



PHYSICAL RESTRAINT AND SECLUSION OF KENTUCKY'S SCHOOLCHILDREN: A GUIDE TO 704 KAR 7:160

By: David Wickersham

In 2009, the Government Accountability Office issued a report that disclosed hundreds of allegations that schoolchildren, most with disabilities, had suffered trauma, injury, and death from the use of physical restraint and seclusion in schools.¹ The National School Boards Association has determined that nearly 80 percent of physical restraints and over 61 percent of seclusions involve special education students.²

Also in 2009, the Office of Civil Rights surveyed Kentucky's schools to determine the extent of physical restraint and seclusion in our Commonwealth. While response was compulsory, only 104 of 174 Kentucky school districts responded. These incomplete self-reports revealed startling facts about school discipline: districts self-reported 2,543 uses of physical restraint (339 of which involved students without disabilities), 926 mechanical restraints (20 of which involved students without disabilities), and 1,833 instances of seclusion (390 of which involved students without disabilities).³

The Kentucky Education Professional Standards Board documented 310 allegations of teacher assaults on students between 2006 and 2012.⁴ Assaults by teachers upon students comprise the second most frequent complaint lodged with the Board.⁵ These 310 cases represent those that are so conspicuous and outrageous that formal action is taken. It is impossible to know how many incidents were unreported. Shockingly, between 2008 and 2012, over half of these cases involved alleged assaults upon special education students.⁶

The Kentucky Department of Public Advocacy, Protection and Advocacy Division, has documented over 100 complaints alleging the abuse and misuse of restraint and seclusion in 63 Kentucky counties.⁷ Protection and Advocacy has documented cuts, abrasions, bruises, friction burns, sprains, broken bones and fractures, psychological trauma, miscarriage, hemorrhage, and shunt displacement resulting from improper physical restraint and seclusion and has found that individual students are often restrained multiple times per day or secluded all day.

In May 2012 the United States Department of Education issued a resource document that contained principles for states and interested stakeholders to consider in addressing physical restraint and seclusion.⁸ Even before this guidance document was issued, federal legislation had been proposed, and state agencies and governments outside of Kentucky had begun to implement regulations, statutes, and guidance to restrict the use of physical restraint and seclusion in schools.⁹

In Kentucky, physical restraint and seclusion was regulated in mental health treatment facilities by 1982,¹⁰ for hospitalized children by 1988,¹¹ in child care centers by 1991,¹² and in juvenile detention facilities¹³ and nursing homes¹⁴ by 2005. The Commonwealth had no regulation governing the use of physical restraint or seclusion for Kentucky's population of over 675,000 schoolchildren.¹⁵

In the face of this compelling information, and charged by KRS 156.160 and KRS 158.444 to promulgate regulations providing for the physical welfare and safety of children in the public schools, the Kentucky Board of Education and the Kentucky Department of Education began work on an administrative regulation to guide school personnel in the safest use of physical restraint and seclusion.

During the regulatory process, a tremendous volume of anecdotal, documentary, written, and testimonial comment and feedback was received from educational partners and interested parties. After extensive and collaborative drafting, the regulation was completed and became effective on February 1, 2013.

The regulation was created against the backdrop of KRS Chapter 503, which prescribes the statutory rights of school personnel to protect themselves, protect others, protect property, and maintain order. Because the regulation was composed to avoid conflict with KRS Chapter 503 and in recognition of the primacy of statutes over regulation,¹⁶ several statutes were explicitly imbedded in 704 KAR 7:160. This integration clarified the function of the regulation, to promote the safety of students and school personnel, and the conformity of the regulation to existing law.

In recognition of the frequent use of physical restraint to promote student safety, the regulation restricts, but does not forbid, physical restraint. Likewise, the regulation restricts, but does not forbid, seclusion. Because seclusion inevitably involves the confinement of students, and because KRS 503.010 explicitly permits confinement as a technique that may be used in self-defense or the defense of others, the regulation may not lawfully ban the practice of seclusion.¹⁷

As adopted, the regulation defines physical restraint as

a personal restriction that immobilizes or reduces the ability of a student to move the student's torso, arms, legs, or head freely, but does not include: (a) Temporary touching or holding of the hand, wrist, arm, shoulder, or back for the purpose of encouraging a student to move voluntarily to a safe location; (b) A behavioral intervention, such as proximity control or verbal soothing, used as a response to calm and comfort an upset student; (c) Less restrictive physical contact or redirection to promote student safety; or (d) Physical guidance or prompting when teaching a skill or redirecting the student's attention. 704 KAR 7:160, Section 1(10).

This definition is enhanced by the listing of activities that do not constitute physical restraint and assuages concerns that the regulation forbade all physical contact between students and school personnel.

The regulation defines seclusion as "the involuntary confinement of a student alone in a room or area from which the student is prevented from leaving but does not mean classroom timeouts, supervised in-school detentions, or out-of-school suspensions." 704 KAR 7:160, Section 1(15). This definition is likewise enriched by the listing of common disciplinary techniques that do not constitute seclusion.

