat of harm to self or other persons. The fact that the student's actions may also damage property does not somehow exclude the situation from one in which restraint or seclusion could be used, if the student's actions present an imminent threat of harm to self or other persons. To conclude otherwise defies logic.

3. The regulation's prohibition on restraint or seclusion to defend property both promotes safety and is an easier standard for staff to implement.

Although your organizations have expressed concern regarding the financial loss that may occur as a result of student behavior and a belief that the use of restraint or seclusion in defense of property may reduce or eliminate that loss, this is not a defensible use of restraint or seclusion. Restraint or seclusion of a student should only be conducted by a trained school staff member; only when positive behavior support has not de-escalated a student's behavior; and only when the student's behavior actually poses a threat of imminent danger to the student or other persons. Because there is the potential for physical injury resulting from a restraint or seclusion and because there have been student deaths in our country resulting from restraint or seclusion, the USED and the KDE have concluded that no financial amount is worth this risk of harm.

There have to be ways for school staff to secure more valuable property, such as technology equipment, to eliminate or reduce the opportunity for harm to property. These precautions could lead to not only the elimination of the opportunity for destruction but also of theft of more valuable school property.

Finally, the bright-line rule prohibiting the use of restraint or seclusion in the defense of property, in the absence of a threat to the safety of persons, is a much more workable standard than a rule allowing restraint or seclusion to protect property of higher value. A rule otherwise would prove nebulous and unworkable for staff as it would require staff to assess the value of property, during an escalated situation, to determine whether or not restraint or seclusion could properly be used to defend a particular piece of property. Such a rule would place persons in jeopardy of harm as well increase the potential liability for school districts and their staff.

4. The regulation will not lead to a mass exodus of staff or students.

The more workable, safer standard for restraint or seclusion provided in the draft regulation will not lead to a mass exodus of staff and students. This assertion is premised upon the other concerns expressed in your letter, which are addressed herein. It is not the standard under which restraint or seclusion is allowed that leads to the exit of most school staff, but the issue of classroom management itself. As stated on the Kentucky Center for School Safety (KCSS) website at <https://www.kycss.org/classroommanagement.php>:

Classroom management seems to entail many aspects of the actual teaching environment. Educators have various definitions and many researchers feel that classroom management highly affects the extent of classroom behavior. Wikipedia, the leading user-contributed encyclopedia states that classroom management is a term used by many teachers to describe the process of ensuring that classroom lessons run smoothly despite disruptive behavior by students. The term also implies the prevention of disruptive behavior. It is possibly the most difficult aspect of teaching for many teachers and indeed experiencing problems in this area causes some to leave teaching altogether.

The KCSS website provides resources, such as information from the Kentucky Center for Instructional Discipline (KYCID)¹, promoting the use of positive behavioral interventions and supports (PBIS), a core aspect of the draft regulation and a key to increasing the safety of staff and students. Information on KYCID and the promotion and value of PBIS is provided on the KCSS website at <https://www.kycss.org/clear/best/kycid.php>.

5. The regulation is not a less workable standard for school district staff than the current KSBA model policy on restraint and seclusion.

As explained above, the regulation's standard is more workable for school district staff and does not place a "snap judgment" requirement on staff that does not already exist. Under the KSBA model policy on

¹ As stated on KCSS's website at <https://www.kycss.org/clear/best/kycid.php>:

In 2001, the Commonwealth of Kentucky has sought to create a more positive, safe and supportive learning environment for both staff and students via the Kentucky Instructional Discipline and Support Schools project (K.I.D.S.). Since then the Department of Education has expanded this program into a statewide center that will reach every school and strive to establish a constructive learning atmosphere for students.

restraint and seclusion, staff currently have to weigh the circumstances they are facing to determine whether or not restraint or seclusion can be utilized: "The current Kentucky standard utilized in public school board policies across Kentucky is the use of reasonable restraint to protect individuals from physical injury, to obtain possession of a weapon or a dangerous object, and to protect property from serious harm." (Letter at 1.)

Under the current KSBA model policy, school staff have to determine whether or not the use of restraint is reasonable and then act accordingly at that moment. Under the regulation's standard, school staff will receive training to better prepare them for this moment and will have a bright-line rule prohibiting the use of restraint or seclusion to protect property. School staff's ability to assess the appropriateness of the use of restraint or seclusion under the standard's regulation will be **positively impacted** by this regulation.

6. This regulation will not place a significant financial burden on the districts.

Our updated information on the cost of training for districts does not indicate that this requirement will place a significant financial burden on the districts for two reasons. First, as a train-the-trainer model is appropriate for this training, each school district will only have to have one employee trained directly by an appropriate training organization, and that single employee can then train others in the district. Second, our information is that the training for the single school district employee will cost less than \$1,000 for initial training, and annual refresher training will cost substantially less.

7. The regulation's directives will not violate federal law, and the training to be conducted under this regulation may be partially funded with IDEA funds.

The KDE has received and reviewed feedback from the Local Superintendents Advisory Council (LSAC) at its most recent meeting. The KDE has made revisions of the draft regulation, in response to LSAC's feedback, and will be presenting the draft regulation in this revised form to the KBE at its August meeting (copy enclosed). Additionally, the KDE has received guidance from the USED, indicating that IDEA funds may be expended for a proportionate amount of the restraint and seclusion training.

Enclosed with this letter is the USED guidance on the use of ARRA IDEA funds. This guidance also can be found on the USED website at <http://www2.ed.gov/policy/gen/leg/recovery/guidance/idea-b-reform.pdf>. Pages 17-18 of the ARRA IDEA guidance discuss a model for this use of ARRA IDEA funds. This guidance provides examples of the appropriate use of ARRA IDEA funds, in conjunction with other funds, and USED has communicated to the KDE that these examples could also be applied to the use of IDEA funds for the restraint and seclusion training.

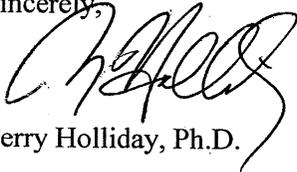
8. This draft regulation's prohibition on the use of restraint or seclusion to force compliance does not translate into a prohibition on the use of restraint or seclusion to protect the safety of students and staff.

Contrary to the assertion and conclusion reached in your letter, the inclusion of a request for compliance, in an escalated situation presenting an imminent threat to the safety of persons in a school, does not eliminate the allowance of restraint or seclusion when needed to protect the safety of persons, as is plainly stated in the draft regulation. There can be no other reading of the regulation's language. As the language of the regulation states, the prohibition on the use of restraint or seclusion to force compliance applies when there is **only** a request for compliance, not when a threat to the imminent safety of persons is presented.

9. This draft regulation's debriefing requirements are not an onerous burden for school district staff.

As stated above, the KDE has received and has responded to the feedback we received from the LSAC on this aspect of the draft regulation. The KDE will be providing a revised version of the draft regulation to allay many of the concerns expressed by the LSAC members at their most recent meeting. It is the process of regulation drafting and stakeholder input that leads to the crafting of law that best serves and reflects the needs of the people of our state. We wholeheartedly embrace this process and its fruits, including the feedback we received from your groups over the past six months resulting in this version of the regulation.

Sincerely,



Terry Holliday, Ph.D.

Enclosures

c: Kentucky Board of Education
Educational Cooperative Directors
LSAC Members
Kevin C. Brown
Felicia Smith