

Advisory Memorandum

To: The U.S. Commission on Civil Rights

From: The Kansas Advisory Committee to the U.S. Commission on Civil Rights

Date: May 27, 2015

Subject: Seclusion and Restraint in Kansas Schools

Introduction

The U.S. Commission on Civil Rights (Commission) is an independent, bipartisan agency established by Congress and directed to study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, national origin or in the administration of justice. The Commission has established advisory committees in each of the 50 states and the District of Columbia. These advisory committees advise the Commission of civil rights issues in their states that are within the Commission's jurisdiction.

On March 23, 2015, the Kansas Advisory Committee (Committee) to the U.S. Commission on Civil Rights convened a public meeting to examine preliminarily the potential disparate impact of the practice of seclusion and restraint in Kansas schools on children with disabilities. For the purposes of this inquiry, restraint was defined according to the United States Government Accountability Office (GAO) guidelines as "any manual method, physical or mechanic device, material, or equipment that immobilizes or reduces the ability of an individual to move his or her arms, legs, body or head freely."¹ Likewise, seclusion was defined as the "involuntary confinement of an individual alone in a room or area from which the individual is physically prevented from leaving."² In this meeting, the Committee sought to begin to understand the extent to which seclusion and restraint practices in both public and private schools may have a disparate, negative impact on students with disabilities. The Committee also sought testimony regarding the potential need for specific federal intervention on this topic. The Committee notes that the focus of this particular inquiry was intentionally limited in scope; including the testimony of four panelists who spoke exclusively on the impact of seclusion and restraint interventions on students with disabilities. The purpose of this inquiry was to determine whether or not sufficient concerns exist to recommend that the Commission consider this topic on a national scale.

The following advisory memo results from the testimony provided during this March 23, 2015, meeting of the Kansas Advisory Committee. It begins by providing brief background information regarding the use of seclusion and restraint in schools, and related legal obligations at both the state and federal levels. It then provides an overview of the testimony before the Committee, as well as preliminary conclusions emerging from this testimony. Finally, the memo concludes by providing specific recommendations to the Commission for further study and

¹ U.S. Government Accountability Office, "Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers" p.01 (May 19, 2009) (available at <http://www.gao.gov/new.items/d09719t.pdf>) [hereafter, *GAO Report*.]

² GAO Report, p. 01

intervention to address the civil rights concerns raised by the Committee’s inquiry. This memo and the recommendations included within it were approved by a majority of the Committee on May 27, 2015.

Background

Over the past decade, a number of research reports and individual incidents have led parents, public officials, and advocates alike to raise concern regarding the use of seclusion and restraint as a means of behavioral control or emergency intervention in America’s schools. In May of 2009, the GAO released a report which found the use of restraint and seclusion in both public and private schools to be dangerous and life threatening, at times resulting in serious injury and death.³ In addition to raising general concern regarding the safety of seclusion and restraint practices in schools, the GAO reported that the majority of children affected by such incidents were those diagnosed with autism or other conditions, including posttraumatic stress disorder and attention deficit hyperactivity disorder.⁴ More recently, in 2012 the National Disability Rights Network issued a report detailing dozens of instances across the country in which students with disabilities were abusively pinned to the floor for hours at a time, handcuffed, locked in closets and subjected to other traumatizing acts of violence.⁵ Such findings are particularly troubling, not only due to civil rights concerns regarding equal treatment, but also because some reports suggest that seclusion and restraint may cause additional trauma for children with disabilities. According to the National Disability Rights Network, while all children experience trauma as a result of restraint and seclusion, “children with significant disabilities are at increased risk if they are not able to fully understand or communicate what happened, how they feel, or report injury or pain as a result of restraint or seclusion.”⁶

Currently, the Children’s Health Act of 2000 protects children from restraint and seclusion in hospitals and other inpatient institutions.⁷ However, there are no similar federal laws or regulations to protect children from these practices in schools. In May 2012, the U.S. Department of Education released “Restraint and Seclusion: Resource Document,” which describes fifteen principles for states, school districts, schools, parents, and other stakeholders to consider when developing or revising policies and procedures on the use of restraint and seclusion.⁸ The document is to be used as “guidance.” The extent to which states and school districts implement these principles “is a matter for state and local school officials to decide using their professional

³ GAO Report

⁴ GAO Report, pp. 07-08.

⁵ National Disability Rights Network, “School is Not Supposed to Hurt,” March 2012, pp. 09-16 (available at [http://www.ndrn.org/images/Documents/Resources/Publications/Reports/School is Not Supposed to Hurt 3 v7.pdf](http://www.ndrn.org/images/Documents/Resources/Publications/Reports/School_is_Not_Supposed_to_Hurt_3_v7.pdf)) (last accessed May 13, 2015) [Hereafter *NDRN Report 2012*]

⁶ Alliance to Prevent Restraint, Aversion Interventions and Seclusion. “Preventing the Use of Restraint and Seclusion in Schools: Addressing a National Epidemic through the Keeping All Students Safe Act.” p. 02 May 27, 2013. (available at <http://stophurtingkids.com/resources/>). (last accessed May 14, 2015)

⁷ 42 U.S.C. § 290jj (2006). Known as the “Children’s Health Act of 2000”, this law amended Title V of the Public Health Service Act and was passed in response to studies that indicated a staggering number of deaths caused by restraint in psychiatric and mental health facilities. (Big Tent Coalition, available at http://www.kslegislature.org/li/b2015_16/committees/ctte_h_children_and_seniors_1/documents/testimony/20150210_14.pdf footnote 05.) (last accessed May 18, 2015)

⁸ U.S. Department of Education., “Restraint and Seclusion: Resource Document”, May 2012. (available at www.ed.gov/policy/restraintseclusion) (last accessed May 14, 2015) [Hereafter, *Resource Document*]

judgment.”⁹ In fact, the document itself directly states that it “does not create nor confer any rights for or on any person or require specific actions by any State, locality or school district.”¹⁰

Despite the lack of enforceable federal regulation to oversee all instances of restraint and seclusion in schools, some federal protections do exist for students with disabilities.¹¹ For example, under the Individuals with Disabilities Education Act (IDEA), eligible students must have an Individualized Education Plan (IEP), which outlines their educational needs and how the school is to meet them in the “least restrictive environment” possible.¹² A student’s IEP may also include clear instruction on behavioral interventions such as the use of seclusion and restraint.¹³ In addition, Federal laws that are enforced by the Department of Education’s Office of Civil Rights include Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination based on disability in programs and activities operated by recipients of federal funds; and title II of the Americans with Disabilities Act of 1990, which prohibits discrimination based on disability by public entities, regardless of whether they receive federal financial assistance. While these laws do not directly address the topic of seclusion and restraint, if such practices are disproportionately applied to children with disabilities, some protection may potentially apply.

