KANSAS STATE DEPARTMENT OF EDUCATION

RESULTS OF ADMINISTRATIVE REVIEW
REQUESTED ON MAY 12, 2017

DATE OF WRITTEN RESULTS: JULY 18, 2017[1]

Kansas school personnel can only use emergency safety interventions (ESI) in specific circumstances and legal obligations attach to their use including parental notification and written documentation. Parents, if displeased with personnel's 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). (...). filed such a request for review alleging (...)(...)(...) staff subjected her son to ESI on numerous occasions and failed to meet its legal obligations. (...) contends other than two incidents it remedied after its investigation, no one used ESIs with the child. Having reviewed this matter, the hearing officer finds (...) staff did use ESIs with the student.

Investigatory Background

This hearing officer interviewed (...) staff in person on July 10, 2017. Other individuals were interviewed by phone. Those interviewed includes:

1. (...)(Parent)
2. (...) (Teacher)
3. (...) (Teacher)
4. (...) (Paraprofessional)
5. (...) (Teacher)
6. (...) (Paraprofessional)
7. (...) (Principal)
8. (...)(Assistant Director of Special Education)
9. (...) (General Counsel, Crisis Prevention Institute)

Additionally, this hearing officer reviewed the request for review filed with the State Board and attached documents, remedial ESI reports, and staff training materials.

Findings of Fact

1. (...) now eleven years old, was a student at (...)'s (...) from mid-semester Fall 2016 through March 2017. (...), (...) mother, timely filed an ESI complaint with (...) where she alleged: 1. (...) staff were using ESIs with (...) without proper notification or documentation; and 2. (...)staff were verbally and physically abusing (...) including shutting his fingers in the seclusion room door and throwing him into

[1] The Commissioner of Education granted an extension, in part, because school personnel were not available to interview until July 10, 2017.

seclusion room. After investigating[2], (...) found there were two instances when (...)staff physically restrained (...) (an ESI) and failed to notify (...) or provide written documentation as required by law (January 26, and February 23, 2017). Otherwise, (...) found the remainder of (...)'s complaints to be meritless.

2. Displeased with the conclusion, (...) timely filed a request for review with the State Board. The request for review contained a number of issues. After speaking with (...), she agreed her real concern was that (...) staff was routinely physically restraining (...) and not notifying her or providing her with written documentation.[3] (...) developed this belief after (...)'s complaints to her and reviewing documents and videos she received from the school. The documents and videos showed (...) staff regularly "escorted" (...) to the reflection and seclusion rooms.

3. (...)staff received, at a minimum, annual Crisis Prevention Institute (CPI), ESI, and SafeSchool training.

4. CPI is an organization that provides crisis prevention and intervention training to schools, hospitals, and other organizations interested in training staff in nonviolent intervention. CPI has provided this service for more than 35 years and trained more than 10 million individuals.[4] Included in that training are a number of techniques to restrain or control someone who is acting out.

5. One such technique is the CPI Transport Position. According to CPI's Applied Physical Training leader's guide, the CPI Transport Position requires staff to reach under an individual's arm and then grab their own wrist. "This cross-grain grip better secures the individual between staff during transport." The staff member then directs the individual's shoulders forward and begins moving. The guide notes staff can use their hips for leverage behind an acting-out person to assist him forward.

CPI Transport Position

[2] (...), KASB attorney, was the assigned investigator. She also represents the district.

[3] This hearing official agrees with (...). There was no evidence to support the other issues raised, *e.g.*, that (...) staff had shut (...)'s fingers in the door or physically or verbally abused him. To the contrary, all videos showed staff acting with patience and professionalism. In-person interviews resulted in the same conclusion.

[4] https://www.crisisprevention.com/About-CPI

6. Videos of specific incidents and (...) staff confirmed they frequently moved (...) to the reflection and seclusion rooms using the CPI Transport Position. It is that technique that (...) believes is a physical restraint under Kansas law.

7. In a phone call, CPI's general counsel, Daniel Gugala, stated he does not believe use of the CPI Transport Position is a restraint under Kansas law. But he did say he believed, regardless of how it is categorized, reporting its use to parents is preferable.

8. In at least 18 states[5], including Kansas, there is at least one school district that notifies parents when the CPI Transport Position has been used. A number of these districts categorize the position as a restraint.

9. (...) staff were trained by CPI trainers (also (...) staff) that use of the CPI Transport Position was not a physical restraint.

10. Based on interviews with staff, the CPI Transport Position was used to move (...) sometimes as frequently as three times per week during (...) attendance. The frequency increased the longer (...) was isolated from his peers—(...) instructed staff to quarantine (...) from all other students in early January 2017. Believing it to be a physical escort, at no time did any (...) staff member document or report the use of the CPI Transport Position on any (...) student as an ESI. Therefore, the number of times (...) staff used the position is unknown.

11. But the videos provided show that (...) staff used the CPI Transport Position to move (...) on January 26, January 31, February 21, February 23, and March 1, 2017.

12. (...) also alleged (...) was physically restrained on January 11th and January 12th in her original complaint to (...). No videos were provided for those days, but Mr. (...)'s notes reflect (...)staff "escorted" (...) on those days.

