



260 Democrat Drive  
Frankfort, KY 40601  
1-800-372-2962 • FAX (502) 695-5451  
KSBA Website: [www.ksba.org](http://www.ksba.org)

#### BOARD OF DIRECTORS

President  
Tom Blankenship  
*Lincoln County*  
President-elect  
Durward Narramore  
*Jenkins Independent*  
Immediate Past President  
Delmar D. Mahan  
*Whitley County*

#### Directors-at-large

Jeff Eaton  
*Allen County*  
Ronnie Holmes  
*Graves County*  
Allen Kennedy  
*Hancock County*  
Linda Duncan  
*Jefferson County*  
Eugene Peel  
*Jessamine County*  
William Owens  
*Lee County*  
Ann Porter  
*Mason County*  
Fern Reed  
*Montgomery County*  
Eddie Cornett  
*Paintsville Independent*  
Dr. Tina Hastly  
*Rockcastle County*  
Phyllis Young  
*Scott County*  
David Webster  
*Simpson County*

#### Regional Chairpersons

Dr. Michael Turner  
*Casey County*  
Murrell "Gene" Allen  
*East Bernstadt Independent*  
Becky Burgett  
*Gallatin County*  
Dennis Smith  
*Hazard Independent*  
Mike Allen  
*Hickman County*  
Phyllis Lawson  
*Menifee County*  
Frank McGuire  
*Pike County*  
Scott Burrows  
*Trimble County*  
Michael Wilson  
*Warren County*  
Dr. E Carolyn Tucker  
*Webster County*  
Jo Sabol  
*West Point Independent*  
Ambrose Wilson  
*Woodford County*

#### EXECUTIVE DIRECTOR

Bill Scott

#### ASSOCIATE EXECUTIVE DIRECTOR

David A. Baird

#### BOARD TEAM DEVELOPMENT

Kerri Schelling

#### CHIEF FINANCIAL OFFICER

Stephen B. Smith

#### GOVERNMENTAL RELATIONS

Shannon Pratt Stiglitz

#### INSURANCE/RISK MANAGEMENT

Myron Thompson

#### LEGAL & ADMINISTRATIVE

TRAINING SERVICES

Teresa Combs

#### MEMBER SUPPORT SERVICES

Brad Hughes

#### POLICY & PROCEDURES SERVICES

Dara Bass

Monday, October 01, 2012

Kevin Brown  
General Counsel  
Kentucky Department of Education  
500 Mero Street  
Frankfort, Kentucky 40601

In Re: Restraint and Seclusion Issues: A reasonable and practical approach to protecting students and personnel

Dear Kevin:

#### ***Executive Summary:***

The primary goal of all local public schools and districts across the Commonwealth is to create and sustain positive learning environments for all students. We want all students to both be, and feel, safe in school environments. The Kentucky School Boards Association (KSBA) and our partners know the primary goal of all public school educators is to provide high quality educational services preparing all students to be college and career ready. In recent months, some advocates for children with special needs have questioned whether the use of restraint and seclusion is putting student safety at risk. School administrators, board members, and educators alike do not want any student injured as a result of the use of restraint and seclusion. At the same time, schools have a responsibility to protect the safety of **all** children in the educational environment. The concerns of school leaders regarding the current regulation proposed by the Kentucky Board of Education boils down to unintended consequences. Any regulation implementing restrictions on restraint and seclusion needs to protect students who may be subject to restraint and seclusion, and also protect the staff and other students who may be impacted. It is for this reason that school boards and school district administrators are asking that the proposed regulation not go into effect. We have worked closely with the Kentucky Department of Education (KDE) to develop a reasonable approach to restraint and seclusion in public schools that protects all students and staff from physical harm; protects the educational environment from significant disruption; and protects the school district, the staff, and other students from suffering significant property damage.