Physical restraint may be used when "the student's behavior poses an imminent danger of physical harm to self or others and as permitted under [penal code provisions] KRS 503.050, 503.070, and 503.110." 704 KAR 7:160, Section 3(3)(a). The physical restraint may not

interfere with the student's ability to communicate in the student's primary language or mode of communication, unless the student uses sign language or an augmentative mode of communication as the student's primary mode of communication and the implementer determines that freedom of the student's hands for brief periods during the restraint appears likely to result in physical harm to self or others.

704 KAR 7:160, Section 3(3)(b). The student's physical and psychological well-being must be monitored for the duration of the physical restraint.¹⁸ Before physically restraining a student, school personnel must determine that less restrictive behavioral interventions have been ineffective in stopping the imminent danger of physical harm to self or others, except in the case of a clearly unavoidable emergency situation posing imminent danger of physical harm to self or others.¹⁹ "School personnel implementing the physical restraint [should be] appropriately trained ... except to the extent necessary to prevent physical harm to self or others in clearly unavoidable emergency circumstances where other school personnel intervene and summon trained school personnel as soon as possible." 704 KAR 7:160, Section 3(3)(d).

School personnel shall not impose "physical restraint if they know that physical restraint is contraindicated based on the student's disability, health care needs, or medical or psychiatric condition." 704 KAR 7:160, Section 2 (f). There is precedent for imputing such knowledge under certain circumstances. Under existing regulation, 707 KAR 1:340, a local educational agency (school district) and its school personnel are "deemed to have knowledge that a child is a child with a disability if the teacher of the child, or other personnel of the [local educational agency], has expressed concern about a pattern of behavior or performance of the child directly to the director of special education or other supervisory personnel of the [local educational agency]. 707 KAR 1:340, Section 16.

The statistically rare "bad actor," employed in a school setting, would likely face scrutiny if attempting to maintain deliberate ignorance of facts that would contraindicate the use of physical restraint. The Sixth Circuit Court of Appeals has repeatedly held that knowledge includes the deliberate avoidance of knowledge.²⁰ School districts will presumably advise school personnel to act in good faith to preserve the justification defenses available under KRS Chapter 503.

Seclusion may be used if "[t]he student's behavior poses an imminent danger of physical harm to self or others[.]" 704 KAR 7:160, Section 4(2). The student must be visually monitored for the duration of the seclusion.²¹ School personnel must determine that "[l]ess restrictive interventions have been ineffective in stopping the imminent danger of physical harm to self or others." *Id.* Finally, school personnel implementing the seclusion must be appropriately trained to use seclusion.²²

Parents will be notified within 24 hours if their child is physically restrained or secluded.²³ School personnel will document the use of physical restraint or seclusion by completing a written record that reports the circumstances leading to and during the physical restraint or seclusion, and includes plans to reduce the future need for such intervention.²⁴ Upon the request of a parent or emancipated student, a debriefing will occur that provides more detailed information about the use of physical restraint or seclusion.²⁵ Annually, schools districts will report the number of uses of physical restraint and seclusion, the number of students affected, the number of injuries, and the frequency with which law enforcement officers are involved.²⁶

A critical, non-controversial component of the regulation is the training requirement. All school personnel will receive annual training in the use of positive behavioral supports and interventions to increase positive student behavior and decrease inappropriate or dangerous student behavior.²⁷ A smaller core team of school personnel will receive more extensive training, and practice, in the use of physical restraint and seclusion.²⁸

During the regulatory process, concerns were expressed about the ability of school personnel to maintain order, to protect themselves, to protect students, and to protect property in light of the regulation. The incorporation of elements of KRS Chapter 503 assists school personnel in determining the circumstances in which they may act and in identifying the standards to which they must adhere. The regulation explicitly states that physical force may be used

as permitted under penal code provisions KRS 503.050, KRS 503.070, and KRS 503.110. A brief summary of those statutes is necessary to more fully illustrate the regulation.

Physical force is defined as “force used upon or directed toward the body of another person and includes confinement.” KRS 503.010(4). Physical force may justifiably be used when the actor believes that such force is necessary to protect herself against the use or imminent use of unlawful physical force by the other person.²⁹ “Imminent” means impending danger.³⁰ “Unlawful” means contrary to law or, where the context so requires, not permitted by law. It does not mean wrongful or immoral[.]” KRS 500.080(16).

Deadly physical force may be used only when the actor “believes that such force is necessary to protect himself against death, serious physical injury, kidnapping, sexual intercourse compelled by force or threat, or a felony involving the use of force... [.]” KRS 503.050(2). “‘Deadly physical force’ means force which is used with the purpose of causing death or serious physical injury or which the [actor] knows to create a substantial risk of causing death or serious physical injury. KRS 503.010(1).

An actor may use physical force to protect a third person against the use or imminent use of unlawful physical force by another person.³¹ An actor may use deadly physical force to protect another only when the actor “believes that such force is necessary to protect a third person against imminent death, serious physical injury, kidnapping, sexual intercourse compelled by force or threat, or other felony involving the use of force... [.]” KRS 503.070(2).