At the state level, laws and regulations vary widely. In 2009, the GAO reported that nineteen states,¹⁴ including Kansas, had no laws or regulations related to the use of seclusions or restraints in schools. Other states had regulations that only applied to selected schools in certain situations; i.e., seven states¹⁵ addressed the use of restraint, but did not regulate seclusion; seventeen states¹⁶ required that selected staff receive training before being permitted to restrain children; thirteen states¹⁷ required schools to obtain consent prior to using foreseeable or non-emergency physical restraints; and eight states¹⁸ specifically prohibited the use of prone restraints or restraints that impede a child’s ability to breathe.¹⁹

⁹ *Resource Document*, p. 02

¹⁰ *Resource Document*, p. 02

¹¹ Since the Committee voted to approve this report on May 27, 2015, the U.S. Department of Justice filed a statement of interest in *S.R. & L.G. v. Kenton County, et al*, in federal court in the Eastern District of Kentucky. See <http://www.justice.gov/opa/pr/departement-justice-files-statement-interest-kentucky-school-handcuffing-case>.

¹² Individuals with Disabilities Education Act, Title I(b), sec. 612(a)(5). Available at <http://idea.ed.gov/explore/view/p/%2Croot%2Cstatute%2CI%2CB%2C612%2Ca%2C>

¹³ 20 U.S.C. §§ 1412-1414.

¹⁴ GAO Report, p. 04. Arizona, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, New Jersey, North Dakota, Oklahoma, South Carolina, South Dakota, Vermont, Wisconsin and Wyoming.

¹⁵ GAO Report, p. 04. Alaska, Colorado, Hawaii, Michigan, Ohio, Utah and Virginia.

¹⁶ GAO Report, p. 04. California, Colorado, Connecticut, Illinois, Iowa, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Texas and Virginia.

¹⁷ GAO Report, p. 04. Colorado, Delaware, Maryland, Massachusetts, Montana, New Hampshire, New York, North Carolina, Oregon, Pennsylvania, Tennessee, Virginia, and Washington.

¹⁸ GAO Report, p.04. Colorado, Connecticut, Iowa, Massachusetts, Pennsylvania, Rhode Island, Tennessee, and Washington.

¹⁹ For additional analysis of state-by-state seclusion and restraint laws and regulations, see Butler, Jessica. *How Safe is the Schoolhouse? An Analysis of State Seclusion and Restraint Laws and Policies*. Autism National Committee, March 22, 2015. Available at: <http://www.autcom.org/pdf/HowSafeSchoolhouse.pdf> (last accessed May 26, 2015) [Hereafter: *Schoolhouse*]

In Kansas, on February 13, 2013, the State Board of Education passed “Emergency Safety Interventions” (ESI) regulations, K.A.R. 91-42-1 and 91-42-2,²⁰ which remain in effect today.²¹ These regulations require that all school districts have a policy in place regarding the use of seclusion and restraint. The policy must include: (1) immediate prohibition of certain types of restraint; (2) school personnel training consistent with nationally recognized training programs on the use of ESI; (3) written parental notification of the use of an ESI with a student within two school days; (4) procedures for documenting the use of an ESI; (5) procedures for data collection and periodic review of the use of ESI at each school; and (6) a local dispute resolution process.²² The regulations also require schools to provide parents with annual notice of the district’s ESI policies, and to post such policies on each school’s website.²³ Despite this progress however, advocates have raised concern that these regulations require only that each district has a policy pertaining to such matters, and not that the district actually implement and follow that policy. Advocates argue that if a district is in violation of their own policies, a lack of independent enforcement provisions could seriously undercut the strength of these requirements.²⁴

Data collection and reporting also varies widely by state. According to a 2015 analysis of state seclusion and restraint policies compiled by attorney Jessica Butler and published by the Autism National Committee, as of March 2015, fifteen states require annual data collection for all children, while twenty-two states require data collection for children with disabilities.²⁵ Data collection and public reporting are important because they help schools to set benchmarks for reducing the use of seclusion and restraint, and enable public oversight to prevent the abuse of such practices.²⁶ As part of this project, the Committee issued a formal request for seclusion and restraint data to the Kansas State Department of Education. The Department noted that available data was limited, as prior to 2013 data reporting from each school was not mandatory.²⁷

²⁰ K.A.R. 91-42-01; K.A.R. 91-42-02, “Emergency Safety Interventions”, text available at http://ksdetasn.org/cms/images/utahstate_media/documents/TASN-ESI/ESI-Regulations/ESI%20Regulations%20K.A.R.%2091-42-1%20and%2091-42-2%20As%20Passed%20by%20the%20Kansas%20State%20Board%20of%20Education.pdf (last accessed May 18, 2015)

²¹ Since the Committee approved this report on May 27, 2015, the Kansas legislature passed a law entitled, “The Freedom from Unsafe Restraint and Seclusion Act,” effective June 4, 2015. See http://www.kslegislature.org/li/b2015_16/measures/hb2170/.

²² KSDE, “Emergency Safety Interventions: Kansas Regulations and Comparisons to Other States.” April 16, 2013. (available at <http://www.ksde.org/Portals/0/SES/SEAC/SEAC-12-13-Report-20130416-ESIREgsKansasOtherStates.pdf>). (Last accessed May 18, 2015)

²³ K.A.R. 91-42-02(1)B

²⁴ *Schoolhouse* p. 26-27 and footnote 57

²⁵ *Schoolhouse* p. 91

²⁶ *Schoolhouse* p. 03

²⁷ Between 2010 and 2012, only 32.8% of all public school districts reported. Furthermore, school districts with fewer than 10 reports of seclusion or restraint were suppressed, which has been more than 50% of districts in some years. See Appendix A for seclusion data as submitted by the KSDE in response to the Committee’s request. Michael Wallis of the KSDE Office of Research and Evaluation noted in an email to Commission staff on January 05, 2015: “Recently, reporting of restraint and seclusion has become mandatory. However, the Kansas Student Privacy act will still be an impediment in supplying you with the data you have requested as only non-aggregate information may be supplied.”