#### ***How did we get to this point?***

First and foremost it must be stated that school boards and school district administrators are not outright opposed to appropriate limitations on the use of restraint and seclusion in schools, nor are we opposed to training all staff in de-escalation techniques. The safety of our students is our utmost concern. This is why KSBA sat down with the KDE staff and other interested parties to negotiate a reasonable, practical approach to restraint and seclusion in schools. KSBA thought we were progressing towards a resolution until May of this year when the regulation that had been reviewed by the Local Superintendent's Advisory Committee (LSAC) and the Kentucky Board of Education was abandoned by KDE and replaced with a new and totally different regulation that was subsequently filed with the Legislative Research Committee (LRC). The proposed regulation is based on a federal resource document that the US Department of Education (USED) said it **did not endorse**. This was done even though KDE staff had told the LSAC, which body reviews KDE regulations pursuant to KRS 156.160(1), they would continue to work with KSBA to formulate a reasonable regulation that would eliminate unrealistic provisions that would result in **unintended, but dangerous consequences**. It is for this reason that we are asking the Kentucky General Assembly to intervene and find the regulation deficient.

School administrators, teachers, and other school staff want to provide a safe environment for all students; including those requiring special education services, general education services, and alternative education services. School districts must also protect the safety of all staff, including teachers, teacher assistants, bus drivers, food service workers, and other staff who work toward the educational success of our children. There must be a balance, giving all students the opportunity to learn in the least restrictive environment, while at the same time allowing appropriate use of restraint and seclusion techniques in order to prevent physical injuries, significant disruptions, and significant property damage. We have serious concerns with 704 KAR 7:160 Use of Restraint and Seclusion in Public Schools as filed with the LRC.

### ***What is restraint and seclusion?***

Restraint and seclusion, generally, are practices utilized in public schools, hospitals, and mental health facilities as crisis intervention tools, to calm persons who act out, including students with disabilities, and may also be used to protect students from harming themselves or others. The clinical definitions of restraint and seclusion vary widely depending on the source, but all definitions would include instances pertaining to students in fights or other situations where physical harm could be an issue. Restraint is holding a student to prevent behavior such as kicking and using hands to attack others. Seclusion is moving a student to a location away from others.

### ***General Background Information:***

Recently, the issue of restraint and seclusion has moved to the forefront in many state legislatures as well as in the U.S. Congress. Congress became involved in the issue when some parents alleged that several children died in instances of improper use of restraint and seclusion (outside of Kentucky). In many, if not all, of these cases criminal charges were filed, civil suits litigated and teaching certificates revoked. Congress has rejected several proposed pieces of legislation on this topic.

While there are some disturbing stories about the improper use of restraint and seclusion, there is no aggregate data about its use in public schools, and at this time, the KDE does not collect data on its use. The Office of Civil Rights (OCR), starting in the 2009-2010 school year began requiring schools to report uses of restraint and seclusion. According to the first such OCR report, there were 40,000 incidents reported in 85 percent of schools across the country. OCR does not report data about the abuse of these tools, and there is no specific Kentucky information about substantiated abuse of restraint and seclusion at this time. According to the United States General Accounting Office report (U.S. G.A.O.), there is evidence of hundreds of **allegations** of misuse of restraint and seclusion. But the report clearly states that these were **only allegations** and the U.S.G.A.O. staff **could not substantiate** whether these allegations were true. Regardless, we agree restraint and seclusion should be used only in limited circumstances and should never be used as punishment.

### ***What do the advocates for the regulation want?***

The advocates concerns seem to be centered on the inappropriate use of restraint and seclusion leading to death, serious physical injury, or emotional trauma. Specific concerns of the advocates include issues such as inappropriate use of restraint and seclusion; lack of training of staff on appropriate implementation; use of restraint and seclusion for minor disruptions; parents being unaware students were restrained or secluded; and the lack of data reporting surrounding their use. KSBA believes that with a balanced reasonable approach to restraint and seclusion all of these concerns can be addressed without jeopardizing the safety of other students and staff.

### ***What are the current policies in school districts on restraint and seclusion?***

Currently, the 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. Some school district policies and procedures vary, but this is the basic policy most of them use.

### ***What are administrators and boards specific concerns with 704 KAR 7:160?***

As the regulation is lengthy and highly technical, KSBA has created the following chart for comparison of the unintentional consequences of physical injury, serious disruptions, serious property damage, and school staff member liability created by the proposed regulation and the safer, more balanced approach recommended by KSBA.