School personnel may use physical force to protect property, as permitted under KRS Chapter 503.³² Force may be used to protect property only when the actor believes that such force is immediately necessary to prevent criminal trespass; robbery; burglary; or another felony involving the use of force, or theft, criminal mischief; or any trespassory taking of tangible, movable property in the actor’s possession or in the possession of another person for whose protection the actor acts.³³

School personnel may use deadly force to protect property only upon a belief that the student against whom such force is used is attempting to dispossess the actor of her dwelling or committing or attempting to commit a burglary, robbery, or other felony involving the use of force of such dwelling or committing or attempting to commit arson of a dwelling or other building in the actor’s possession.³⁴

Chapter 503 also prescribes the mental states implicated in the justifiable use of force. If the actor “is wanton or reckless in believing the use of any force, or the degree of force used, to be necessary or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of the use of force,” the justification defense is unavailable. KRS 503.120(1).

A person acts wantonly

when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. KRS 501.020(3).

A person acts recklessly when he fails to perceive a substantial and unjustifiable risk.³⁵ The risk must be of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.³⁶

The choice of evils statute is also implicated. “[C]onduct which would otherwise constitute an offense is justifiable when the [actor] believes it to be necessary to avoid an imminent public or private injury greater than the injury which is sought to be prevented by the statute defining the offense charged, except that no justification can exist under this section for an intentional homicide.” KRS 503.030(1).

If an actor believes that conduct which would otherwise constitute an offense is necessary, but is wanton or reckless in having such belief, justification is unavailable in a prosecution for any offense for which wantonness or recklessness suffices to establish culpability.³⁷

Teachers may justifiably use physical force if they believe that the force used is necessary to promote the welfare of a student or to maintain reasonable discipline in a school, class, or other group and the force that is used is not designed to cause or known to create a substantial risk of causing death, serious physical injury, disfigurement, extreme pain, or extreme mental distress.³⁸

Kentucky’s statutes and 704 KAR 7:160 permit the flexibility sought by school personnel in electing to use physical restraint or seclusion, but also require school personnel to make wise choices that are consistent with their rights and obligations.

The regulation is designed to train school personnel to improve the school climate, and to provide pedagogical and physical tools to either defuse or manage dangerous student behavior.

Based on the successes of other states that have restricted the use of physical restraint and seclusion,³⁹ there is reason to expect that the regulation, implemented by the professional educators and administrators that students and parents have come to rely upon, will improve student outcomes and safety in Kentucky’s school districts. **B&B**



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- 1 Governmental Accountability Office, GAO-09-719T, *Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers* (2009).
- 2 Nirvi Shah, *Data Reveal Disparities in Schools' Use of Restraints*, Education Week, March 13, 2012 (available at http://www.edweek.org/ew/articles/2012/03/13/24data_h31.html?tkn=VXPFmlhTC%2Fz%2FrFhbhlclEXONxt5cBU%2Bxdjnx&cmp=clp-edweek).
- 3 Office of Civil Rights, *Civil Rights Data Collection* (2009) (searchable database available at <http://ocrdata.ed.gov/DistrictSchoolSearch#schoolSearch>).
- 4 E-mail from Alicia A. Sneed, Director of Legal Services, Kentucky Educational Professional Standards Board, to Kevin Brown, Associate Commissioner and General Counsel, Kentucky Department of Education (Nov. 28, 2012, 4:38 p.m., EST) (on file with author).
- 5 *Id.*
- 6 *Id.*
- 7 Commonwealth Council on Developmental Disabilities and Kentucky Protection & Advocacy, *Restraint and Seclusion FACT Sheet* (2012).
- 8 United States Department of Education, *Restraint and Seclusion: Resource Document* (2012) (available at <http://www2.ed.gov/policy/seclusion/index.html>).
- 9 *Id.*
- 10 KRS 202A.191.
- 11 KRS 645.035.
- 12 922 KAR 1:300.
- 13 505 KAR 1:120.
- 14 KRS 216.515.
- 15 Kentucky Department of Education, *Kentucky Education Facts* (2013) (available at <http://education.ky.gov/comm/edfacts/Pages/default.aspx>).
- 16 See KRS 13A.120(2).
- 17 KRS 13A.120(2).
- 18 704 KAR 7:160, Section 3(3)(c).
- 19 *Id.*
- 20 *United States v. Mitchell*, 681 F.3d 867, 876 (6th Cir. 2012); see also *United States v. Ross*, 502 F.3d 521, 528 (6th Cir. 2007).
- 21 704 KAR 7:160, Section 4(2)(b).
- 22 *Id.*
- 23 704 KAR 7:160, Section 5 (2)
- 24 704 KAR 7:160, Section 5 (1)
- 25 704 KAR 7:160, Section 5 (5)
- 26 704 KAR 7:160, Section 7
- 27 704 KAR 7:160, Section 6
- 28 *Id.*
- 29 KRS 503.050(1).
- 30 KRS 503.010 (3).
- 31 KRS 503.070(1).
- 32 704 KAR 7:160, Section 3 (1) (d)
- 33 KRS 503.080.
- 34 *Id.*
- 35 KRS 501.020(4).
- 36 *Id.*
- 37 KRS 503.030(2).
- 38 KRS 503.110.
- 39 United States Department of Education, *supra* note 8, at 3.