

**HANDLE WITH CARE BEHAVIOR MANAGEMENT
SYSTEM, INC.
184 MCKINSTRY ROAD, GARDINER, NY 12525
PHONE 845-255-4031, FAX 845-256-0094**

TO:
School Superintendents and Principals
School Administrators/Pupil
Services/Special Education Director:

FROM:
Bruce Chapman, President HWC
www.handlewithcare.com

cc: Members of the Kentucky Board of Education: Leo Calderon; Judy Gibbons; David K. Karem; Roger L. Marcum; Jonathan Parrent; Nawanna Barton Privett; Brigitte B. Ramsey; William Twyman; Mary Gwen Wheeler; Robert L. King. DOE GENERAL COUNSEL: Kevin Brown. BOE Administrator: Susan Palmer

**Kentucky's Proposed Regulation: 704 KAR 7:160 Use of Restraint and
Seclusion in Public Schools – 7/12/12 draft**

WARNING

**Kentucky's Proposed Restraint Regulation threatens the safety of
every teacher and student in Kentucky.**

Kentucky's Board of Education for the Department of Education has proposed a regulation entitled the "Use of Physical Restraint and Seclusion in Public Schools." Be advised that pending DOE regulation 704 KAR 7:160 will expose every teacher and aide in Kentucky to an increased risk of injury from the most common injury-causing dynamic of physical restraint - an uncontrolled crash to the floor.

To add insult to your injuries, by forcing teachers to fight your lives to keep otherwise appropriate and routine physical interventions in a standing or seated configuration, the DOE is deliberately shifting all of the legal liability squarely onto your shoulders when a student is injured following their dangerous policy. Common sense dictates, when you attempt to keep a physically capable and combative student in a standing-only hold, it is not a question of whether you are going to the floor but how. Even one and two-person standing-holds that leave the students upper body and head pitched forward of center by design leave the student vulnerable to striking the floor face-first. It is irresponsible to deny teachers, especially those working with larger middle and high school students, access to safe and reliable standing holds that have carefully engineered rearward takedowns.

Who in their right mind would push for this legislation? This is the work of a nationally organized "restraint-free" movement comprised mainly of radical special interest advocacy law firms (the "National Disability Rights Network", "Protection and Advocacy"). These advocate attorneys are ideologically driven, predatory and predisposed to defamation, lies and innuendo to discredit anyone who would oppose them. Their arguments against restraint usage have no basis in science and are without credible statistical data to support them. Their shrill admonitions against prone and floor restraint would be laughable if not for the progress they've made lying to the terminally gullible that all prone floor holds are deadly. We train tens of thousands of MDs and RNs every year. Properly engineered floor (face up and face down) methods are not only safe, they are life-saving.

Fortunately, when common sense and the laws of physics fall on deaf ears, there is always the law. Regulation 704 KAR 7:160 violates a constellation of Federal and Kentucky laws that govern restraint usage in schools and human services. First and foremost, this ban will violate your legal right to self-defense and your right to come to the defense of another in Kentucky. You do not lose this right the moment you enter onto school grounds. Your right to self-defense and your legal duty to exercise your “professional judgment” in the service of your students are non-waivable, immovable and chiseled in State, Federal and Constitutional law.

- **Kentucky’s proposed restraint regulation is in violation of every teacher and student’s Constitutional rights. The proposed regulation is a 14th Amendment Equal Protection violation. It also violates Kentucky’s State Constitution Section 1; Section 2 and Section 26 (see attached letter to Kentucky Attorney General Jack Conway.**

Explanation: While self-protection laws are represented in Kentucky’s penal code as a justification defense, the defense is written into the penal code in order to protect a person’s right to protection of self and others. The right to self-defense is enumerated in the U.S. 5th and 14th Amendments and Kentucky Constitution, Sections 1, 2 and 26.

- **BOE’s proposed restraint regulation is also a violation of the 14th Amendment right to due process. An unelected administrative Board of Education has no legal authority to enact regulations limiting a person’s right to reasonably protect self or others. See also Kentucky’s Constitution Sections 1, 2 and 26. The BOE also has no legal authority to enact administrative regulations that conflict with statutes enacted by State legislators as the proposed restraint regulation conflicts with KRS 203.110.**

The Kentucky State Board of Education (BOE) is appointed by the governor. Apparently this unelected Board can enact regulations that automatically come into effect unless or until the governor, attorney general or legislature to declare it “deficient” i.e. illegal, arbitrary, cost prohibitive and/or overreaching.

