KANSAS STATE DEPARTMENT OF EDUCATION

RESULTS OF ADMINISTRATIVE REVIEW
REQUESTED ON FEBRUARY 17, 2017

DATE OF WRITTEN RESULTS: APRIL 25, 2017[1]

Kansas school personnel can only use emergency safety interventions (ESI) in specific circumstances and legal obligations attach to their use including documentation and parental notification. Parents, if unhappy with the use of an ESI, may file a complaint with the local board, and, thereafter, may request a review of the local decision by the Kansas State Board of Education (State Board). (...) and (...) filed such a request for review alleging (...) secluded or restrained their daughter on seven occasions and failed to meet its legal obligations.[2] (...) contends no one secluded or restrained the child, and, therefore, ESI obligations were not triggered. Having reviewed this matter, the hearing officer finds (...) did not seclude or restrain (...).

Investigatory Background

This hearing officer visited (...)'s (...) twice to interview district staff and to view the resource room and the (...). During the course of the investigation, sixteen individuals were interviewed in person and via phone including:

Findings of Fact

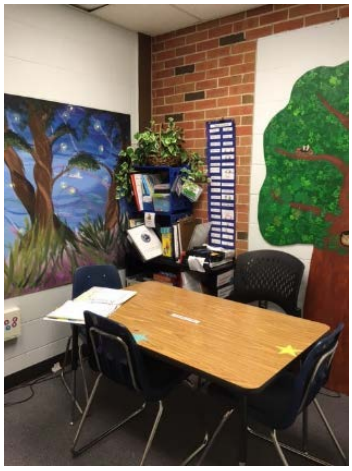
1. (...). is a seven-year-old child whose family, including parents (...) and (...), moved to (...), in 2016. (...). first attended (...)'s (...) in August 2016. (...). is a special education student with an Individualized Education Program (IEP) and a Behavior

[1] The Commissioner of Education granted a seven-day extension to enable follow-up interviews.
[2] The parents also make one allegation regarding potential use of mechanical restraint that is not a well-developed argument, and, after investigation was without merit.
[3] A fourth paraprofessional that worked with (...). is no longer a district employee.
[4] Board Certified Behavioral Analyst.

Intervention Plan (BIP).[5] Both documents reflect that (...). requires intense behavioral support related to her physical aggression, non-compliance, and elopement. (...) physically aggressive behaviors may include kicking, hitting, punching, throwing objects, scratching, grabbing hair, knocking over tables and chairs, and pulling peers to the ground without warning. She also may pinch or scratch herself.

2. During (...) time at (...), staff reported that her routine included starting the day in a general education classroom. But she spent increasing amounts of time in the school resource room and a room called the (...). The resource room is a large open classroom. In contrast, the (...) is approximately 10 feet by 7 feet. It has a door with a long narrow windowpane and an interior lock that is disabled by activating the interior handle or by key.

3. Occasionally, when (...). was working in the resource room, her behavior would necessitate the evacuation of the room for the safety of other students.



4. The (...) is pictured to the right as it appeared on March 24, 2017. District Staff said the room is similar to the time it was used for H.R other than it would have been set up to serve her, *e.g.*, sensory break and calming tools, (...) activities, etc. (...) parents disagree. They state the room was previously barren: no art and no activities. When they saw the (...) it had a bean bag.

5. During the 2016 fall semester, (...) and (...) parents worked to develop a new IEP and BIP for (...). A number of meetings were held at (...). Most of the district staff required to serve (...). attended those meetings and, as a result, paraprofessionals supervised (...). at that time. During the meetings, (...). was usually in the (...), adjacent to the meeting space, or in the resource room. (...) parents stated November 21, 2016[6], was the first time they were aware (...) was placing (...). in the (...).

6. On December 12, 2016, (...) and (...) e-mailed (...) Assistant Director of Special Services for (...), and alleged the school's continued placement of (...). in the resource room and (...) was seclusion and, therefore, ESI use. This was of "significant concern" for them because of "the lack of notification" they believed was required by law.

---

5 (...) parents provided draft copies of the IEP and BIP with their request for review. Much of the information included in those copies is not relevant to determining whether (...) secluded (...).

6 The parents have the incorrect date. The meeting was held on November 22, 2016.

7. (...) investigated (...) and (...)s complaint immediately. She interviewed school staff and determined that, while (...). spent time in the resource room and the (...), at no time was (...). secluded. Staff reported (...). did occasionally elope to the (...), locking staff out by activating the interior lock. But (...). always had the ability to open the door and all relevant staff had keys to the (...) and they were able to quickly unlock the door.