Furthermore, the Committee's request for available data to be disaggregated by disability status, race, and sex, was denied by the Data Release Review Board.²⁸

For the purposes of this project, the Committee sought testimony specifically regarding disparities in the incidence of seclusion and restraint on the basis of disability status for students in Kansas schools; however, the Committee also recognizes that data also points to intersecting disparities on the basis of race or color.²⁹ These themes raise civil rights concerns regarding disparate impact, equal protection, and due process of law. The Commission should consider each of these as areas of further study in subsequent inquiries both in the State of Kansas and at the national level.

Summary of Panel Testimony

In this project the Committee sought to examine whether children with disabilities are disproportionately and negatively impacted by seclusion and restraint practices in Kansas schools. The Committee also sought preliminary information regarding the transparency afforded by the Kansas State Department of Education on the incidence of these practices; the forms of redress available to parents or guardians wishing to file a complaint regarding the seclusion or restraint of their child; the effectiveness of current regulations to ensure the physical and emotional safety of students experiencing seclusion and restraint in Kansas schools; and, if found to be ineffective, what areas of federal intervention may be beneficial to address the related civil rights concerns.

The Committee heard testimony from four panelists including the mother of a student who was directly impacted by seclusion and restraint practices in her school, attorneys with the Kansas State Department of Education, an attorney with the Disability Rights Center of Kansas, and a legislative liaison to the Kansas Association of Special Education Administrators. The Committee also requested testimony from the U.S. Department of Education Office of Civil Rights, but the Department did not follow through by providing a panelist in response to the Committee's repeated requests.³⁰ In addition to the panel testimony heard, the Committee welcomed any written testimony to be submitted on the topic from any member of the public. See Appendix C for written testimony and other documents received.

Panelist I: Tonia A. Wade, a Parent.

²⁸ See Appendix B for meeting minutes from the KSDE Data Release Review Board pertaining to the Committee's request.

²⁹ U.S. Department of Education, Civil Rights Data Collection. Data Snapshot: School Discipline. Issue Brief No.1, March 2014. Available at: <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf> (last accessed May 18, 2015)

³⁰ Mr. Bill Dittmeier of the US DOE Office of Civil Rights in Kansas City, MO, responded to the Committee's initial inquiry on March 04, 2015 requesting more information. USCCR staff responded the same day providing him with the project proposal and offering to hold a phone conference to discuss the project and the role of the Committee. USCCR staff spoke twice with Mr. Dittmeier afterward, offering clarifying information. However, no representative from the US DOE offices in Kansas City or Washington, DC, offered a response to the invitation prior to the March 25 meeting.

Tonia A. Wade is a mother of a student in the Kansas City, Kansas School District. During her testimony, she recounted the traumatic seclusion of her 16 year-old autistic daughter in a “small makeshift box built out of material you can get at your local hardware store. The box looked more fitting for a dog rather than a child.”³¹ Ms. Wade testified that she was called to the school because of her daughter’s reaction to the seclusion. She stated that when she arrived at the school, she found her daughter “lying naked on a cold floor... she had taken off all her clothes... she kept repeating ‘Mommy, no breath,’” indicating that she was having difficulty breathing.³² Ms. Wade testified her daughter was so traumatized by the incident, she had to take her to the emergency room because: “she couldn’t breathe. She was crying, sweating, and trembling.”³³ After the incident, Ms. Wade stated that her daughter began suffering from difficulty sleeping, anxiety, and incontinence, remaining consistent for the past seven years since the incident.³⁴

Ms. Wade testified that even though the incident she described involving her daughter took place prior to the implementation of the 2013 State ESI regulations, these provisions remain insufficient to prevent such events from reoccurring today.³⁵ She cited unclear standards for when seclusion and restraint are allowable, an appeal process that favors school districts rather than providing for independent review, and a fear of retaliation by local school districts against students and their families when complaints are filed as continued concerns that remain to be addressed.³⁶

Panelist II: Catherine Johnson, Disability Rights Center of Kansas

Catherine Johnson, an attorney with the Disability Rights Center of Kansas, outlined a number of concerns regarding the use of seclusion and restraints that parents have brought forth to her office—even following the implementation of the April 2013 State ESI regulations previously described. For example, Ms. Johnson pointed out that current regulations in Kansas require only that a “student presents an immediate danger to self or others,”³⁷ a qualification which she said lacks a clear definition, and can lend itself to disputes between parents and schools regarding what behaviors constitute “immediate danger.”³⁸ She noted that the U.S. Department of Education provides further definition in its 2012 Resource Document on the topic, by suggesting these practices should be limited to situations presenting immediate danger of “*serious physical harm*.”³⁹ The principles outlined in this document also specify that these interventions should be used only when all less restrictive interventions have been deemed ineffective, and they should

³¹ Public Meeting of the Kansas Advisory Committee to the U.S. Commission on Civil Rights, March 25, 2015. “Civil Rights and the Use of Seclusion and Restraint on Children with Disabilities in Kansas Schools.” Wade testimony. *Transcript*, p. 03 lines 27-28. Available at:

<http://www.facadatabase.gov/committee/meetingdocuments.aspx?flr=126111&cid=249> [Hereafter cited as *Transcript*]

³² Wade testimony. *Transcript*, p. 03 lines 32-36

³³ Wade testimony. *Transcript*, p. 04 lines 01-03

³⁴ Wade testimony. *Transcript*, p. 04 lines 03-09

³⁵ Wade testimony. *Transcript*, p. 04 lines 10-14

³⁶ Wade testimony. *Transcript*, p. 04 lines 15-19; p. 22 line 26 – p.23 line 33

³⁷ K.A.R. 91-42-1(c) and K.A.R. 91-42-2

³⁸ Johnson testimony. *Transcript*, p. 18 lines 11-16

³⁹ *Resource Document*, Principle 03, p. 12

be discontinued as soon as the threat dissipates.⁴⁰ In comparison to these principles, Ms. Johnson testified that current Kansas regulations are a “very weak standard.”⁴¹

