KANSAS STATE BOARD OF EDUCATION

ADMINISTRATIVE REVIEW

On October 19, 2020, [redacted] [Parent] filed a formal complaint alleging the inappropriate use of emergency safety interventions and the lack of appropriate documentation/communication after the use of such interventions on her son [Student] by staff of USD 408. The district's resolution of Parent's complaint was sent to her on December 2, 2020. On January 8, 2021, the Kansas State Department of Education received a request for an Administrative Review from [redacted][1]. This Hearing Officer ["HO"] has been duly appointed by the Kansas State Board of Education to conduct the administrative review and provides the following findings of fact and conclusions of law.

In support of this review, the Hearing Officer conducted the following investigation:

1. An interview with Parent by telephone
2. An interview with Justin Wasmuth, Principal of Marion Elementary School by telephone
3. An interview with Aaron Homburg, Superintendent of USD 408 by telephone
4. Review of documents provided by Parent including emails, district policies, and notices
5. Discussion with staff members of the Special Education and Title Services team of the Kansas State Department of Education

This matter comes before the Hearing Officer as authorized by K.A.R. 91-42-5. The Parent raises many concerns within the request for an administrative review and her supporting documents. This Hearing Officer summarizes the allegations of the Parent as follows:

1. The Student was restrained out of staff convenience rather than for any lawful reason.
2. USD 407 does not provide adequate, accurate, or timely documentation whenever restraint is used.

[1] During the end of 2020 and beginning of 2021, all state agencies were required to work remotely. This caused delays in receiving our mail on a regular basis. The COVID-19 pandemic as well as recent changes within the U.S. postal service have caused several issues with the Kansas State Department of Education receiving mail in a timely manner.

To the extent there may be other concerns that fall outside the reach of the Freedom from Unsafe Seclusion and Restraint Act and/or the related regulations of the Kansas State Board of Education, those concerns will not be evaluated.

Findings of Fact

1. At all times between September 15, 2020 and October 15th, 2020, the Student was enrolled and in attendance at Marion Elementary School.

2. USD 408 receives training in the use of emergency safety interventions through the Marion County Cooperative. According to Principal Wasmuth, this training includes materials from CPI.

3. According to Principal Wasmuth, as of the time of our phone conversation, he had been a building principal for the last 10 years. Principal Wasmuth recalls going through the training perhaps twice in the last 10 years.

4. According to Principal Wasmuth, all staff of Marion Elementary are aware of emergency safety intervention protocols but not all staff had gone through the full training.

5. Sometime between September 15th and October 15th, there were at least two incidents whereby staff came into physical contact with the Student on the school playground.

6. During one incident, the Student had wedged himself underneath some playground equipment and staff believed he was at risk of hurting himself. Staff held their hands between the Student's head and the equipment, then helped him to his feet to get out from under the equipment.

7. During a separate incident on the playground, Student became physically ill. This is believed to have been caused by a feeding tube and a health issue. School staff assisted the Student in moving from the playground to inside the school so he could be cleaned up[2].

8. On a form dated October 1, 2020, school staff documented the use of restraint at three different times by a teacher and one time also involving Principal Wasmuth. The documentation did not include explanations as to either the reason why restraint was necessary or the type of restraint.

9. Sometime between September 15th and October 15th, Staff stopped Student from running out of the school building by grabbing his arm. This grabbing may have resulted in bruises documented by Parent on the Student's arm. This incident did not result in notification or documentation being sent

[2] Use of the term "assisted" rather than "escorted" here is intentional. Although CPI trains that their method of physical escore is not a form of physical restraint, changes to state law and at least two previous administrative review findings have stated otherwise. This will be discussed further in this review.

to the Parent as required by state law. School staff do not believe this incident involved the use of seclusion or restraint.

10. Sometime between September 15th and October 15th, there was an incident whereby the Student ran into the women's bathroom and hid under a bench and had crawled into a stall near a toilet. Other students were in the bathroom at the time. Staff assisted the Student in getting off of the floor and away from the toilet for fear of him putting his hands either on or inside of it. Parent received notification for the use of restraints on the 15th. The notification gave more detail as to why restraint was necessary.

11. On October 19th, the Parent filed a complaint pursuant to the school district's formal complaint process regarding the use of restraint on Student.

12. On December 2nd, Parent received a response to her complaint. According to the response, the school district found no evidence where ESI was used improperly and that they found no evidence of physical abuse. The response did not include any findings of fact. The response did not include a statement of the parent's right to request an administrative review by the Kansas State Board of Education.

Analysis

Were the September and October uses of restraint in violation of state law?