We must note the proposed regulation contains far more restrictive standards regarding restraint (physical management) of students than does the regulation of the Kentucky Cabinet for Health and Family Services regarding children in child caring facilities. That regulation, 922 KAR 1:300 – Standards for child-caring facilities, allows restraint to prevent **any** injury to the child being restrained or to others. It further allows restraint to prevent serious property damage or disruption of the child-caring facilities program.

The proposed KDE regulation allows school staff to restrain, which the regulation defines as any physical intervention other than a touch to gain “voluntary compliance,” only in the case of imminent danger of “**serious physical injury**” to the student or others.

The definition of “serious physical injury” that courts will likely use in applying the proposed regulation is found in KRS 500.080. That is as follows:

“Serious physical injury” means physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss of impairment of the function of any bodily organ.

In contrast “physical injury” is defined in that statute as:

“Physical injury” means substantial physical pain or any impairment of physical condition.

Examples of injuries Kentucky appellate courts have found **not to be “serious”** are bird shot to the chest; burns around the mouth with a cigarette lighter; and a cut along a person’s jawbone that did not result in serious and prolonged disfigurement. These decisions indicate that an injury that is not permanent is not serious under Kentucky law. See *Luttrell v. Commonwealth*, 554 S.W.2d 75 (Ky. 1977); *Souder v. Commonwealth*, 719 S.W.2d 730 (Ky. 1986); and *Anderson v. Commonwealth*, 352 S.W.3d 577 (Ky. 2011).

We must further note that the proposed KDE regulation contains provisions directly contrary to Kentucky legislation. First, KRS 158.148(4) states:

(4) Each local board of education shall be responsible for formulating a code of acceptable behavior and discipline to apply to the students in each school operated by the board.

That statute further states at (4)(b):

The code shall contain the type of behavior expected from each student, the consequences of failure to obey the standards, and the importance of the standards to the maintenance of a **safe** learning environment where **orderly** learning is possible and encouraged. (emphasis by author)

Other such statutes are KRS 161.180, which says teachers and administrators are to hold students to a strict account for misconduct; also KRS 161.190 states it is unlawful to disrupt or interfere with normal school activities, order and discipline. Kentucky courts have also held that school officials are in *loco parentis* to students in *Casey County v.*

*Luster*, 282 S.W.2d 333 (Ky.App. 1955). Further, in *Byrd v. Begley*, 90 S.W.2d 370 (Ky. 1936), Kentucky’s then highest court held students are not to be allowed to substantially disrupt the school environment, create danger to health and safety, endanger school property or property of others, or infringe upon the rights of others. Additionally, in *Knox County v. Willis*, 405 S.W.2d 952 (Ky.App. 1966), Kentucky’s then highest court upheld termination of a teacher’s contract for not controlling the behavior of her students.

The “reasonable force under the circumstances” physical restraint standard currently used by Kentucky school districts follows the language of KRS 503.110 – Use of force by person with responsibility for care, discipline, or safety of others. That statute states:

(1) The use of physical force by a defendant upon another person is justifiable when the defendant is a parent, guardian, or other person entrusted with the care and supervision of a minor or an incompetent person or when the defendant is a teacher or other person entrusted with the care and supervision of a minor, for a special purpose, and:

(a) The defendant believes that the force used is necessary to promote the welfare of a minor or mentally disabled person or, if the defendant's responsibility for the minor or mentally disabled person is for a special purpose, to further that special purpose or maintain reasonable discipline in a school, class, or other group; and

(b) 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.

KRS 503.110 further states at (3):

The use of physical force by a defendant upon another person is justifiable when the defendant is a person responsible for the operation of or the maintenance of order in a vehicle or other carrier of passengers and the defendant believes that such force is necessary to prevent interference with its operation or to **maintain order** in the vehicle or other carrier, except that deadly physical force may be used only when the defendant believes it necessary to prevent death or serious physical injury. (emphasis by author)

The proposed regulation also bans restraint to prevent property damage and to stop disruption. These provisions also run afoul of Kentucky statutes. Kentucky law provides for protection of property in various criminal statutes and in KRS 405.025, which provides parents and guardians can be required to pay monetary damages if their children damage property of others. Additionally, school employees are required by KRS 158.155 and KRS 158.154 to report serious crime, including property damage, to a law enforcement agency. School staff who fail to make reports of serious property damage face criminal charges under KRS 158.990.