In addition to lacking clarity regarding when seclusion and restraint interventions can be used, Ms. Johnson raised several concerns with the complaint process available to parents whose children had been subjected to them. She noted that many parents fear retaliation against their children from school personnel if they file a complaint locally.⁴² She also testified that some parents have been denied access to the local complaint procedures because the school did not consider what happened to their child to be “seclusion.” Therefore, no incident report was filed, and parents have no outlet to address their concerns.⁴³ She also pointed out that in order to file a complaint, it is currently the responsibility of the parents to produce supporting documents and evidence regarding the incident in question. “The requirements that parents file the complaints with all the supporting facts and documents, this is oftentimes very difficult for parents of children with disabilities. It’s hard sometimes just to get through the day.”⁴⁴

Ms. Johnson noted that a proposed amendment to the current K.A.R. 91-42-1 and 91-42-2 regulations would establish a procedure allowing parents to request the Kansas State Board of Education conduct an administrative review of their complaint and its resolution by the local school board. This amendment has not yet been implemented, and is currently undergoing review by the Attorney General’s office.⁴⁵ However, Ms. Johnson raised two primary concerns with this proposal. First, the proposed amendment limits parents to requesting an administrative review regarding one of nine identified types of issues.⁴⁶ It is unclear how the Department would handle complaints that fall outside of one of these identified areas. Parents fear that complaints that do not meet one of these criteria would be dismissed, including disputes regarding whether or not a specific incident constitutes seclusion or restraint.⁴⁷ Second, the authority of the hearing officer is “very discretionary.” As such, parents and advocates worry that the hearing officer may “defer greatly to the local school district’s decision instead of conducting an independent hearing

⁴⁰ Johnson testimony. *Transcript*, p18 lines 17-23. See also *Resource Document*, Principle 03, p. 12.

⁴¹ Johnson testimony, *Transcript*, p. 05 lines 35-37; p. 18 lines 17-24

⁴² Johnson testimony. *Transcript*, p. 06 lines 11-13; p. 21 lines 15-21

⁴³ Johnson testimony. *Transcript*, p. 05 lines 18-26; p. 17 line 25 – p. 18 line 03

⁴⁴ Johnson testimony. *Transcript*, p. 06 line 37 – p. 07 line 02

⁴⁵ Johnson testimony. *Transcript*, p. 06 lines 16-19

⁴⁶ Coalition to Protect Children from Unnecessary Seclusion and Restraint March 2015. Proposed Draft of K.A.R. 91-42-4(a)(b). “Any parent or eligible student, who filed a complaint with a local board of education... may request an administrative review by the KSBE of the local board’s resolution of said complaint. A request for administrative review shall allege one or more of the following: 1)the school district does not limit its use of seclusion and restraint to those circumstances described in 91-42-1(d); 2) the school district uses [specifically unauthorized forms of physical restraint]; 3) the school district uses [unauthorized forms of] chemical restraint; 4) the school district uses [unauthorized forms of] mechanical restraint]; 5)the school district does not have written policies pertaining to the use of emergency safety intervention; 6) the school district’s written policies pertaining to the use of ESI is not [publicly] accessible; 7) the school district does not train school personnel as required by K.A.R. 91-42-2(a)(2); 8) written parental notification is not provided within two school days of the use of ESIs; or, 9) the school district does not have procedures for a local dispute resolution process as required by K.A.R. 91-42-2(a)(6). p. 13 Available at: http://kslegislature.org/li/b2015_16/committees/ctte_s_ed_1/documents/testimony/20150311_02.pdf (last accessed May 15, 2015)

⁴⁷ Johnson testimony, *Transcript*, p. 06 lines 20-31.

and making his or her own decision.”⁴⁸ Ms. Johnson remarked, “This is not what the parents asked for. The parents asked for an independent complaint process to be filed directly with the [Kansas] State Board of Education.”⁴⁹

Ms. Johnson concluded her testimony with a discussion of currently pending legislative action that would further impact seclusion and restraint practices in Kansas schools. House Bill 2170, which passed in February of 2015⁵⁰ and was sent to the Kansas Senate, creates a uniform standard of use for seclusion and restraint by restricting the use of these practices to situations in which there is a serious threat of physical harm to self or others. It also provides a means for parents to file an independent complaint. It does not however, require that all less restrictive interventions be used prior to seclusion or restraint. Senate Bill 2170⁵¹ in contrast, does require less restrictive alternatives be used before using seclusion or restraint. It also requires debriefing and a review after the third use of seclusion or restraint within a school year, and requires parents be notified the same day seclusion or restraint occurred. Despite these provisions, the Senate Bill is limited because it (1) does not offer an independent complaint process for parents; (2) it weakens the standard of use from “immediate danger of serious physical harm” to “immediate danger of physical harm,” and (3) its scope is limited in that it does not expressly include students with a Section 504 educational plan.⁵²

Because of these challenges, Ms. Johnson testified to the need for uniform protections against seclusion and restraint: “the only uniform way to move forward is for the federal law to be implemented that would set a uniform standard.”⁵³

Panelist III: Laura Jurgensen of the Kansas State Department of Education

Laura Jurgensen and Julie Ehler, Early Childhood, Special Education and Title Services Attorneys with the Kansas State Department of Education provided an overview of current regulations regarding seclusion and restraint in Kansas schools, and the processes involved in developing them. Ms. Jurgensen noted that current policy regarding seclusion and restraint in Kansas schools is set by the State Board of Education in collaboration with the Special Education Advisory Council (SEAC), to ensure compliance with federal requirements regarding special education for students with disabilities.⁵⁴ The Board first adopted guidelines regarding the use of seclusion and restraint on students with disabilities in 2007, and in 2011 these guidelines were expanded to apply to all students. In 2013 the Board adopted the current