K.A.R. 91-42-2 authorizes the use of emergency safety interventions only when the student presents a reasonable and immediate danger of physical harm to the student or others with the present ability to affect such physical harm. When the Freedom from Unsafe Restraint and Seclusion Act was first passed in 2015 and revised in 2016, there were discussions as to whether school staff should wait until the level of feared injury was "substantial." The Legislature determined, by using the language adopted by the Kansas State Board of Education, to not hamper educators' efforts to protect students. Although that Act has since sunset, the origins and evolution of that Act are pertinent in determining the intent behind language used within regulations adopted by the Kansas State Board of Education. Principal Wasmuth explained that while crawling around underneath the playground equipment the Student may have been at risk of unintentionally hurting himself. Wasmuth went on to say he is not sure that Student was at risk of hurting himself from vomiting on himself, but that staff wanted him inside to clean him up.

In either case, Wasmuth did not believe the use of a physical escort or of picking a child up from the ground to be forms of physical restraint.

This HO generally does not question or doubt school staff members' perceptions of whether a student is at risk of causing themselves or others physical injury. Here, it is reasonable for a staff member to believe the Student could hurt himself crawling around in a manner for which the playground equipment was not designed. It is also reasonable for a staff member to believe it is not appropriate – much less safe – to leave a child laying on the ground after they'd just vomited all over themselves. The Parent also acknowledged that there may be times, such as cold or wet weather, when she would not want Student left to his own devices/make up his own mind as to when to come inside. That being said, the question remains as to whether assisting the Student by either lifting him or by using what CPI training calls "2-person transport" constitutes restraint as defined in K.A.R. 91-42-1(n).

Principal Wasmuth described the manner in which he and another staff member assisted Student in going into the building after he had gotten sick. According to Wasmuth, the two staff members stood on each side of the Student and locked arms with him in a manner whereby Student walked but did not have full freedom of movement. Wasmuth explained this was a method he received training in from CPI. Based on a previous review, this HO believes school staff used what CPI describes as a "physical escort." CPI training defines physical restraint as "[a] personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely." CPI training also explains that restraint "[d]oes not include a physical escort (CPI: 2-person transport)." This claim is repeated on a later slide within the same training presentation. CPI training on physical escorts does not accurately reflect Kansas law. In 2017 a hearing officer described the CPI 2-person transport as follows[3]:

> 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 E.C., 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 (sp) 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, E.C. 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.

[3] 2017-ESI-02

That explanation applies in this case as well. Student was restrained in some form during both incidents in which he was moved from the playground. Parent should have received documentation – including information on her rights to request a complaint and administrative review – after each incident.

The same goes for the incidents in which Student was held by his arm to prevent him from running out of the building and removed from the girls' restroom. Parent acknowledges that Student often presents challenges for those responsible for his education and well-being. Parent also acknowledges that she would not want Student to be left alone to run outside if it appeared he could be in harms way. She also understands the need to stop Student from placing his hands near or in a toilet of a girls' bathroom. This HO does not believe any such interventions were done out of anyone's convenience but were intended to protect Student from physical injury. Nobody can predict exactly how or when a child will act up. It would be an unreasonable expectation of an educator to expect her or him to know every time a child is going to run away, or know whether the child can reach a door to get outside. An adult could spend every minute watching and re-directing a child as necessary and still not be able to prevent the child from running off. That is why emergency safety interventions exist. None of the interventions discussed in this review were used inappropriately or for improper purposes. Unfortunately, the documentation provided to Parent after these incidents was inadequate.

The following exert from a previous ruling is worth repeating here:

> School districts are required to provide quite a bit of documentation the first time an emergency safety intervention is used on a student. Said documentation shall include the date and time of the intervention, the type of intervention used, the length of time of the intervention, school personnel who participated in or supervised the intervention, events leading up to the need for the use of an intervention, student behaviors that necessitated the use of an intervention, steps taken to transition the student back into the educational setting, an opportunity for parents to provide feedback or comments, an invitation for parents to schedule a meeting to discuss the incident, and contact information for school personnel with whom the parents may meet to discuss the use of interventions. Additionally, schools must provide written standards of when interventions may be used, a flyer on the parent's rights, information to assist parents in the local dispute resolution process, information to assist parents in how to file for an administrative review by the Kansas State Board of Education, and contact information for parent-advocates. These requirements stem from

the theory that parents need this information in order to understand and protect their rights as well as the rights of their children.[4]