Who we are: Handle With Care Behavior Management System, Inc. is a crisis intervention, behavior management and restraint training service provider. We are experts in the field of crisis intervention, behavior management and restraint and are committed to teaching staff how to create a learning environment that is safe and free from threats of physical harm and significant disruption. Website: www.handlewithcare.com

DO NOT SIT PASSIVELY WHILE YOUR SAFETY IS COMPROMISED AND YOUR RIGHTS VIOLATED. By October 2, 2012, it will be too late!

By taking these 3 simple steps right now, you can defeat this Regulation BEFORE it sees the light of day

- **STEP 1:** Give formal "notice" to Kentucky DOE attorney Kevin Brown (kevin.brown@education.ky.gov or Fax: 502-564-9321); BOE Chairman Robert L.

King (Robert.king@ky.gov) and DOE Commissioner Terry Holliday (Terry.Holliday@education.ky.gov). Sample letter attached.

- **STEP 2:** Demand “Indemnification” from DOE attorney Kevin Brown (kevin.brown@education.ky.gov or Fax: 502-564-9321); BOE Chairman Robert L. King (Robert.king@ky.gov) and DOE Commissioner Terry Holliday (Terry.Holliday@education.ky.gov), to include 1) a shield from personal liability for any injuries caused to a student and 2) a shield from any administrative or disciplinary action that will arise when you and a child crash to the floor during a restraint.
- **STEP 3:** Request a written legal opinion from your State's Chief Law Enforcement Officer, Attorney Jack Conway (Fax: 502-429-7129), as to whether the proposed Regulation is in accordance with the Federal Constitution and Kentucky Law, which includes your right to use reasonable force in coming to the defense of yourself or another. **As a citizen of Kentucky and someone who will be adversely impacted by this ban, you have the legal standing to request a written opinion from your Attorney General, and copy your state legislator.** Sample letter attached.

This kit was prepared by an attorney and by a leading expert on the use-of force and physical restraint in schools and human services. The fleet of advocacy attorneys, disability groups and other non-experts that drive "the restraint-free movement" and its various sub-movements have absolutely no answer to our legal arguments. It is far less likely you will cheerfully surrender your rights when you understand your real rights and real duties. With this sense of mission to guide us, HWC has been disseminating position briefs to every school and every agency in every State contemplating similar changes in restraint policy.

As for the possibility of retaliation against HWC for our efforts in Kentucky (and elsewhere), BOE, P&A, NDRN and the other lobbyists driving this Regulation are advised that HWC remains eternally vigilant for any evidence of retaliation. HWC will aggressively protect our business interests and the right of our client-agencies and schools in Kentucky to provide a safe, secure and therapeutic environment. We will not be intimidated nor will we stand down.

It is our hope that by empowering teachers, aides and principals with the facts and the law, you will be in better position to stand up for yourself. As we have always maintained, teachers and aides cannot teach unless they feel safe. Children cannot learn unless they feel safe. Every person's safety is equally important under the law. Equal protection is the law.

Congress THRICE REJECTED banning the use of restraint as part of an IEP or behavioral plan and Kentucky should too.

The American Association of State Administrators ("AASA") Agrees:

- AASA has long opposed the prohibition of seclusion and restraint in public schools. AASA believes the use of seclusion and restraint has enabled many students with serious emotional or behavioral conditions to be educated not only within our public schools, but also in the least restrictive and safest environments possible.
- IDEA was never meant to restrict parents from receiving a unique, effective education plan for their child: For these students, legislation or state policy that prohibits these practices from being written into an individualized education plan (IEP) or behavioral intervention plan means that school

personnel are unable to work with parents to create a plan for coping with the student when their behavior becomes unmanageable. Legislation or policy that prohibits parents and school personnel from communicating about the student's needs and corresponding school interventions runs counter to the entire purpose of the Individuals with Disabilities in Education Act (IDEA).

While the Kentucky BOE's regulation cites guidance issued by the Department of Education regarding restraint in schools, we advise that **Congress THRICE REJECTED DOE's guidance and Kentucky should too.**

**TO GET MAXIMUM IMPACT FROM THIS KIT:
Make sure every teacher in your school receives their own copy of the Kit.**

- 1. Sign both letters and fax them to the people listed and copy your state legislator**
- 2. Physically hand or fax the "Indemnification" letter to your school or employer.**

Note to Principals and School Districts:

The "Workman's Comp" notices and explanations contained in this Kit are not intended to increase injury claims or expose your school or district to more liability. The intended purpose is to reduce your injuries and liability. Our purpose is to provide you with some cover and enable you to say to the unelected, appointed, board members who are being hounded to vote for this Regulation, "Do you see what this will do to our injuries and liability?" Even if they do not care about your personal safety or your reputation, the financial cost of this Bill to the system is a compelling argument, which is why we depend on it so heavily. PLEASE ALLOW THIS KIT TO BE DESEMINATED

FOR THE RECORD. HWC can comply with Kentucky's proposed restraint regulation. We write this email not because we cannot comply, but because the proposed regulation is a bad idea and not in the best interests of your educators, schools or students.