Further, in the *Bullying Bill* (codified in KRS 158.156) the Kentucky legislature evidenced its intent that students not bully other students in educational environments. KRS 158.156 provides for holding students who physically harm, threaten, or terrorize other students to account by requiring school employees to report such misconduct to law enforcement agencies and requires a law enforcement agency to investigate such reports.

KSBA believes bullies will take full advantage of the KDE proposed ban on restraining them unless they are inflicting “serious physical harm” on others. If the subject KDE regulation is allowed to go into effect, KSBA

believes more students and staff will be injured, and there will certainly be more property damage, disruption, and liability exposure to school district staff than occurs under our current “reasonable force under the circumstances” standard. No one has presented evidence of any **substantiated** serious injuries to students in Kentucky due to the use of restraint or seclusion; only “**allegations**” have been referenced.

KSBA believes no significant injuries to Kentucky students have occurred due to restraint and seclusion being used because school district staff have been properly trained to address such situations when the need became apparent, and because Kentucky school staff members have appropriately implemented the tools of restraint and seclusion. This proper use has protected staff and children.

***Conclusion:***

In conclusion, the inappropriate use of restraint and seclusion should be prevented and we agree steps should be taken to protect all students. It is the responsibility of school districts to provide safe environments for all children. Any regulation should protect all students and personnel without the heavy restrictions in the proposed regulation that will assuredly result in students and staff suffering physical injuries and serious disruption to their education, and school districts and staff suffering serious property damage and highly increased exposure to liability. KSBA supports training, data reporting, and limited use of restraint and seclusion. Our hope is that we can work with the Kentucky Board of Education and KDE staff to create and develop a regulation that will provide the balance local school districts need to provide a safe and orderly education for all students in the least restrictive environment. (Our chart comparing KDE’s proposed provisions and KSBA’s proposed changes follows.)

Respectfully submitted,

A handwritten signature in cursive script that reads "William Scott".

William Scott  
Executive Director  
Kentucky School Boards Association (KSBA)

Issue	KDE Regulation	Unintended Consequences	Our Approach
<b>The use of the phrase serious physical harm</b>	Requires that restraint or seclusion can be implemented <b>only if</b> a student’s behavior poses an imminent danger of <b>serious</b> physical harm to self or others.	Such a legal standard forces staff to let other students be harmed if the physical harm/bullying is not serious. It allows physical and emotional terrorizing of others, e.g., assaults, threats, and bullying to occur with the teacher prohibited from restraining the <b>offending</b> student. It forces a staff member to second guess in situations to determine when serious physical harm versus any physical harm is being inflicted. This will increase the likelihood of physical harm and it will surely increase staff and district liability exposure for allowing physical harm to other students, staff, and others.	Allow appropriate use of seclusion and restraint when students engage in imminent threat of <b>any</b> physical harm and for verbal threats that do not stop when staff members request them to stop.
<b>Definitions generally</b>	Some of the definitions use modifiers, such as <b>serious and imminent to modify physical injury and voluntary to modify student compliance with a staff directive to stop hurting someone.</b> The definitions say a staff member can merely touch a student to enforce <b>voluntary</b> compliance.	These modifiers severely restrict the use of the tools of restraint and seclusion to the point that we believe more students and staff will be harmed under this proposed regulation than have been harmed under our current “reasonable restraint under the circumstances” standard. Also, these severely restrictive definitions will certainly increase liability exposure for school personnel and districts.	Amend the overly restrictive definitions that so severely limit restraint and seclusion that they require that others suffer serious physical injury before staff can intervene with more than a light touch and a verbal reminder to stop an attack.
<b>Prone restraint banned and facial monitoring required during restraint</b>	These provisions ban the use of restraint from behind a student, e.g., to pull the student off another student s/he is attacking. They also require monitoring the student’s “face” for the duration of the restraint.	These requirements could make restraints in attack situations more dangerous for the person restraining and for others. If staff must wait until they can get in position to see the face of the student aggressor, staff members will most certainly be injured and there will be a delay in protecting the victim of the assault. Also, the use of prone restraint in some situations can be implemented effectively with appropriate training.	We propose that these two provisions be modified in order to provide for safety of staff and victims of attacks. The regulation should recognize the practical situations where facial monitoring may not be possible. Finally, some prone restraint techniques can be implemented safely with proper training and guidance.