In the previously-cited Order, the issue of whether documentation is adequate was one of first impression. Within that Order, I included the following explanation of what's expected of a school district, "Describing the circumstances which led to and resulted in the use of an emergency safety intervention requires more of an answer than just a few words. If the school believes they have done everything appropriately, there is no reason to not thoroughly describe – in writing – what transpired." Although the Kansas State Department of Education was to include that information in all training materials following that Order, it does not appear that as of this Administrative Review such materials were produced. That will be remedied immediately. Nonetheless, this HO finds the documentation provided to the Parent to be inadequate. This HO also finds the district's response to Parent's formal complaint to be inadequate. It is not sufficient to tell a parent that you've forwarded your complaint to someone else – in this case a service center - and found nothing wrong. K.A.R. 91-42-3 outlines the requirements of a dispute resolution final decision. First, the decision is to be made by the local board – not by district staff and not outsourced to a service provider. There are ways by which a local school board can vote on something in public without violating student privacy. For example, this Administrative Review will be publicly available in a redacted form as soon as it is published. There is no reason a school board could not take similar actions – even if it is to affirm conclusions reached by district staff. I believe the intent of the ESI regulations is to ensure that school boards are not only are aware of the formal complaint but that they are ultimately the responsible party. Second, 91-42-3(a)(2)(C) requires the final decision to include findings of fact and conclusions regarding corrective action. These findings are important for parents to know their concerns were thoroughly investigated. These findings are also important tools for the school district to justify their own actions and/or decisions. It certainly would make it easier for this HO to determine if the school district abided by regulations and by its own policy if I could read exactly what the district took into consideration. Finally, the final decision issued by the school board must include a statement of the parent's rights to request an administrative review by the State Board. Frankly, every time a district fails to complete an adequate final decision it shoots itself in the foot, because this HO gives some latitude to requests for review

[4] 18-ESI-03

for this reason alone – if school districts do not think parents should get extra time to get such requests submitted, then the districts need to fulfill their legal obligations under K.A.R. 91-42-3(a)(2)(d).

To be clear, I did not find anything to indicate malice or intentional wrongdoing from anyone at USD 408. By all accounts, due to staffing changes and improved communication Student has returned to in-person instruction at the school and things are going much better. That being said, there have been violations of the Kansas State Board of Education's Emergency Safety Intervention regulations. Specifically,

1. USD 408 did not provide parental notifications each time restraint was used on Student.
2. When parental notification was provided, some notifications did not include every element required by K.A.R. 91-42-4.
3. When parental notification was provided, some notifications were not timely as required by K.A.R. 91-42-4.
4. USD 408 did not provide Parent with information as to the deadline by which the parent must submit a request to the Kansas State Board of Education for an administrative review.

Suggested Corrective Action

USD 408 staff and Parents have both been cooperative throughout this process. Although this administrative review did not reveal any intentional or flagrant violations of the Kansas State Board of Education regulations, the following corrective actions are necessary to ensure that USD 408's local policies meet the requirements of law:

1. USD 408 is to provide evidence that every teacher and every paraprofessional has received training in the appropriate uses of emergency safety interventions. USD 408 shall receive prior approval from the Kansas State Department of Education's Special Education team [SPED Team} for any training it plans to use. The training will only be approved if it covers – at a minimum – the following:

    a. The difference between a physical escort and a physical restraint according to Kansas law.

b. How to identify whether a student presents a reasonable and immediate danger of physical harm to the student or others with the present ability to effect such physical harm.

c. Alternative/less restrictive measures that should be used if the student does not present a reasonable and immediate danger of physical harm to the student or others.

d. Any other specific subjects deemed necessary by the SPED Team.

Any training delivered since October 15th, 2020 will be acceptable so long as the SPED Team determines all of the previously-listed subjects were appropriately and sufficiently covered.

2. USD 408 administration should use checklists whereby someone double-checks the work of whomever is responsible for reporting the use of emergency safety interventions to parents. The purpose would be to make sure no steps (or parts of necessary documentation) are missed.

3. Individuals reporting the use of emergency safety interventions need to provide at least a reasonable amount of information to parents – in writing – as to what lead up to and ultimately resulted in the use of said intervention(s). Answering as if it is a multiple-choice or a fill-in-the-blank question is not reasonable. Writing a full essay is probably more than what is necessary.

4. Give parents a specific form to fill out -- not unlike the form required by the Kansas State Department of Education when requesting an administrative review – for formal complaints. Tell parents the specific deadline by which that form must be submitted.

A copy of this Administrative Review will be shared with the Kansas State Department of Education's Teacher Licensure and Accreditation team for accreditation review purposes. Therefore, it is strongly suggested that USD 408 provide documentation to the SPED Team that it has complied with these suggested corrective actions.

Signed,

R. Scott Gordon
Designated Hearing Officer
Kansas State Department of Education