Respectfully,

Bruce Chapman, President
Handle With Care
Website: www.handlewithcare.com
Email: Info@handlewithcare.com or HWCBruce@aol.com

August 30, 2012

VIA EMAIL OR FACSIMILE

Department of Education
Attn: Terry Holiday
First Floor, Capital Plaza Tower, 500 Mero
Street, Frankfort, Kentucky, 40601
[Email: Terry.Holiday@education.ky.gov](mailto:Terry.Holiday@education.ky.gov)
Fax: 502-564-9321.

VIA EMAIL OR FACSIMILE

Department of Education
Attn: Kevin C. Brown, General Counsel
First Floor, Capital Plaza Tower, 500 Mero
Street, Frankfort, Kentucky, 40601
[Email: Kevin.Brown@education.ky.gov](mailto:Kevin.Brown@education.ky.gov)
Fax: 502-564-9321.

Dear Commissioner Holliday and Attorney Brown,

I write to give you formal notice that the proposed regulation 704 KAR 7:160: Use of Restraint and Seclusion in Public Schools – 7/12/12 draft, will expose me to an unacceptable risk of injury from an uncontrolled crash to the floor. This law will force me to fight for my life to keep an otherwise appropriate physical intervention in a standing configuration. It will prevent me from even using a wall to keep myself and the student from crashing in a heap. It is as unlawful as it is irresponsible.

Furthermore, regulation 704 KAR 7:160 will shift all of the legal liability squarely onto my shoulders when I inevitably injure a student while following this dangerous law. Common sense and my years of experience as an educator dictate, whenever I attempt to keep a physically capable and combative student in a standing-only hold, it is not a question of whether the student and I are going to the floor but how. Students will suffer the kinds of catastrophic face and head injuries that are now routinely avoided when we receive training in safe restraining methods with takedowns that are carefully engineered to eliminate impact. This law puts me at risk of having my employment threatened and my reputation ruined. It is especially irresponsible to deny teachers working with larger middle school and high school students access to safe holds that have sufficient mechanical advantage along with a carefully engineered rearward takedown.

In addition to the threat to safety, this Bill violates a constellation of Federal and Kentucky State laws that actually govern restraint usage in schools and human services. First and foremost, this ban will violate my legal right to self-defense and my right to come to the defense of another child or faculty member in Kentucky. I do not lose this right the moment I enter school grounds. Unelected state officials appointed by the Governor have absolutely no authority to restrict my right to defend myself or another. My right to self-defense and my duty to exercise my professional judgment in the service of my students are non-waivable, immovable and chiseled in State and Federal statutory and case law.

I hereby give you, the Commissioner and Counsel for the Kentucky Department of Education and my School District formal notice that this law will compromise my personal safety in the performance of my lawful duties. There is no doubt that a universal ban on prone and supine floor holds will expose me to an extraordinary workplace hazard. I have been advised that my employer will risk losing its veil of protection from punitive

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damages normally provided by its Workers Compensation Insurance policy if they/you are indifferent to this foreseeable hazard after being noticed.

I also formally request that you, Commissioner Holiday or Attorney Brown provide me with a written statement that extends indemnification to me from 1) any personal liability and 2) any administrative or disciplinary actions that will arise when a child impacts the floor during a restraint - as a precondition to my compliance with this law.

I am also requesting a formal legal opinion from our State's chief law enforcement officer, Attorney General Jack Conway (attached), as to whether this proposed law is lawful and in accordance with existing Federal and Kentucky State Law, including my right to use reasonable force in coming to the defense of myself or another in the State

Finally, this letter is discoverable document for 1) all employees who are injured by this ban and have a Workman's Compensation Claim filed as a result of performing a standing only restraining hold and 2) to all future plaintiffs and/or students who are injured by an employee subject to these unlawful restrictions. Be advised that, if injured, I intend to exercise my right to hold every offending party not shielded by State action immunity, personally responsible for my injuries.

Please respond in writing to my request for indemnification or provide me with an explanation as to why my request is being denied.