13. In her (...) complaint, (...) alleges (...) was shut in the reflection room and that (...) staff verbally abused him on March 8th In her request for review, (...) alleged ESI occurred on March 8th but does not further clarify what she is alleging. Assuming she is again alleging that the door was shut on (...), there is no evidence to support that claim. Mr. (...)'s notes for that day demonstrate that(...) was blocked from leaving the activity room but otherwise had great freedom of movement including two times he left the building without staff permission. There is no indication he was secluded.

[5] Alaska, California, Florida, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Ohio, Oregon, South Dakota, Texas, and Washington.

14. The (...)investigation concluded physical restraint was used on January 26th and February 23rd and ESI reports should have been completed.[6] The investigation did not conclude the use of the CPI Transport Position on those days was the reportable conduct.

15. A review of the videos also showed that on January 31, 2017, (...) staff briefly left (...) alone in the seclusion room. After nearly 10 minutes in the seclusion room with (...), the two (...) staff members with (...) leave the room and shut the door for nearly 30 seconds. When interviewed, (...) believed (...) may have asked staff to leave the room. There was no audio with the recording, however.

16. Additionally, on March 1, 2017, Mr. (...) briefly held (...) in an attempt to keep him from pushing on and kicking the seclusion room door.

17. (...) possesses most if not all available videos, teacher's notes, and behavioral logs documenting (...)'s (...) attendance. Because of server limitations, (...) is only able to retain video files for six to eight weeks unless they have been specifically pulled, as was done with the videos provided in this matter.

Conclusions of Law

1. In Kansas, an ESI is the use of any seclusion or physical restraint. K.S.A. 72-89d02(g); K.A.R. 91-42-1(g).

2. A student is secluded with the he or she is placed in a location where the 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).

3. Physical restraint is "bodily force used to substantially limit a student's movement, except that consensual, solicited or unintentional contact and contact to provide comfort, assistance or instruction shall not be deemed to be physical restraint." K.S.A. 72-89d02(p); K.A.R. 91-42-1(m).

4. Physical escort alone is not an ESI. Physical escort is "the temporary touching or holding the hand, wrist, arm, shoulder or back of a student who is acting out for the purpose of inducing the student to walk to a safe location." K.S.A. 72-89d02(o); K.A.R. 91-42-1(l).

[6] ESI reports for those incidents were completed after investigation.

5. Physical escort is only not an ESI if it otherwise does not meet the definition of an ESI. The State Board clarified this principle in its amendment to K.A.R. 91-42-2(h), effective July 7, 2017.

6. Schools who use an ESI are required to notify the parent on the same day the ESI was used. The school must also complete written documentation and provide it to the parent no later than the school day following the day the ESI was used. K.S.A. 72-89d04; K.A.R. 91-42-4.

7. Here, the question is whether use of the CPI Transport Position constitutes physical restraint and therefore triggers the ESI notification and documentation requirements. (...) staff used the CPI Transport Position to move E.C. to the reflection or seclusion room on numerous occasions. That technique meets the definition of a physical escort. But, more importantly, it also meets the definition of a physical restraint. Yes, staff used the technique to induce (...), who was acting out, to walk to safety. And the position was temporary. But the "cross-grain grip" used exceeds the definition of mere touching or holding. The grip is describe in the guide as one that "better secures" the individual. It does this by using bodily force to substantially limit someone's movement. In this case, (...) was physically restrained anytime the CPI Transport Position was used. While in the position he was unable to break free—it is clear from the video is attempting to do that—and unable to move his arms or shoulders freely. The State Board's amendment to K.A.R. 91-42-2(h) supports this conclusion.

8. Additionally, after review, there is one other instance where (...) was secluded. On January 31st, he was placed in the seclusion room, where he was accompanied by two staff members for nearly ten minutes. Staff then left and closed the door. That constitutes seclusion because: 1. (...) was placed in an enclosed area; 2. He was isolated from adults (as noted above he was always isolated from peers at the direction of (...)); and 3. He was unable to leave.

9. Finally, on March 1st, Mr. (...) briefly held (...)from behind in an attempt to remove him from the area directly in front of the seclusion room door. This hold, even though less than five seconds, constituted a physical restraint and also should have been documented and reported.

Determination

Use of the CPI Transport Position constitutes physical restraint as defined in K.S.A. 72-89d02(p) and K.A.R. 91-42-1(m). This conclusion is supported by the State Board's recent amendment to K.A.R. 91-42-2(h). Recognizing this may not have been clear to (...), or any other Kansas school district, prior to this review, no remedial corrective action is recommended on this issue, *e.g.*, it is not recommended that (...)try to recreate ESI reports for every instance it used the CPI Transport Position. It should, however, consider generating ESI reports for the January 31st seclusion and March 8th physical restraint.

(...)is not negatively impacted by this determination. One of the purposes of parental notification and written documentation is parental knowledge. (...) possesses ample documents regarding her son's attendance at (...). (...) staff was in daily contact with her through behavior logs, e-mail, and telephone. Recommending (...), or any other Kansas school, try to recreate ESI reports of this extent from memory and limited documentary evidence would be an onerous task leading to unreliable results.

(...) should, however, plan on treating as an ESI any future use of any technique that substantially limits a student's movement, like the CPI Transport Position. Parents should be notified and written documentation should be provided following the use of any such technique.

Kelli M. Broers

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 18th day of July, 2017, a true and correct copy of the above was via U.S. Mail and courtesy copies were provided by e-mail to:

Kelli M. Broers

Kelli Broers