⁴⁸ Johnson testimony, *Transcript*, p. 06 lines 31-37

⁴⁹ Johnson testimony, *Transcript*, p. 06 lines 20-21

⁵⁰ Available at: http://www.kslegislature.org/li/b2015_16/measures/hb2170/ (last accessed May 13, 2015)

⁵¹ Senate Sub SB 2170. Available at: http://www.kslegislature.org/li/b2015_16/measures/documents/hb2170_03_0000.pdf (last accessed May 13, 2015)

⁵² Johnson testimony, *Transcript* p. 07 line 16 – p. 08 line 11. *See Also*: Section 504 is a part of the Rehabilitation Act of 1973 that prohibits discrimination based upon disability. Section 504 is an anti-discrimination, civil rights statute that requires the needs of students with disabilities to be met as adequately as the needs of the non-disabled are met. More information available at: <http://www.greatschools.org/special-education/legal-rights/868-section-504.gs> (last accessed May 18, 2015)

⁵³ Johnson testimony, *Transcript*. p. 26 lines 09-20. *See also* p. 04 lines 31-36; p. 07 lines 21-26

⁵⁴ Jurgensen testimony, transcript p. 08 line 35 – p. 09 line 08

regulations K.A.R. 91-42-1 and 91-42-2, which Ms. Jurgensen testified reflect the consensus of a broad group of stakeholders.⁵⁵ These stakeholders considered “first and foremost the safety of staff and students” when developing the current regulations. They also considered the importance of parental notification; accessibility to dispute resolution processes; training in de-escalation and prevention and positive behavioral intervention techniques; the role of law enforcement and the effect of these regulations on their duties; the constitutionality of proposed regulations; and the cost to districts for implementing them, among other things.⁵⁶

Ms. Jurgensen noted there is currently no federal law governing the use of seclusion and restraint in schools; however the U.S. Department of Education (USDOE) has released a Resource Document on the topic to assist schools in developing and implementing their policies. She provided an overview of K.A.R. 91-42-1 and 91-42-2, and described the ways in which the Kansas State Department of Education (KSDE) has sought to assist schools in implementing these new regulations—including making the Resource Document of the USDOE available to them as they worked to develop their policies. The KSDE has also brought in free and low-cost training and technical assistance to the schools to ensure that school personnel are trained on the use of Emergency Safety Interventions (ESI), including seclusion and restraint, in a way that is “consistent with nationally recognized training programs.” Ms. Jurgensen noted the KSDE reviews ESI data submitted by each school twice per calendar year to determine which buildings and districts will receive this targeted technical assistance and training.⁵⁷ They also “provide guidance” to buildings that don’t submit data, and provide technical assistance to buildings that report no incidence of ESI to ensure they have procedures in place.⁵⁸ According to Ms. Jurgensen, the intent that each building and district periodically review their data so that they can look for patterns and make decisions regarding staff training.⁵⁹ Ms. Jurgensen noted that the KSDE started collecting data in 2007, though it was not required until 2013. Therefore, it is unclear how valid ESI data is prior to the 2013/2014 school year. In 2013/2014 there were 4,450 incidents of restraint, and 6,295 incidents of seclusion reported in Kansas schools.⁶⁰ Current data does not indicate how many of these incidents involved the same student being restrained or secluded on multiple occasions.⁶¹

Finally, Ms. Jurgensen spoke to the complaint proceedings and enforcement provisions that have been proposed in a pending amendment to K.A.R. 91-42-1 and 91-42-2. She testified that the intent of these provisions is to allow complaints to be resolved at the local level with the people who would have been involved in the incident in question. Parents and students over the age of eighteen would have the opportunity to request a review by a hearing officer appointed by the KSDE after filing a complaint and receiving a determination by the local school board. She also stated that her office takes calls from parents with concerns at any time and they try to resolve

⁵⁵ Jurgensen testimony. *Transcript*, p. 09 lines 09-15; Agencies and stakeholders include: parents, the Disability Rights Center of Kansas, the Kansas Association of Special Education Administrators, the Kansas Association of School Boards, United School Administrators, Families Together and the Kansas Parent Information Resource Center.

⁵⁶ Jurgensen testimony. *Transcript*, p. 09 lines 18-28

⁵⁷ Jurgensen testimony. *Transcript* p. 11 line 33 – p.12 line 02

⁵⁸ Jurgensen testimony. *Transcript* p. 11 line 33 – p.12 line 02

⁵⁹ Jurgensen testimony. *Transcript* p. 11 lines 17-32

⁶⁰ Jurgensen testimony. *Transcript* p. 16 lines 32-34

⁶¹ Jurgensen testimony, *Transcript*, p. 16 line 22 – p. 23 line 05

these concerns informally if possible. If a parent is still unsatisfied with the outcome, Ms. Jurgensen suggested they could file a complaint with the KSDE directly if the complaint alleges a violation of special education law.⁶² Parents may also be able to contact the Kansas Department of Children and Families to discuss other potential remedies.

⁶² Panelist Catherine Johnson later testified that while a parent could file a formal complaint with the KSDE under the Individuals with Disabilities in Education Act (IDEA), the Department “will most probably dismiss that complaint because IDEA does not address seclusion and restraint. It’s not something that department has jurisdiction over to investigate.” See Johnson testimony. *Transcript*, p. 21 lines 19-30.