Issue	KDE Regulation	Unintended Consequences	Our Approach
<b>Protection of employees, and other students from physical injury, bullying, disruption and liability</b>	Safety, threats, bullying, and disruption to others' education <b>are not addressed</b> in the proposed regulation. It allows restraint or seclusion <b>only if "serious" physical injury is imminent.</b>	Without civil liability immunity protections staff will be exposed to frivolous lawsuits. One consequence of the lack of civil liability immunity protection is that staff will always contact law enforcement to intervene in situations in order to protect themselves from lawsuits. This delay will result in other students being injured and terrorized.	As a result of the regulation, we think it is critical for the General Assembly to provide liability protections for employees in situations of seclusion and restraint. (Maine previously had immunity protections prior to the implementation of its law.) Immunity for acting in good faith allows staff to be more comfortable about intervening during attack situations to protect victims when they reasonably believe it is necessary.
<b>Medical exception</b>	Currently the regulation states that any student receiving a note from a medical professional prohibiting the use of restraint or seclusion cannot be restrained under any circumstances. This regulation makes no exception for incidents when the student is causing injury to another.	Staff and other students will certainly be harmed, as this provision does not make any exception for <b>restraining even if the student with the medical statement is severely harming or even killing others.</b> Further, schools have many experiences of medical professionals writing recommendations merely because the parent asks them to do so.	Delete or modify this language. First, it does not clarify medical professionals to mean that their prohibition on restraint or seclusion must be within their scope of their practice areas. Secondly, imposing this zero tolerance rule creates a legal duty that means any employee violating it could be liable in court for restraining a student with a medical excuse from attacking, even if s/he is causing serious physically injury or even death.
<b>Ban on any restraint that interferes with a student's ability to communicate</b>	The regulation says physical restraint may <b>never</b> interfere with the student's ability to communicate in the student's primary language or mode of communication.	This means, e.g., staff cannot under any circumstances restrain a student's arms if the student's primary communication mode is sign language. As it is a total ban, there is <b>no exception</b> for restraining said student's arms if said student attacks someone.	Delete this provision for safety of others.
<b>Disruption to other students' education and emotional well being</b>	The current regulation prohibits the use of seclusion or restraint to get a student to stop being disruptive.	It is difficult to discuss some of the incidents that occur as a result of not allowing the use of seclusion or restraint for disruptions. But schools experience instances when students disrobe in class and/or engage in personal sexual activity. While they may not be a danger to themselves, clearly this is not behavior that should be encouraged, nor should other students have to be subjected to these scenes, or removed from the room because the student will not comply with a verbal request to put his/her clothes on or to stop the sexual activity.	KSBA supports having restraint and seclusion as tools for serious disruption and threatening behavior. Even the Individuals with Disabilities Education Act (which governs education of severely disabled students) allows disruption to the education of others to be taken into account when planning for the education of a special education student.

Issue	KDE Regulation	Unintended Consequences	Our Approach
<b>Mechanical restraint</b>	The regulation does not allow for calming “restraint” techniques recommended by qualified professionals <b>unless they provide greater freedom of motion.</b>	Some students benefit from calming therapies such as blanket wrapping and compression therapy.	Allow for “restraining” therapies that do not necessarily allow greater movement, but are recommended by a qualified professional in order to address the needs of the students and allow them to remain in school settings, rather than being placed in residential settings.
<b>Strict statement of nothing being in a seclusion area which could harm student</b>	The regulation has a strict ban on anything with which a student could harm self or others being in an area or room used for seclusion.	A student could harm self by strangling or smothering with a piece of clothing. Strictly speaking the student would have to be unclothed in order to comply with this provision. Further, the regulation provides the student is monitored while in seclusion.	Modify the provision by saying” other than the student’s own clothing”, as the way this is written sets an unrealistic standard.
<b>Total ban on restraint to prevent property damage</b>	The regulation prohibits the use of seclusion and restraint in the absence of imminent risk of <b>serious physical harm to people.</b>	Already cash-strapped school districts will spend additional money replacing expensive equipment that will be destroyed. Districts provide students electronic and other equipment /devices they need due to their physical and educational needs. Personal property of students and teachers has also been damaged/destroyed during student outbursts.	Allow for imminent risk of <b>significant</b> property damage to be a reason to use restraint or seclusion.
<b>Reporting requirements</b>	The regulation requires schools to notify parents within 24 hours of any incident involving the use of seclusion and restraint. Additionally, every incident resulting in physical injury or death must be reported to KDE within 24 hours.	KDE is not open on weekends when many school activities occur. Similarly, school staff are not at school during activities that occur off school grounds.	KSBA supports reporting, but give districts more time to report incidents which may happen during school events, but not necessarily on a school day (e.g., a fight at a Saturday night football game).
<b>Definition of parent for reports to parents</b>	The regulation defines a parent as including “one acting as a parent.”	This will cause districts to violate Federal student records confidentiality law.	Define this as it is defined in Federal student records confidentiality law (FERPA).