8. (...) called (...) and (...) on December 15, 2016, and verbally shared the results of her investigation with them. (...) and (...) made a new allegation at that time. They alleged that on December 14, 2016, their privately contracted (...), (...), witnessed (...) staff holding the door of the (...) so (...). could not leave. (...) also investigated this complaint, including speaking to (...) and (...) who was with (...) during her December 14 visit to (...) to observe (...). (...) report notes that (...) said it did not appear the door was held shut but that staff was speaking to (...). through the door. (...) reported to (...), and this hearing officer, that she did not see anyone holding the door shut during Suter's visit. (...) conclusion remained the same: (...). was not secluded.

9. It is worth noting here that there is confusion regarding the date the parents allege staff prevented (...). from leaving the (...). On December 15, they reported to (...) that the event occurred when (...) was at (...) for observation the day before. (...) investigated upon receiving their complaint and, based upon her report, (...) also remembered this event as having occurred December 14. The parents did not mention the event in their December 19, 2017, formal complaint to the district. It reappears in their February request for review to the State Board, and again the date provided is December 14. But when speaking with this hearing officer, both (...) and (...) parents were adamant that the event occurred on November 28, during an IEP meeting bathroom break. And instead of (...) having been the sole witness, the parents also recalled seeing (...). held in the (...) and prevented from leaving.

10. As noted above, on December 19, (...) and (...) filed a formal complaint with (...). There, they again alleged (...). had been secluded in violation of Kansas law because the school had placed her in the resource room alone. More specific complaints included:

> "it appears our daughter is placed in seclusion not only during class time, but also during lunch and recess. She has been placed in seclusion in the 'resource room' in the dark, with only an iPad. She has been in seclusion in the 'resource room' for nearly an entire school day, only allowed to attend music and gym class."

(...) parents also alleged the school violated Kansas law because it failed to notify them each time (...). was secluded. Unlike their December 12, 2017, e-mail to (...), (...) parents did not mention the (...) in their formal complaint.

11. After receiving the complaint, (...) called the Kansas State Department of Education's (KSDE) Early Childhood, Special Education, and Title Services (ECSETS) team for guidance. Based on the information (...) shared, ECSETS staff stated it did not believe the complaint met the requirements for a formal written complaint. Having had the benefit of reviewing the entire complaint, this was inaccurate guidance. In their formal complaint, (...) and (...) clearly allege (...). was secluded. (...) responded to (...) and (...) on January 19, 2017, and based on KDSE's guidance, told (...) and (...) that their formal complaint was insufficient under Kansas law and local board policy and would not be acted upon by (...) as such.

12. This error is meaningful because the local board did not get an opportunity to review the complaint before (...) parents filed their request for review. Otherwise, it does not impact this review. (...) fully investigated the matter in December and was able to issue a complete report, which was attached to the district's January 19, 2017, response letter. When asked, (...) confirmed her investigation would not have differed if the complaint had been treated as a formal complaint under local board policy. And, in fact, her report addresses all of (...) parents complaints, including those not raised in the formal complaint.

13. (...) and (...) timely filed this request for review on February 17, 2017. They made seven ESI-related complaints. To the extent they allege other violations of law, those issues are outside the scope of this review. It should also be noted that the parents's formal complaint to the district made no mention of the (...). But their request for review does. To the extent their request for review contains allegations related to the (...), those also have been considered. The seven ESI-related issues raised in the request for review are:

1. On November 21, 2016[7], both parents saw (...). in the (...). After speaking with them, they believe she was alone in the room with two paraprofessionals stationed outside the door and that she was there for at least three hours.
2. On November 28, 2016,(...) saw (...). in the (...). (...) parents believe Ms. (...) said (...). was alone in the room with paraprofessionals stationed at the door for three to four hours. They also believe she was held in the room.
3. On November 30, 2016, (...) parents believe (...). was again in the (...) alone.
4. On December 7, 2016, (...). was placed in the resource room for lunch and other activities.

[7] The parents have the incorrect date. The meeting was held on November 22, 2016.

5. On December 14, 2016, (...). was in the (...) and resource room.
6. On December 19, 2016, (...). could not be seen by (...) parents. Her location in the school was unknown.
7. The school used a weighted blanket, which might have been a mechanical restraint.