Panelist IV: Terry Collins, Legislative Liaison for the Kansas Association of Special Education Administrators

Terry Collins, Legislative Liaison for the Kansas Association of Special Education Administrators, and Director at Doniphan County Education Cooperative, testified that current regulations K.A.R. 91-42-1 and 91-42-2 were the product of a cooperative effort including a number of stakeholders and were “not just [the KSDE] saying ‘this is what we’re going to do.’”⁶³ He described the history of seclusion and restraint in schools, beginning in the 1980’s with the de-institutionalization movement. “When kids came out of the institutions and entered the public school, teachers didn’t really know how to handle them so they adopted some of the behavioral training that came out to the institutions”⁶⁴ He noted that since this time, the school districts have endorsed this transition and done a “great job in working with students with those severe disabilities.”⁶⁵ Today, Mr. Collins testified that seclusion and restraint are no longer used as behavioral intervention tools in Kansas. He attributed this success in part to the currently implemented regulations, and applauded the training being done by the KSDE as the “most intensive, concentrated training in the history of special education since the development and the implementation of the individual education [plan].”⁶⁶ Mr. Collins testified that 1,465 Kansas schools reported seclusion and restraint data, and over 1,000 of those schools had no incidence of these practices at all.⁶⁷ He also noted that parent complaints of seclusion and restraint incidents have been extremely minimal—the Kansas Association of Special Education Administrators developed a statewide steering committee to work directly with parents who have complaints regarding seclusion and restraint. Their desire is to resolve all issues involving seclusion and restraint “at the lowest level possible.”⁶⁸ In the last year, they have received only two formal complaints, and both have been resolved.⁶⁹

Finally, Mr. Collins cautioned that implementing policies restricting ESI practices to situations that present a threat of “serious bodily harm” could be dangerous. He noted, “OSHA’s definition of ‘serious physical harm’ is that an organ or a body limb is permanently damaged and unable to use it. . . we don’t want people to think you can’t intervene in an emergency situation unless somebody’s going to lose an eye or lose an arm.” Instead, he suggested that “imminent threat or immediate danger to self or others”⁷⁰ is sufficient, and that people across the state have received enough training that a “reasonable and prudent” person is going to understand when to step in

⁶³ Collins testimony, *Transcript*, p. 14 lines 12-15

⁶⁴ Collins testimony, *Transcript*, p. 13 lines 21-34

⁶⁵ Collins testimony, *Transcript*, p. 13 lines 25-27

⁶⁶ Collins testimony, *Transcript*, p. 13 lines 10-16

⁶⁷ Collins testimony, *Transcript*, p. 13 lines 25-27

⁶⁸ Collins testimony, *Transcript*, p. 14 lines 21-22

⁶⁹ Collins testimony, *Transcript*, p. 14 lines 27-33; p. 22 lines 10-15. According to the testimony of panelist Tania Wade, fear of retaliation is likely the cause for the low incidence of complaints. See *Transcript*, p. 22 line 20 – p. 23 line 37

⁷⁰ Collins testimony, *Transcript*, p. 15 line 12. Note: Mr. Collins’ original testimony as cited in the transcript states “imminent threat of serious harm or danger of harm is sufficient.” Mr. Collins later amended this testimony during a meeting of the Kansas Advisory Committee, May 27, 2015. Meeting minutes available at: <https://database.faca.gov/committee/meetingdocuments.aspx?flr=126370&cid=249> (last accessed May 29, 2015)

and stop an incident from occurring.⁷¹ For this reason, he noted that 47 out of the 50 states currently do not use the term “serious bodily injury” when talking about seclusion and restraint.⁷²

Committee Conclusions from the March 25, 2015 meeting:

The Committee heard balanced testimony regarding disparities related to the seclusion and restraint of students with disabilities in Kansas schools. The Committee submits the following conclusions based upon this preliminary testimony provided:

1. Federal rules currently restrict the use of seclusion or restraint in many public institutions such as hospitals and psychiatric centers; however no federal laws or regulations exist to govern these interventions in U.S. schools.
2. Current regulations passed by the Kansas State Board of Education define seclusion and restraint and require that all schools have specific policies governing these interventions.⁷³ These regulations require that schools develop their own policies within the state guidelines; however each school or district implements and enforces their own policies. As such the effectiveness of these regulations is unclear.⁷⁴
3. Despite the inclusion of definitions for seclusion and restraint as outlined in the Kansas State Board of Education regulations, a disconnect remains between school administrators and parents regarding how, in practice, these terms are defined.⁷⁵ As a result, advocates have raised concern that parents are not always notified of related interventions involving their child if the school does not classify the action as “seclusion” or “restraint.” In such a situation, the parent may also not have the option to file a complaint regarding that particular incident, because the school did not classify it as a qualifying incident.⁷⁶
4. Current state regulations in Kansas require all schools to have policies regarding staff training on the use of emergency safety interventions such as seclusion and restraint that are “consistent with nationally recognized training programs.”⁷⁷ However, implementation and enforcement of policies established by individual schools or districts is the responsibility of that same school or district. As such, training may be inconsistent, and concern remains that untrained staff may harm children when improperly using methods of seclusion and restraint. Untrained staff may also apply such techniques inconsistently and in a discriminatory manner.
5. In Kansas, schools are required to have a policy regarding how they will collect and maintain documentation of any incident involving the use of “emergency safety interventions” (ESI), including seclusion and restraint.⁷⁸ However, each district is permitted to develop their own procedures for this data collection. Thus analysis across districts can be difficult, and it is

⁷¹ Collins testimony, *Transcript*, p. 15 lines 01-17

⁷² Collins testimony, *Transcript*, p. 15 lines 04-09

⁷³ K.A.R. 91-42-01; K.A.R. 91-42-02

⁷⁴ Wade testimony, *Transcript* p. 03 lines 06-21; Johnson testimony, *Transcript* p. 05 line 01 – p. 07 line 09. See also *Schoolhouse* p. 26-27 and footnote 57

⁷⁵ Johnson testimony, *Transcript*, p. 18 lines 11-16; p. 06 lines 11-13; p. 21 lines 15-21.

⁷⁶ Johnson testimony, *Transcript*, p. 06 lines 26-34.

⁷⁷ K.A.R. 91-42-2(a)(2).

⁷⁸ Schools are further required to report this data biannually to their district superintendent. Districts are required to report this information to the Kansas State Department of Education upon request, and the Department is required to provide an annual report to the State Board of Education.

unclear what, if any enforcement mechanisms are in place for districts that fail to report the required data. Also, the KSBE does not currently collect any data regarding the number of students who have faced repeated incidents of seclusion or restraint, and no specific requirements exist regarding reporting data disaggregated by the race, color, disability, or sex of the student involved in the incident.⁷⁹ More consistency in data collection and transparency in publicly reporting disaggregated data is necessary to accurately assess the effectiveness of Kansas' regulations in ensuring the safety, equal treatment, and equal protection of students.