Sincerely,

Your Name and/or Contact Information Here

August 30, 2012

Attorney General
Hon. Jack Conway
Attorney General's Office
Capitol Suite 118
Capitol Avenue
Frankfort, KY 40601-3449
Main Fax: 502-564-2894
Fax: 502-429-7129 (Louisville Office)
Fax: 606-889-1823 (Prestonsburg Office)

Dear Attorney General Conway,

This letter concerns the proposed Board Of Education Regulation 704 KAR 7:160: Use of Restraint and Seclusion in Public Schools – 7/12/12 draft currently under consideration by the Kentucky Department of Education. As a registered voter in Kentucky and an employee of a Kentucky School, I give you notice, I will be adversely and unfairly impacted by this law. **I am hereby requesting a legal opinion from you, the Kentucky Attorney General, concerning the legality of this Bill.**

This proposed law violates the laws of Kentucky and the United States

First and foremost, if passed, this law will violate my legal right to self-defense and my right to come to the defense of another child or adult in Kentucky using reasonable and proportionate force in accordance with a “reasonable person” standard. Properly engineered prone and supine floor holds and especially holds with established records of safety, are considered entirely reasonable and are used safely and appropriately in every jurisdiction throughout the United States.

With all due respect, the unelected state appointees on the board of education have no demonstrable expertise in restraint and have nothing personally at stake in terms of their own safety. Kentucky administrators will be imposing this regulation from the relative safety of an office while I risk life and limb and my personal reputation. This regulation unreasonably and arbitrarily forces teachers, teacher's aides and school administrators to keep every application of physical restraint in a standing (or seated) configuration, absent any regard for the students size, physical capabilities or the degree of threat presented to other students and faculty or the public. This proposed regulation exposes me to a dramatically increased risk of injury from the most common injury-causing dynamic of physical restraint usage - an uncontrolled crash to the floor. Common sense and all of my experience as an educator dictates, when I attempt to keep a physically capable and combative student in a standing hold, it is not a question of whether we are going to the floor but how. Many elementary, middle school and high school students have substantial physical assets and are capable of presenting a level of threat that would render standing-only holds foolhardy and dangerous to attempt.

Schools are required under Federal Law to provide training for me that meets the real and foreseeable safety needs of the school and my students. As it is both likely and foreseeable that NOT every physical intervention can be maintained in a standing position, the school has an obligation to train me how to handle this situation so as to protect myself and others from harm. *Canton v. Harris*. By forcing me to fight for my life to try to keep an otherwise appropriate and routine physical intervention in a standing configuration, the Department of Education is shifting all of the risk and all of the legal liability squarely onto my shoulders. No police officer or school resource officer will ever be required to comply with this law on school property and they have far more skill and realistic options in the area of restraining than I do.

Aside from violating the laws of physics and my personal safety, this law violates the Federal and Kentucky Constitutions. It also violates a constellation of Federal Laws and regulations, Federal case law and Kentucky State laws that govern restraint usage in schools and human services.

Kentucky laws violated by proposed regulation 704 KAR 7:160:

First and foremost, this ban will violate my legal right to self-defense and my right to come to the defense of another child or adult in Kentucky using reasonable and proportionate force in accordance with a “reasonable person” standard.

The Constitution of the State of Kentucky

Section 1 states "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: First: The right of enjoying and defending their lives and liberties Third: The right of seeking and pursuing their safety and happiness."

Section 2 states “Absolute and arbitrary power over the lives, liberty and property of freemen exists NOWHERE in a republic, not even in the largest majority.”

Section 26 states “To guard against transgression of the high powers which we have delegated, We Declare that everything in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void.”

Conclusion: Kentucky’s Constitution gives me the right to defend my life, liberty and safety by all means reasonable. An unelected state administrative body has no power to arbitrarily limit my rights, and pursuant to Section 26 any regulation to the contrary is automatically void. As the attorney general and chief law enforcement officer of Kentucky we request that you declare this proposed regulation arbitrary and void so that I am not placed in the position of having to violate a regulation in the exercise of my lawful rights.

Kentucky Statutes

(KRS 503.050) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person.

(KRS 503.080) Protection of property.

- (1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is immediately necessary to prevent:
- (a) The commission of criminal trespass, robbery, burglary, or other felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055, in a dwelling, building or upon real property in his possession or in the possession of another person for whose protection he acts; or
 - (b) Theft, criminal mischief, or any trespassory taking of tangible, movable property in his possession or in the possession of another person for whose protection he acts.
- (3) A person does not have a duty to retreat if the person is in a place where he or she has a right to be.