14. Not a single individual recalled (...). having been alone while at (...) except for when she eloped with adults pursuing her or she shut adults out of a room. Staff said (...). generally required at least two adults with her because of her behavior and because the school was collecting data to determine how to better serve her. Staff stated she was a sweet and athletic child who had great visual memory and with whom they enjoyed working. But they also noted H.R.'s behavior was unpredictable. She was harmful to other students, staff, and property, and she had a penchant for eloping.
15. According to (...), who was responsible for the resource room, anytime (...). was working in the resource room she was not only with adults, but generally with other students. (...) confirmed the resource room generally had multiple students working at any given time and multiple staff members serving those students. She described it has having "lots of traffic." (...), a third-party (...) (...) hired to help evaluate (...) services, also confirmed multiple students were working in the resource room when she visited. (...) noted there were only a few students in the resource room during her two-hour observation.
16. District staff reported they used the (...) for (...) sensory breaks, reward breaks, calming breaks, and as a work and lunch space. Generally, when (...). worked in the (...), she was the only student present: but not always. Staff members were always present, either working in the room with her or stepping into the hallway to get new activities from her cart. The door was generally open but sometimes was closed when staff was working in the room with (...). The door could also be closed if (...). had eloped into the room or pushed staff out into the hallway. On occasion, (...). would lock staff out of the (...). (...). could always unlock the door by either turning the lock or the handle. Staff members had a key to the room and if (...). did not unlock the door, staff did.
17. Occasionally, (...). would use a sensory blanket in the (...) and would ask that the lights be turned off for a calming effect. The sensory blanket was reported as a "weighted blanket" in the district's response. But no staff member could recall (...). having a weighted blanket, only a silky and textured sensory blanket and a weighted vest. The latter was used under the IEP.
18. (...), school principal, stated the (...) was not and is not a seclusion room and has never been used as a seclusion room. (...) said that when (...). was in the (...), the door

was propped open with a chair 99% of the time. (...) noted that during one of the IEP meetings (...) parents helped place (...). in the (...) without any complaint. He also confirmed (...). was in the resource room during the December 19 meeting.

19. (...), the intervention support teacher assigned to (...), stated, and she also expressed to (...) and T.R., that she believed the (...) was being used too often for (...). (...) did not recall the (...) door being closed during the IEP meetings she attended. She did say the door was shut at other times. Whether the (...) was being used too often, *i.e.*, was (...). placed in the least restrictive environment, is a question outside the scope of this review.
20. According to (...) and other staff, the default was for (...). to eat lunch with her peers in the cafeteria. (...) noted (...). sometimes ate in the resource room or (...) and peers could, and did, join her there on occasion.
21. (...) provided paperwork demonstrating that (...). had an excused absence on November 22, 2017, because she was ill the previous day. When the November 22 IEP meeting was over, (...). went home with her parents.
22. After this review commenced, (...) parents and (...) allege district staff held (...). in the (...) on November 28. The parents saw (...) and (...) holding the (...) door shut and telling (...). to get back. (...) only saw staff holding the door shut and having unintelligible conversation. Neither (...) nor (...) had any specific memory regarding that specific day. But both emphatically stated the (...) door was shut only if (...). had eloped or pushed them out of the room, or, on occasion if they were working with her in the room. If (...). had eloped or pushed staff out of the (...), they would give her instructions to get back to direct (...). safely away from the door so they could use their key to unlock and open the door.

Conclusions of Law

1. An emergency safety intervention is the use of any seclusion or physical restraint. K.S.A. 72-89d02(g); K.A.R. 91-42-1(g).
2. Mechanical restraint means: "any device or object used to limit a student's movement." K.S.A. 82d02(m); K.A.R. 91-42-1(j).
3. Seclusion means: "placement of a student in a location where all the following conditions are met:

   "(1) The student is placed in an enclosed area by school personnel;

"(2) The student is purposefully isolated from adults and peers; and
"(3) The student is prevented from leaving, or the student reasonably believes that such student will be prevented from leaving, the enclosed area."
K.S.A. 72-89d02(t); K.A.R. 91-42-1(o).