6. Despite requirements that each school district establish a process for local dispute resolution, advocates have raised concern that a number of barriers remain which may prevent parents from effectively navigating this process. Such barriers include placing the burden of proof on parents to present documentation and evidence regarding the seclusion and/or restraint of their child; a lack of independent review of disputes; and fear of retaliation directed at their child by local school officials.⁸⁰ According to testimony heard, 4,450 incidents of restraint and 6,295 incidents of seclusion were reported during the 2013/2014 school year, after the implementation of the current ESI regulations. Yet, only two formal complaints regarding these incidents have been filed.⁸¹ Despite the extremely low incidence of formal complaints filed with the state, advocates maintain they continue to receive informal complaints on a regular basis.

Recommendations

Among their duties, advisory committees of the U.S. Commission on Civil Rights are authorized to advise the Commission (1) concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the Federal Government with respect to equal protection of the laws and (2) upon matters of mutual concern in the preparation of reports of the Commission to the President and the Congress.⁸² In keeping with these responsibilities, and in consideration of the testimony heard on the topic of seclusion and restraint practices in Kansas schools, the Kansas Advisory Committee submits the following recommendations to the Commission:

1. The Commission should collaborate with the U. S. Department of Education to review available state-by-state data regarding the incidence of seclusion and restraint in U.S. schools. The purpose of this review is to determine if sufficient data exists to identify any areas of disparate impact of these interventions on the basis of a federally protected category such as disability, sex, race, or color. If insufficient or inconsistent data exists to make such a determination, the Commission should issue specific recommendations to the Department of Education to: (1) collect and analyze the necessary data based on the results of the review;

⁷⁹ K.A.R. 91-42-02 (a)4 schools are only required to keep a record of the date and time of the intervention, type of intervention, length of time the intervention was used, and the school personnel who were involved.

⁸⁰ Johnson testimony. *Transcript*, p. 04 line 27 - p. 08 line 18; Wade testimony. *Transcript* p. 04 lines 15 -19 and p. 23 lines 17-24

⁸¹ One formal complaint was made to the KSDE and one parent utilized the local district's dispute resolution process. See Collins testimony, *Transcript*. p. 22 lines 10-15 and 21-25; See also Jurgensen testimony, *Transcript* p. 16 lines 30-34

⁸² 45 C.F.R. § 703.2

- and (2) to mandate the cooperation of all State Boards of Education in collecting and reporting on such standardized national data to the extent permitted by the U.S. Constitution.
2. If available data supports the conclusion that seclusion and restraint practices in U.S. schools are resulting in a disparate impact on students on the basis of disability status, sex, race, or color; the Commission should issue specific recommendations to the U.S. Department of Education that the Department implement mandatory, base line regulations to govern these practices, to the extent permitted by the U.S. Constitution. Such regulations may, at a minimum: (1) provide a clear definition of seclusion and restraint; (2) restrict these interventions to certain clearly defined situations; (3) require timely parental notification of incidents involving seclusion or restraint; (4) require standardized data collection and public reporting of seclusion and restraint incidents disaggregated by sex, race, color, and disability status; and (5) require all school personnel to be trained regularly on the safe implementation of these interventions, and prohibit any untrained personnel from participating in such emergency intervention.
 3. The Commission should raise further inquiry into the complaint and appeal processes available to parents who believe their child has sustained injury from seclusion or restraint in school, or who has faced such interventions inappropriately. The purpose of this national inquiry is to determine the extent to which all children and their parents are afforded due process and equal protection under the law with respect to their treatment in schools.
 4. Given the failure of the U.S. Department of Education, Office of Civil Rights to provide a timely response in cooperation with the Kansas Advisory Committee's inquiry into this topic, and pursuant to 42 U.S.C. § 1975(b)(e) which states that all federal agencies shall "cooperate fully with the Commission to the end that it may effectively carry out its functions and duties," the Commission should use all available avenues of authority to solicit the testimony and compel the cooperation of this office regarding such matters as they have been raised in this memo.

Appendix A

Total reported seclusions 2010-2012 as submitted by the Kansas State Department of Education Office of Research and Evaluation January 05, 2015.

Organization #	Number Secluded 2010	Number Secluded 2011	Number Secluded 2012
D0101	0	<10	0
D0108	0	0	<10
D0113	0	<10	<10
D0200	<10	0	0
D0202	<10	<10	<10
D0204	0	<10	0
D0208	<10	0	0
D0229	15	15	23
D0231	<10	<10	<10
D0232	10	10	<10
D0233	56	63	46
D0234	0	0	<10
D0239	<10	0	0
D0243	<10	<10	<10
D0244	0	<10	<10
D0246	0	0	<10
D0248	<10	<10	<10
D0250	20	34	33
D0253	10	12	14
D0255	0	0	<10
D0259	59	34	42
D0260	13	0	<10
D0262	<10	<10	0
D0263	<10	0	0
D0265	<10	<10	<10
D0266	<10	<10	<10
D0268	<10	0	0
D0287	<10	<10	0
D0290	<10	<10	0
D0305	41	31	35
D0308	11	<10	<10
D0320	<10	<10	<10
D0323	<10	<10	<10

D0325	<10	0	0
D0329	0	0	<10
D0330	0	<10	0
D0339	0	<10	12
D0342	0	0	<10
D0345	10	11	<10
D0348	0	<10	<10
D0357	<10	<10	<10
D0358	<10	<10	0
D0360	<10	<10	0
D0362	0	0	<10
D0364	0	<10	0
D0365	<10	0	<10
D0368	<10	<10	<10
D0372	0	0	<10
D0373	<10	<10	<10
D0377	<10	0	0
D0378	0	<10	0
D0379	0	0	<10
D0381	<10	<10	0
D0383	15	20	19
D0385	0	<10	0
D0387	<10	<10	0
D0400	<10	0	0
D0404	<10	0	0
D0407	0	<10	0
D0408	<10	<10	0
D0409	21	22	19
D0410	<10	<10	<10
D0413	11	<10	<10
D0416	<10	<10	<10
D0418	0	0	<10
D0421	0	0	<10
D0428	<10	<10	<10
D0430	0	0	<10
D0434	0	<10	0
D0435	<10	0	<10
D0437	16	16	19
D0439	<10	<10	<10
D0441	<10	0	0
D0443	0	0	<10