<b>Issue</b>	<b>KDE Regulation</b>	<b>Unintended Consequences</b>	<b>Our Approach</b>
<b>Required participation in parent meeting</b>	The regulation requires that if a parent requests a meeting with school personnel, all school personnel within close proximity to the incident of seclusion and restraint must participate in the meeting.	If an incident occurs at a school assembly or sports event, a majority of a school's personnel would be required to be out of classrooms to participate in such a meeting.	In order to minimize educational disruptions, personnel not directly involved in the incident should not have to attend such a meeting, but be allowed to submit a written report regarding the incident.
<b>Training</b>	The training requirements detailed in the regulation are overly prescriptive.	The prescriptive training requirements limit the options for districts to select training programs. Most districts already use some type of positive behavioral supports and interventions (PBIS).	We agree with training of staff, and frankly think that many, if not most, districts are currently engaging in de-escalation training, PBSI, and other training. In order to reduce the heavy cost to districts, KDE should provide training materials for implementation, or develop less expensive and time consuming requirements in order to implement a more flexible training system. According to an evaluation study of PBIS it cost a district \$9,266 for initial implementation and scaling up cost for the entire district \$3,009 <sup>1</sup> . Further, Kentucky districts have received notice from the director of the Kentucky Center for Instructional Discipline that those services will not be funded past December 31, 2012.
<b>Emergency restraint when staff members are not extensively trained</b>	This provision says staff who restrain even in a clearly unavoidable emergency situation must be trained.	This conflicts with a later provision in the regulation that states staff who restrain in such a situation do not have to be trained. It needs to be clear that staff who are not provided the intensive, expensive training referenced later in the regulation can restrain in an emergency situation that is not foreseen.	Delete the provision stating all staff who ever engage in restraint even in emergencies must be trained. This conflicting provision was likely left in the regulation in error.
<b>School resource office (SRO) exception</b>	The regulation exempts SROs from the prohibitions on restraint that apply to others who contract with, or are employed by, school districts. However, the exemption applies to only SROs as defined in KRS 158.441.	The problem with this statement is that it does not extend the exception to sworn law enforcement officers as defined in KRS Chapter 61. Some districts directly employ their own sworn law enforcement officers, rather than using an outside contractor, or an SRO.	The provision should be restated to allow the exception to apply to all sworn law enforcement officers.

<sup>1</sup> Horner, Robert, George Sugai, et. al. "What Does It Cost to Implement School-Wide PBIS" July 2012

<b>Issue</b>	<b>KDE Regulation</b>	<b>Unintended Consequences</b>	<b>Our Approach</b>
<b>Data Collection</b>	Data collection is required in the aggregate and must be reported in the student information system.	These provisions are confusing – leaves districts questioning exactly how to report information.	Clarify whether the data collection process is to be reported at the school level, or at the district level.
<b>School and district investigation</b>	The regulation provides the parent may request that both the school and the district investigate an incident of restraint or seclusion.	This has the potential to drain precious resources from school districts.	We recommend only one (1) investigation be required for such an incident.
<b>Prevent use of seclusion and restraint for punishment</b>	The regulation prohibits the use of seclusion and restraint for punishment	None	We support the prohibition on punishment as a reason for restraint and seclusion.















\_\_\_\_\_