4. If a student is subjected to an ESI, the school is required to notify the parent on the same day the ESI was used. K.S.A. 72-89d04; K.A.R. 91-42-4.
5. Here, there is no evidence (...). was restrained or secluded.
6. In the request for review, (...) parents note a "weighted blanket" and their concerns it may have been used as a mechanical restraint. After interviewing district staff, the blanket in question was a sensory blanket. (...). was not mechanically restrained.
7. Regarding seclusion, anytime (...). spent in the resource room must be immediately discarded as potential seclusion. The resource room is a regularly sized classroom. Generally, the school operated the resource room like any other classroom. All witnesses reported that the resource room contained staff and peers at all times other than a few instances where staff evacuated students from the room because of (...) behaviors. Evacuating a classroom of all but one student who is causing safety concerns does not equal seclusion. Removal of (...). from general education classrooms to receive instruction in the resource room is not seclusion. All allegations that (...). was secluded in the resource room are unfounded.
8. Regarding the (...): school personnel often placed (...). in the (...), which is an enclosed area. But the (...) was used for myriad purposes including, sensory breaks, reward breaks, calming breaks, lunch, and work. Placement in the (...) alone is not seclusion unless the other two prongs of the definition are met. The second prong requires (...). to have been purposefully isolated from adults AND peers. This means she must have been alone. And not only alone, but purposefully so. No one interviewed reported (...). was ever outside the company of others. Unless (...). had eloped or shut staff out of the room, she was always working with or supervised by at least one adult, but usually two. Removal from peers is not seclusion. Elopement to an enclosed area is not seclusion. Physically pushing staff or attacking staff such that they must retreat and regroup is not seclusion.
9. Allegations regarding (...) mere placement in the (...) do not survive the second prong of the seclusion definition because she was never purposefully isolated from adults AND peers. But the allegations that (...). was held in the (...) against her will warrant further attention.

10. As noted above, there was confusion regarding when (...). was allegedly held in the (...). The parents and (...) only reported the November 28, 2016, IEP meeting as the date in question after this hearing officer began investigating. (...) stated she attended all IEP meetings including the meeting on November 28, 2016. At that meeting, (...) took a bathroom break where she believed she observed two adults outside of the (...)—one appeared to be holding the door shut with (...). inside. (...) stated she believed the adults were trying to give (...). direction, but (...) could not understand what (...). or the adults were saying. (...) admitted an adult could have been standing in the room or sitting on the floor and she would not have seen the adult—the windowpane is narrow. Additionally, when asked how she determined the adult was holding the door closed rather than trying to open it, (...) was unable to articulate why she reached that conclusion. She stated she did not see a key.
11. (...) and (...) also stated they took a bathroom break on November 28, 2016, and witnessed Ashley (...) and (...) holding the (...) door shut and telling (...). to step back. They also could not articulate why they believed the door was being held shut rather than trying to be opened.
12. None of the three, (...), (...), or (...), contemporaneously inquired why school staff was holding the (...) door shut with (...). inside alone.
13. (...) and (...)do not have a specific memory of that day. Both reported that when (...). eloped or shut them out of the (...) they would need to give her direction to step back so they could open the door. (...) reported that individuals trying to unlock interior building doors may have to pull the door to keep the lock from catching.
14. (...)'s and (...) and (...) statements, notwithstanding the inconsistent reporting regarding date, were credible. They believed they saw the door being held shut. But the school staff's explanation is more compelling. The staff explanation is reasonable and consistent with (...) behavior. It is much more likely that (...) and (...) parents witnessed (...). having shut and locked the door and the two supervising adults were giving (...). instructions to either open the door or were trying to open the door themselves. District Staff did not purposefully place (...). in the (...) and hold the door shut.
15. Because (...). was not secluded or restrained, an ESI was not used. Therefore, (...) had no obligation to notify (...) parents when the resource room or (...) were utilized.

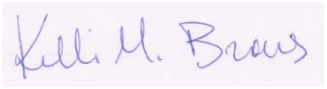
16. To the extent (...) parents complain (...). was secluded from her peers, exclusion is not seclusion. Any complaints regarding implementation of the IEP or BIP, denial of a free and appropriate education, or an IDEA violation are outside the scope of this review.

Suggested Corrective Action

Formal complaints filed with school districts should be construed generously and in a manner that encourages school districts to investigate allegations involving an ESI.

Determination

The local board did not resolve the complaint because (...) relied upon KSDE guidance. To the extent K.(...) 91-42-5 requires this Hearing Officer to enter a determination regarding the local board's actions, it is not applicable in this instance.



Kelli M. Broers, Attorney
Hearing Officer
Office of General Counsel
Kansas State Department of Education
900 SW Jackson St., Suite 102
Topeka, Kansas 66612
(785) 296-3204

CERTIFICATE OF MAILING

I hereby certify that on this 25th day of April, 2016, courtesy copies were provided by e-mail to the parties and I mailed a true and correct copy of the above and foregoing on April 26, 2017, to:

S

Kelli Broers