(KRS 503.070) Protection of another

- (1) The use of physical force by a defendant upon another person is justifiable when:
- (a) The defendant believes that such force is necessary to protect a third person against the use or imminent use of unlawful physical force by the other person; and
 - (b) Under the circumstances as the defendant believes them to be, the person whom he seeks to protect would himself have been justified under KRS 503 .050 and 503 .060 in using such protection.
- (3) A person does not have a duty to retreat if the person is in a place where he or she has a right to be.

Conclusion: While self-protection laws are represented in Kentucky's penal code as a justification defense, defense of self or others is a right. The defense is written into the penal code in order to protect a person's right to life, liberty and safety of self and others as enumerated in the U.S. 5th and 14th Amendments and Kentucky's Constitution, Sections 1, 2 and 26. There is also a 2nd Amendment right to self-defense as per the recent SCOTUS ruling, *Heller v. DC*, written by Justice Scalia. In its opinion, the Supreme Court specifically cites the inalienable right to self-defense in striking the provision requiring a handgun to be kept disassembled, unloaded and otherwise inoperable as contrary to that right. If the Supreme Court is willing to confirm the individual right to self-defense as applied to a handgun, the same Supreme Court is unlikely to exclude floor or prone restraint as a necessary tool for self-defense. The right to life, including the right to defend and protect that life, has always been a fundamental Constitutional right. Any limitation placed on that right by a State is subject to 'strict scrutiny' for it to pass constitutional muster.

(KRS 503.110) Use of force by person with responsibility for care, discipline, or safety of others.

- (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.

(4) The use of physical force by a defendant upon another person is justifiable when the defendant is a doctor or other therapist or a person assisting him at his direction, and:

(a) The force is used for the purpose of administering a recognized form of treatment which the defendant believes to be adapted to promoting the physical or mental health of the patient; and

(b) The treatment is administered with the consent of the patient or, if the patient is a minor or a mentally disabled person, with the consent of the parent, guardian, or other person legally competent to consent in his behalf, or the treatment is administered in an emergency when the defendant believes that no one competent to consent can be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent.

Conclusion. BOE's proposed regulation is in conflict with this statute which gives the person responsible for the care and well-being of the child the ability to determine what interventions are in the best interests of the child.

Federal laws that are violated by proposed regulation 704 KAR 7:160:

The United States Constitution

Specifically, 5th and 14th Amendment rights to due process/equal protection.

Youngberg v. Romeo, 457 U.S. 307 (1982)

This Supreme Court ruled that the legal responsibility for making treatment decisions is exclusively in the hands of the professionals who work directly with the child and who are best able to 1) determine the clinical needs of the child and 2) balance those needs with the overall safety and security of the school.

Canton v. Harris, 489 U.S. 378 (1989)

This is a failure to train case where inadequacy of training can serve as the basis for 1983 liability.

The Supreme Court decision in *Canton v. Harris* along with other settled law firmly places the

responsibility for making restraint policy and choosing training in the hands of the schools and professionals with direct responsibility for the students.

St. Catherine's Care Center of Findlay v. Centers for Medicare & Medicaid Services, Docket No. C-01-721; Decision No Cr1190 (June 14, 2004)

A Federal Administrative Court ruled that it is the responsibility of the entity that directly cares for the client to determine crisis intervention program in place at the school must meet the real needs of the school and **“neither federal reimbursement practices nor state screening practices relieves the [school] of its responsibility to provide its [students] with necessary care and services.”)**

In the case at bar, the agency was trained in standing restraint only and the court ruled that the crisis intervention and restraint training this agency was using was not sufficient to maintain a safe environment. The court held that regardless of policy, it is the [school's] responsibility to provide training and tools for its workers that meet the "real" needs of its target population. If standing holds are insufficient to manage the specific population and maintain safety, the [school] has a legal obligation to provide holds that do.

In conclusion, I submit that the proposed Regulation 704 KAR 7:160 is illegal and deprives me of my equal protection under the law. I respectfully request your legal opinion as to the accuracy of my submission to you and your assistance, as the chief law enforcement official of Kentucky, in stopping this violation of my civil rights and the laws of the State of Kentucky.

As the proposed bill will affect 43,767 teachers, 1474 Kentucky Public Schools and approximately 650,000 students, it is imperative that you respond quickly. Please copy your response to the Kentucky Legislature and Governor Steve Beshear.

Sincerely,

Your Name and/or Contact Information Here