D0444	0	<10	<10
D0445	<10	<10	<10
D0446	<10	<10	<10
D0447	<10	<10	0
D0448	<10	<10	0
D0450	<10	<10	<10
D0453	0	<10	<10
D0457	<10	<10	<10
D0458	0	<10	0
D0465	<10	16	<10
D0470	0	0	<10
D0473	0	0	<10
D0475	16	10	18
D0480	0	<10	0
D0491	<10	<10	<10
D0493	<10	0	0
D0497	18	20	34
D0501	27	31	28
D0503	0	<10	<10
D0509	<10	<10	0
D0605	<10	<10	0
Z0032	44	44	51

Appendix B

Meeting Minutes from Kansas Data Release Review Board - December 16, 2015

Team:		DRRB Data Request Review Board		December 16, 2014 1:30pm-3:00pm 656 Landon	
Facilitator:		Michael Wallis		Recorder: Tiffany Hoffman	
KSDE Mission:					
Objectives					
1. Review request for data considering privacy laws and requirements					
<i>Members - (present at meeting ✓, absent at meeting left blank)</i>					
Voting Members					
X	Linda Smith	X	Scott Smith	X	Scott Myers
X	Craig Neuenswander	X	Denise L Kahler		
Non-Voting Members					
X	Michael Wallis		Melissa Tillman		Beth Fultz
X	Scott Gordon, Esquire (Legal Advisor)	X	Zach Conrad		
Guests					
	Cheryl S Johnson		Mark Erickson (phone)		Dr. Quan
X	Dr. Leigh Ann Taylor Knight	X			X
Agenda Items		Key Points		Decisions Made	
Fp 2975		Mr. Erickson (USD 259) is assessment coordinator Evaluation of Mastery Learning Process Willing to accept data with pseudo ID Has been informed about pre 2006 data. Mr. Erickson will attend by phone.		Motion made to approve request by Scott Myers as request was written. No one seconded the motion so the motion died. Denise Kahler made a motion to approve the request (other than the free and reduced lunch data as that data belongs to the Department of Agriculture). Seconded by Scott Smith All were in favor and motion was granted. Michael will contact Mr. Erickson within 24 hours and Scott Gordon will work on a Data sharing agreement.	
Fp 2947		Request for free & reduced lunch counts by various sub counts by USD or County for 2012. Study for Share Our Strength by Wellesley College.		Motion was made by Scott Smith to provide data as written. Seconded by Linda Smith. All were in favor and motion was granted.	

Fp 2978	This is a continuation of fp 2330. KSDE agreed on Jan. 12, 2013 to supply K-FIT data to H&E. They are returning under fp 2978 requesting most recent data collected under ongoing program of KS Health Foundation.	Linda Smith made a motion to provide KSDE with the K-Fit Data (with the exception of the free and reduced lunch as that data belongs to the Department of Agriculture) Scott Smith seconded the motion. All were in favor and motion was granted.
Fp 2951	Request from KC-AREC for 65 variables of non-PII data at district, building, grade for entire state of KS for years 1993-2014. Have been informed that much of data may not exist & significant suppression & staff time.	Motion was made by Scott Smith to give the data requested with the variables cut in half. Scott Myers seconded the motion. All were in favor and motion was granted. KC-AREC will send Michael the new list that has the updated variables.
Fp 2961	U S Civil Rights Commission in Chicago is requesting restraint & seclusion data for "all relevant years". Have been informed that current data may not be available before 12/15/2014.	Motion was made by Scott Myers to deny the request. Linda Smith seconded the motion. All in favor except Scott Smith Motion was denied 3 to 1.
Fp 2977	Request from Mark Hauptman asking for Special Education Student Level Data when this topic comes up at the Legislature	Motion made by Denise Kahler to go back to Mark and ask him to redefine his request. His current request is asking for PII data which a violation of FERPA. Seconded by Scott Myers the motion. All in favor and motion was granted and we will wait to hear back from Mark with his redefined request.

Next Meeting:

Date/Time/Location:	January 22, 2015 at 1:30 in 656 south
Facilitator/Recorder:	Michael Wallis/Tiffany Hoffman

Appendix C: Written Testimony and Documents Received



Early Childhood, Special Education and Title Services

Kansas State Department of Education
Landon State Office Building
900 SW Jackson Street, Suite 620
Topeka, Kansas 66612-1212

(785) 291-3097
(800) 203-9462
(785) 291-3791 - fax
www.ksde.org

May 26, 2015

David Mussatt, Ph.D., J.D.
Chief, Regional Programs Unit
U.S. Commission on Civil Rights
55 W. Monroe St., Suite 410
Chicago, IL 60603
(312) 353-8311
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dmussatt@usccr.gov
www.usccr.gov

Dear Kansas Advisory Committee to the U.S. Commission on Civil Rights,

Our agency has reviewed the draft memo on Seclusion and Restraint in Kansas Schools and respectfully request that the Office of Civil Rights (OCR) monitor statewide implementation of the Kansas Regulations on Emergency Safety Interventions (ESI) for all students that went into effect April 19, 2013 prior to making recommendations to ban all forms of ESI. The Kansas State Department of Education (KSDE) Special Education staff is concerned that if there is a total ban on the use of emergency and safety interventions, that students with disabilities will be segregated away from their nondisabled peers at a higher rate than necessary. This could lead to students with disabilities being removed from general education classes and their neighborhood schools when in fact students with disabilities in Kansas benefit from being educated in general education settings. Additionally, this could lead to increased involvement by law enforcement personnel, which may result in students with disabilities having criminal charges filed against them. KSDE Special Education staff would like OCR to monitor statewide implementation of the Kansas ESI Regulations so that additional state ESI data is available for review and the proposal considers the concerns above. KSDE is committed to working towards a safe learning environment for all students and staff in Kansas schools. We also request that this letter be included as part of the public record on seclusion and restraint of disabled children in Kansas schools.

Thank you for your consideration.

Sincerely,

Colleen Riley
Director

Cc: Mr. Brad Neuenswander, Interim Commissioner of Education
Dr. Randy Watson, Incoming Commissioner of Education