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Thursday, July 26, 2012

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RE: 704 KAR 7:160 Use of Restraint and Seclusion in Public Schools – 7/12/12  
draft

Dear Sir/Madam:

As entities that work closely with Kentucky public school districts across the state, we are committed to a public school learning environment that is safe and free from threats of physical harm and significant disruption. We understand the proposed regulation is modeled after a guidance document obtained from, but **not** endorsed by, the federal government and language for legislation currently **proposed** in Congress. Nonetheless, this regulation contains a multitude of practical implementation problems that will make it extremely problematic for school districts to implement.

The undersigned associations believe that to implement the regulation in its proposed form will cause school districts to lose teaching staff, as well as students, to other work and learning environments. 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. We submit that school districts also should be able to address significant disruption.

It is our belief that more students and staff will be injured, and there may be more serious property damage and significant disruption, if the proposed regulation is adopted than if schools continue under the reasonable restraint standard currently utilized in Kentucky public schools. Further, such changes will require public school districts in Kentucky to spend more money for less effective interventions than are currently utilized, and many students will have to be placed in more restrictive learning environments in order to protect students, staff, and others from physical harm. Also, under the proposed regulation, that expense may have to totally be paid from Kentucky's financial coffers, as the proposed regulation does **not** allow for any planning on how to safely restrain or seclude special education students to be written into special education student programs (IEPs). We strongly encourage the Board to investigate whether federal Individuals with Disabilities

Education Act (IDEA) money can be utilized to pay for the expensive training mandated in the proposed regulation if no planning for restraint and seclusion can be reflected in IEP documents, as is stated in the current proposed regulation.

We additionally are concerned that the proposed prohibitions on planning for safe restraint and seclusion in an IEP document may violate federal law. Historically, our courts have held that in certain anticipated serious misbehavior situations, restraint of special education students should be planned by the same team of qualified professionals that plans for all of the child's specialized education needs.

We also point out that page 13, at lines 21 through 22 of the proposed regulation incorporates by reference a guidance document sent to state departments of education as a resource guide from the U.S. Department of Education. However, that 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. The precise language is set out below:

This resource document contains websites and resources created by a variety of organizations. These websites and resources are provided for the user's convenience. No official endorsement by the U.S. Department of Education of any product, commodity, service or enterprise mentioned in this report or on websites referred to in this report is intended or should be inferred. The views expressed herein do not necessarily represent the positions or policies of the Department of Education and no official endorsement of them by the Department is intended or should be inferred.

To incorporate into regulation such a document with varying views from different groups will confuse school district staff. A regulation should give clear guidance to school staff, as a regulation has the force of law.

It should be noted that this proposed regulation applies to all students. Adoption of the regulation in its present form would put public school district staff between the proverbial "rock and a hard place." Under the language in the proposed regulation, school staff are not allowed to pull a student off another student during a physical attack, unless the staff member can make a "snap judgment" that the attack "poses an imminent danger of serious physical harm to self or others." See p. 6, lines 21 through 22 of the regulation for when physical restraint can be used.

If, during an attack, a teacher makes the wrong "snap judgment" about how seriously a student attacker may hurt him/her, another student, staff member, volunteer, or visitor to the school and restrains the student, the teacher can be sued and action may be taken to revoke the teacher's teaching certificate. Additionally, as general liability law requires school district staff to take reasonable measures to keep students safe from a known risk, victims injured by student attackers could sue the teacher for failing to take reasonable

measures to stop the attack. The definition of physical restraint on page 4, at lines 1 through 4 is:

(11) “Physical Restraint” means a personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely but does not include 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.

An example of other problematic language within the proposed regulation is the language on page 7, at line 3, which says, “The student is monitored face-to-face for the duration of the physical restraint.” Given the definition of restraint in this regulation, even during a serious physical harm situation a staff member could not pull a student attacker off someone unless facing the attacker.

Another problematic provision in the regulation states a child can never be restrained or secluded to force compliance. See p. 6, at line 8. This means staff could not restrain nor seclude a student to get the student to stop hitting someone, stop banging on a desk, or stop throwing iPads on the floor.

Any such regulation should allow for restraint and seclusion in situations where the student is causing serious property damage. Also, the regulation should allow a student to be carried into a room for seclusion purposes when the student is causing significant disruption, such as when a student removes his/her clothing. Under this proposed regulation language, a staff member cannot dress a student who does not voluntarily comply with a verbal request to put his/her clothing back on.

We also have concerns that the debriefing requirements and training requirements in the proposed regulation are very time consuming, expensive, and unwarranted.

There are many additional problems with this proposed regulation; we have pointed out only some of the most serious. Our concern is that there are many unintended consequences to this proposed regulatory language. A regulation has the force of law, and this regulation will be interpreted in legal settings by its literal meaning.

Our purpose in communicating our most serious concerns in this letter is to strongly urge that a common sense approach that will create a safer and less disruptive setting for everyone in our school environments be pursued.

We request that any regulation adopted on the referenced topics take into account our concerns about safety, serious property damage, and significant disruption for all in the school community.

We respectfully request the Kentucky Board of Education to consider changing this proposed regulation or hold it in abeyance until it is determined whether there will be federal regulation in this area.

We respectfully ask that the Board **not** approve the regulation in its current form.

Respectfully submitted,



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cc: Terry Holiday, KDE  
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